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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

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JUDGES

OF THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

FIRST CIRCUIT.

HON. HORACE GRAY, CIRCUIT JUSTICE.
HON. LE BARON B. COLT, CIRCUIT JUDGE.
HON. NATHAN WEBB, DISTRICT JUDGE, MAINE.
HON. DANIEL CLARK, DISTRICT JUDGE, NEW HAMPSHIRE.
HON. THOMAS L. NELSON, DISTRICT JUDGE, MASSACHUSETTS.
HON. GEORGE M. CARPENTER, DISTRICT JUDGE, RHODE ISLAND.

SECOND CIRCUIT.

HON. SAMUEL BLATCHFORD, CIRCUIT JUSTICE.
HON. WILLIAM J. WALLACE, SENIOR CIRCUIT JUDGE.
HON. E. HENRY LACOMBE, JUNIOR CIRCUIT JUDGE.
HON. NATHANIEL SHIPMAN, DISTRICT JUDGE, CONNECTICUT.
HON. A. C. COXE, DISTRICT JUDGE, N. D. NEW YORK.
HON. ADDISON BROWN, DISTRICT JUDGE, S. D. NEW YORK.
HON. CHARLES L. BENEDICT, DISTRICT JUDGE, E. D. NEW YORK.
HON. HOYT H. WHEELER, DISTRICT JUDGE, VERMONT.

THIRD CIRCUIT.

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HON. LEONARD E. WALES, DISTRICT JUDGE, DELAWARE.
HON. JOHN T. NIXON, DISTRICT JUDGE, NEW JERSEY.

HON. WILLIAM BUTLER, DISTRICT JUDGE, E. D. PENNSYLVANIA.
HON. MARCUS W. ACHESON, DISTRICT JUDGE, W. D. PENNSYLVANIA.

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HON. HUGH L. BOND, CIRCUIT JUDGE.
HON. THOMAS J. MORRIS, DISTRICT JUDGE, MARYLAND.
HON. AUGUSTUS S. SEYMOUR, DISTRICT JUDGE, E. D. NORTH CAROLINA.
HON. ROBERT P. DICK, DISTRICT JUDGE, W. D. NORTH CAROLINA.
HON. CHARLES H. SIMONTON, DISTRICT JUDGE, SOUTH CAROLINA.
HON. R. W. HUGHES, DISTRICT JUDGE, E. D. VIRGINIA.
HON. JOHN PAUL, DISTRICT JUDGE, W. D. VIRGINIA.
HON. JOHN J. JACKSON, DISTRICT JUDGE, WEST VIRGINIA.

FIFTH CIRCUIT.

HON. WILLIAM B. WOODS, CIRCUIT JUSTICE.
HON. DON A. PARDEE, CIRCUIT JUDGE.
HON. JOHN BRUCE, DISTRICT JUDGE, M. AND N. D. ALABAMA.
HON. HARRY T. TOULMIN, DISTRICT JUDGE, S. D. ALABAMA.
HON. THOMAS SETTLE, DISTRICT JUDGE, N. D. FLORIDA.
HON. JAMES W. LOCKE, DISTRICT JUDGE, S. D. FLORIDA.
HON. WILLIAM T. NEWMAN, DISTRICT JUDGE, N. D. GEORGIA.
HON. EMORY SPEER, DISTRICT JUDGE, S. D. GEORGIA.
HON. EDWARD C. BILLINGS, DISTRICT JUDGE, E. D. LOUISIANA.
HON. ALECK BOARMAN, DISTRICT JUDGE .W. D. LOUISIANA.
HON. ROBERT A. HILL, DISTRICT JUDGE, N. AND S. D. MISSISSIPPI.
HON. CHAUNCEY B. SABIN, DISTRICT JUDGE, E. D. TEXAS.
HON. A. P. McCORMICK, DISTRICT JUDGE, N. D. TEXAS.
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SIXTH CIRCUIT.

HON. STANLEY MATTHEWS. CIRCUIT JUSTICE.
HON. HOWELL E. JACKSON, CIRCUIT JUDGE.
HON. JOHN WATSON BARR, DISTRICT JUDGE, KENTUCKY.
HON. HENRY B. BROWN, DISTRICT JUDGE, E. D. MICHIGAN.
HON. HENRY F. SEVERENS, DISTRICT JUDGE, W. D. MICHIGAN.
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HON. GEORGE R. SAGE, DISTRICT JUDGE, S. D. OHIO.

HON. D. M. KEY, DISTRICT JUDGE, E. AND M. D. TENNESSEE.
HON. E. S. HAMMOND, DISTRICT JUDGE, W. D. TENNESSEE.

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HON WALTER Q. GRESHAM, CIRCUIT JUDGE.
HON. HENRY W. BLODGETT, DISTRICT JUDGE, N. D. ILLINOIS.
HON. WILLIAM J. ALLEN, DISTRICT JUDGE, S. D. ILLINOIS.
HON. WILLIAM A. WOODS, DISTRICT JUDGE, INDIANA.
HON. CHARLES E. DYER, DISTRICT JUDGE, E. D. WISCONSIN.
HON. ROMANZO BUNN, DISTRICT JUDGE, W. D. WISCONSIN.

EIGHTH CIRCUIT.

HON. SAMUEL F. MILLER, CIRCUIT JUSTICE.
HON. DAVID J. BREWER, CIRCUIT JUDGE.
HON. HENRY C. CALDWELL, DISTRICT JUDGE, E. D. ARKANSAS.
HON. ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.
HON. MOSES HALLETT, DISTRICT JUDGE, COLORADO.
HON. OLIVER P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.
HON. JAMES M. LOVE, DISTRICT JUDGE, S. D. IOWA.
HON. C. G. FOSTER, DISTRICT JUDGE, KANSAS.
HON. RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA.
HON. AMOS M. THAYER, DISTRICT JUDGE, E. D. MISSOURI.
HON. ARNOLD KREKEL, DISTRICT JUDGE, W. D. MISSOURI.
HON. ELMER S. DUNDY, DISTRICT JUDGE, NEBRASKA

NINTH CIRCUIT.

HON. STEPHEN J. FIELD, CIRCUIT JUSTICE.
HON. LORENZO SAWYER, CIRCUIT JUDGE.
HON. OGDEN HOFFMAN, DISTRICT JUDGE, N. D. CALIFORNIA.
HON. E. M. ROSS, DISTRICT JUDGE, S. D. CALIFORNIA.
HON. GEORGE M. SABIN, DISTRICT JUDGE, NEVADA.
HON. MATTHEW P. DEADY, DISTRICT JUDGE, OREGON.

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CASES REPORTED.

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ARRANGED UNDER THEIR RESPECTIVE CIRCUITS AND DISTRICTS.

THIRD CIRCUIT.

FOURTH CIRCUIT.

FIFTH CIRCUIT.

SIXTH CIRCUIT.

SEVENTH CIRCUIT.

NINTH CIRCUIT.

CASES CITED.

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

SYLVESTER and others *v.* DANZIGER.[1]

(*Circuit Court, E. D. Louisiana.* June 6, 1887.)

INSOLVENCY—DISCHARGE—FOREIGN CREDITOR.

Defendant made a *cessio bonorum* in the insolvent court of Louisiana. Plaintiffs, citizens of New York, brought a suit against the syndic of the insolvent estate in the state court having jurisdiction thereof, to enforce a vendor's lien upon some goods sold by them to him; and, *secondly*, plaintiffs went into the insolvency court, and took a rule to have certain goods delivered to them, which they alleged were their property, and not included in the cession. *Held*, that the plaintiffs could not be held to have impliedly assented to the defendant's discharge.[2]

On Exceptions.

Harry H. Hall, for plaintiffs.

Joseph P. Hornor and *Francis B. Lee*, for defendant.

BILLINGS, J. The question submitted is whether, upon the facts stated in the plea, the plaintiffs have participated in the insolvency proceedings of the defendant, so as to conclude them by his discharge.

The defendant had made a *cessio bonorum* in the insolvent court of the state, and has since been discharged. What the plaintiffs are alleged to have done is—*First*, to bring a suit against the syndic of the estate to enforce a vendor's lien upon some goods sold by them to him; and, *secondly*, to go into the insolvency court, and take a rule to have certain goods delivered to them, which they alleged were their property, and not included in the cession.

In the case of *Hyde* v. *Stone*, 20 How. 170, it was held that bringing in the state court a suit which was under the laws of Louisiana trans-

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

[2] A discharge under the insolvency laws of Massachusetts does not bar the right of recovery of a non-resident creditor, unless he was a resident of the state at the time of the proceedings, or voluntarily submitted to its jurisdiction and assented to the discharge. Norris v. Atkinson, (N. H.) 5 Atl. Rep. 710, and note.

ferred to the insolvency court, in which defendant's insolvency proceedings were then pending, and cumulating that suit with those proceedings, was not a participation in the insolvency proceedings in such a manner as constituted an assent. Prof. Parsons (2 Pars. Cont. 536) states the test to be "whether the creditor has assented to the relief or discharge of the debtor expressly, or by some equivalent act, as becoming a party to the process against him under the law, taking a dividend and the like."

In this case the question is, "Did the creditor do anything, or derive any advantage, under or by virtue of the insolvent proceeding?" I think he did not. He followed up his rights precisely as he could have done without any insolvent law. He proved no claim. He received no dividend. His condition was in no respect changed from what it would have been if there had been no insolvent proceedings. He cannot be held to have impliedly assented to defendant's discharge.

Let the exception be overruled.

SLYFIELD *v.* HEALY.

(*Circuit Court, N. D. Iowa, C. D.* January Term, 1886.)

1. TAX SALE—PERIOD FOR REDEMPTION—NOTICE OF EXPIRATION—AFFIDAVIT OF SERVICE—LIMITATION.
   Before the issuance of a county treasurer's deed of lands sold for taxes an affidavit that notice had been given to the owner of the expiration of the period for redemption was filed, which was defective in that the seal of the notary was not attached to the jurat. *Held*, that the defect was capable of being remedied, and that the lapse of five years would operate as a bar to question the validity of the deed, under Code Iowa, § 902, providing that "action for the recovery of real property sold for non-payment of taxes must be brought within five years from the execution of the treasurer's deed."
2. SAME—ACTION FOR REDEMPTION—LIMITATION.
   Code Iowa, § 902, providing that an action for the recovery of real estate sold for non-payment of taxes must be brought within five years from the execution of the treasurer's deed, cannot be set up as a defense to an action for redemption from a tax sale, where notice of the expiration of the period of redemption has not been given to the actual owner of the land as required by Code, § 894.

In Equity. Bill to redeem certain realty from tax sale, and to quiet title.

A. F. Call and *Geo. E. Clarke*, for complainant.

Wright & Farrell, for defendant.

SHIRAS, J. Complainant seeks in this cause a decree to the effect that he is entitled to redeem two pieces of realty from tax sales, and prays that the tax deeds executed by the treasurer of Palo Alto county be set aside, and complainant's title be quieted thereto. The case is submitted on a stipulation setting forth the facts, from which it appears that complainant is the owner of the fee title to the S. W. ¼ of N. W. ¼ of section 11, town-

ship 97 N., of range 31 W., of fifth principal meridian, and the N. W. ¼ of S. W. ¼ of section 32, township 94 N., of range 31 W., of fifth principal meridian. To the first-described piece the defendant holds a tax deed, executed by the treasurer of Palo Alto county on the twenty-eighth day of April, 1879, and duly filed for record on the twenty-fourth day of May, 1879. To the last-described piece the defendant holds a tax deed executed by the treasurer of Palo Alto county on the twenty-third of July, 1877, and duly filed for record on the twenty-sixth of July, 1877. The present proceeding to redeem was commenced in July, 1885, more than five years after the time of recording the treasurer's deeds, as above stated. From the agreed statement of facts, it appears in the years 1878 and 1879 the S. W. ¼ of N. W. ¼ of section 11 was taxed in the name of J. Graham. Under the provisions of section 894 of the Code of Iowa, in order to entitle defendant to demand and the treasurer of the county to execute a valid tax deed of these premises, it was necessary that the holder of the tax certificate should serve notice upon said Graham that the right of redemption would expire in 90 days. Proper proof of the service of such notice is required to be made by affidavit of the holder of the certificate, or his agent, the same to be filed with the treasurer. Until such notice is given, and the proper proof is filed with the treasurer, he has no right to execute the deed. In the present case it is admitted that the notice was in fact given, but it appears that the affidavit of proof filed with the treasurer was defective, in that the seal of the notary was not attached to the jurat.

Under the rulings made in *Tunis* v. *Withrow*, 10 Iowa, 307, and *Stephens* v. *Williams*, 46 Iowa, 542, it must be held that the so-called affidavit is lacking in an essential requisite, and the proof of service was not made by affidavit, as required by the statute. It appears, however, that the treasurer did in fact execute a deed proper in form, which was delivered to defendant, and by him duly recorded, more than five years before the bringing of this suit; and defendants claim that the lapse of the five years bars the right of recovery under the provisions of section 902 of the Code.

In *Trulock* v. *Bentley*, 25 N. W. Rep. 824, the supreme court of Iowa held that, when a notice of the expiration of the time of redemption had in fact been given, but the proof made thereof and filed with the treasurer was defective in some particular capable of being cured by amendment, then the five-years limitation contained in section 902 was applicable.

The failure to affix the seal to the jurat is a defect which may be remedied, it being admitted in the statement of facts that M. L. Brown, before whom the affidavit was signed, was a duly commissioned notary at that time, and that the omission to attach the seal to the jurat was by mistake and oversight, and hence the present question comes within the rule in *Trulock* v. *Bentley*. It follows that the lapse of five years operates as a bar to the right of complainant to question the validity of the deed to the S. W. ¼ of N. W. ¼ of section 11, and as to this quarter section complainant's bill must be dismissed.

Touching the N. W. ¼ of S. W. ¼ of section 32, it appears that the tax deed was executed on the twenty-third of July, 1877. The notice filed with the treasurer was an affidavit showing that a notice addressed to one J. M. Eldridge, or the unknown owners, was published for the requisite length of time in a newspaper of Palo Alto county. The land at the time the notice was published was taxed in the name of M. Healy, the defendant. It does not appear that the land was ever taxed to Eldridge, or that he ever had any interest therein. The facts are therefore that the land was assessed in the name of the person holding the certificate of purchase, and that no notice of the expiration of the time of redemption was given to any one except to Eldridge; and it does not appear that he had any interest whatever in the land. In fact, therefore, no notice of the expiration of the time of redemption was given, and the question is whether the fact that the land was assessed in the name of Healy, the holder of the tax certificate, will dispense with the necessity of doing that which the statute expressly requires, *i. e.*, giving notice to the person in whose name the property is taxed. On the one hand, it is argued that giving notice to Healy would be a vain and useless thing, because he was the very party who was about to apply to have the deed executed, and he already knew all the notice could give him knowledge of. On the other, it is said the requirement of the statute is imperative, and, unless obeyed, the treasurer has no right to execute the deed. The spirit of the section in question is to provide that the right of redemption shall not be lost to the owner of the land until he has had 90 days' notice of the fact that the time of redemption is drawing to an end. The letter of the section requires service of the notice upon the person in whose name the property is taxed. In the present case, the defendant does not show or claim that he has fulfilled the spirit of the section by giving notice to the actual owner, and admits that he has not fulfilled the letter of the statute. The treasurer had no right to sit in judgment upon the question whether the defendant was excused from obeying the letter of the statute. No notice was given, and, in the absence thereof, the treasurer could not lawfully execute the deed. The issuance thereof was a void act, and is not cured by the five-years limitation found in section 902. It is a defect not curable by any amendment to the papers or proofs, and, under the rule recognized by the supreme court of Iowa in *Trulock* v. *Bentley*, the five-years limitation is not applicable.

As to this quarter section, therefore, complainant is entitled to a decree entitling him to redeem said quarter section.

The costs will be equally divided.

NEW ORLEANS WATER-WORKS CO. *v.* ERNST and others. SAME *v.* MAGINNIS OIL & SOAP WORKS. SAME *v.* RUCH. SAME *v.* NEW ORLEANS C. & L. R. Co.[1]

(*Circuit Court, E. D. Louisiana.* June 15, 1887.)

1. WATER COMPANY—EXCLUSIVE PRIVILEGES.
An injunction will not issue to prevent defendants from procuring water from a river in pipes, in a city where the exclusive privilege to do so has been granted to a company, when such company has no mains, or no adequate mains, for the delivery of water in sufficient quantities for the wants of the defendants.

2. SAME—"CONTIGUOUS PERSON"—LOUISIANA STATUTE.
The charter of the New Orleans Water-Works Company (Acts La. 1877, p. 51) provides, in section 18, "that nothing in this act shall be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use." The supreme court of the United States decided in *Water-Works Co.* v. *Rivers*, 115 U. S. 674, 6 Sup. Ct. Rep. 273, that the proprietor of a building five blocks from the river was not "a contiguous person." Therefore no lot can be contiguous unless it actually fronts on the river, or is separated from the river only by a public highway, with no private owner intervening, or, possibly, on a block or square so situated.

On Rule *Nisi* for Injunctions.

J. R. Beckwith, for complainant.

B. Frank Jonas and *J. O. Nixon, Jr.*, for Ernst & Co. and Louis Ruch.

W. S. Benedict, for Maginnis Oil Co.

Geo. H. Braughn, *Chas. F. Buck*, *Max Dinkelspeil*, and *W. O. Hart*, for New Orleans C. & L. R. Co.

BILLINGS, J. Two questions are presented in addition to those already passed upon by former decrees in this court:

1. Whether an injunction shall issue when the complainant has no mains, or no adequate mains, for the delivery of water in sufficient quantities for the wants of the defendants. This question must be answered in the negative, from the very title of the act under which the complainants claim, which is as follows: "No. 33. An act to enable the city of New Orleans to promote the public health, and to afford greater security against fire, by the establishment of a corporation to be called the 'New Orleans Water-Works Company,'" etc. It cannot be that it was the intention of the legislature to deprive any person of, or to limit any person in, the use of water by the exclusive right given to complainant. The object of the grant, and the creation of the water-works corporation, was to furnish, and not deprive of, water. The clause in complainant's charter which requires it to lay mains in streets whenever the water rates in any street of petitioners amount to 10 per cent. per annum of the cost of laying mains, was intended to give the citizens an additional right, and by no means takes away their

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

right to supply themselves with water if the complainants have not the facilities therefor. Wherever, therefore, the complainant has no mains on the street on which the defendants' property supplied, or to be supplied, with water is situated, or wherever there are mains, but they are inadequate to furnish the amount of water requisite for the defendants' use, the injunction is refused. Whenever the defendants desire, the matter as to whether there are mains, or whether they are adequate, may be referred to a master to take the evidence, and report the same, with his conclusions, to the court.

2. As to the clause with reference to "contiguous persons." The grant is (section 5) "of the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi river, or any other stream or river, by means of pipes and conduits." The charter further provides (*inter alia*) that the water-works company "may have the right to levy and place any number of conduits or pipes or aqueducts, and to cleanse and repair the same, through or over any of the lands or streets of the city of New Orleans." Section 18 of the charter provides "that nothing in this act shall be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use."

In *Water-Works Co.* v. *Rivers*, 115 U. S. 674, 6 Sup. Ct. Rep. 273, the supreme court decided that the proprietor of the St. Charles Hotel was not "a contiguous person." The St. Charles Hotel is five blocks from the river. It being settled that it is not contiguous, it seems to me that no lot can be contiguous unless it actually fronts on the river, or is separated from the river only by a public highway, with no private owner intervening, or possibly on a block or square so situated. There is no line of demarkation short of this; for, in a broad sense, the whole city of New Orleans is contiguous to the Mississippi river.

I think that the question of contiguity must have been meant to be determined by present circumstances. The limitation in the eighteenth section of the charter presupposes a right already existing which is recognized, not created. If an owner had been, but is not now, within the meaning of the term, "contiguous," as here used, his former right would have passed from him along with all other rights dependent upon continued, present contiguity. It follows, no one of the defendants is a person contiguous to the Mississippi river except Louis Ruch. His property is separated from the river only by a street or public highway, and he is a "contiguous person."

3. As to the price to be charged for the delivery of water. The supreme court of our state have construed the provision of the charter as to what should be the maximum price or rate. This rate must not be exceeded.

The injunction is refused as to defendant Ruch, and as to the defendant the New Orleans City Railroad Company, to the extent to which there are no mains on the street adjacent to the places where they require and obtain water. In the other cases the injunction will issue.

The injunction will be conditioned that the rate of the charge shall in no case exceed that established by the supreme court, and a defendant may at any time apply to the court for an order to enforce this condition.

GLENN, Substituted Trustee, v. MACON and others.[1]

(*Circuit Court, E. D. Louisiana.* May 30, 1887.)

CORPORATIONS—RECEIVER—CONSTRUCTION OF ORDER—ASSESSMENTS.

In a suit brought by a stockholder, on behalf of himself and of other stockholders who may join him in the suit, against the corporation, its directors and superintendent, seeking an injunction to prevent waste, and asking for a receiver, a receiver was appointed, and the order contained these words: "And, if there shall be any sums due upon the shares of the capital stock of said company, the said receiver will proceed to collect and recover the same, unless the persons from whom the said sums may be due shall be wholly insolvent, and for this purpose may prosecute actions," etc. *Held*, that the authority intended to be conferred was merely to bring suit in case the court should levy an assessment, and that the order of itself did not amount to a call, from which prescription would begin to run.

On Motion for New Trial.

Alfred Goldthwaite, for plaintiff.

Thomas J. Semmes and *James Legendre*, for defendants.

BILLINGS, J. This action is brought for the recovery of 70 per cent. of the subscription, as shareholders, against numerous citizens of this state. All other questions having been adjudged, the remaining question is to be considered whether the order appointing a receiver, and defining his powers, in the case of *Reynolds* v. *National Exp. & Transp. Co.*, formerly pending in the circuit court for the Fourth circuit of the United States, district of Virginia, on January 12, 1867, amounted to a call upon the stockholders for the full amount of their subscriptions for stock. The question is, did the order or decree amount to any call at all? If it did, then it is conceded prescription began to run, and the action would, to the extent of the call, be barred.

That suit is an action instituted by Reynolds as a stockholder, he owning, as he alleges, 50 shares of the stock of the corporation, in behalf of himself and the other stockholders who may join him in the suit against the corporation, its directors and superintendent. The suit was an injunction suit to prevent waste by paying usurious interest and by gross negligence. A receiver is also asked for, and was appointed. The order appointing the receiver is in the usual form, and contains these words: "And, if there shall be any sums due upon the shares of the capital stock of the said company, the said receiver will proceed to collect and recover

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

the same, unless the persons from whom the said sums may be due shall be wholly insolvent, and for this purpose may prosecute actions," etc. The bill further states that the directors are about to sell the stock of the plaintiff himself and others, though it does not state whether for an unpaid assessment or for some other cause. It appears that the capital stock of the company was $5,000,000.

It seems to me that the language, "and if there shall be any sums due," etc., must be construed by the considerations coming from the nature of and parties to the suit. The suit is brought by a stockholder to prevent waste, and to wind up the affairs of a corporation. The amount of indebtedness is not alleged, further than that the corporation is averred to be insolvent. The creditors are not complainants. Nobody is a party or is asked to become a party complainant except stockholders. Under these circumstances, and upon these facts, I construe the language giving the receiver power to bring suit—*i. e.*, the words "if there shall be any sums due upon the shares of the capital stock"—to mean to bring suits, "or if in the course of litigation the court shall order any assessment." It was intended by these words not to levy an assessment, but to give authority to collect whatever assessments should thereafter be levied. My opinion is that there was here no action of the court making what is termed a "call" or assessment upon the stockholders for the payment of their subscriptions. Therefore I must still hold that the plea of prescription is overruled. It follows that judgment must go for the plaintiff.

As to the time of entering this judgment. None of these numerous causes are appealable. This is a suit brought by a trustee to wind up the affairs of a corporation whose debtors reside in many states. There will be no inconvenience caused to him if there should be a delay in entering these judgments, provided there is security given. Therefore a motion may be made, at any time within 10 days, by any of the defendants, upon their giving bond with security for the payment of any judgment which shall be ultimately rendered against them in the cause. Upon such motion being made, and such a bond being given, (say to exceed by one-fourth the amount claimed in the petition,) the court will take under advisement the motion, and hold the same until the question of rescission of the order to pay the assessment is passed upon in the appellate chancery court in Virginia. In the other cases judgment will be entered and signed at the end of 10 days.

STOCKTON, Atty. Gen. of New Jersey, v. BALTIMORE & N. Y. R. Co. and others.

(*Circuit Court, D. New Jersey.* August 1, 1887.)

1. CONSTITUTIONAL LAW — POWER "TO REGULATE COMMERCE" — INTERSTATE BRIDGE.
   The act of congress of June 16, 1886, authorizing the Staten Island Rapid Transit Company, a corporation of New York, and the Baltimore & New York Railroad Company, a corporation of New Jersey, or either of them, to construct and maintain a railroad bridge across the Staten Island sound, known as "Arthur Kill," and establishing "the same as a post-road," is within the power "to regulate commerce" vested in congress by the constitution of the United States, it being competent for congress, under that grant of power, to open up commercial communication between different states, by land as well as by water.[1]
2. SAME—CONSENT OF THE STATES.
   The power of congress in this respect being supreme, and the act in plain terms granting authority to build the bridge, the privilege is not promissory in its character, and may be exercised without the consent or concurrence of the states in which the structure is authorized by the act to be placed.
3. SAME—GRANT CONSTRUED.
   The grant by congress, in the exercise of its power to regulate commerce, of the privilege of erecting and maintaining a bridge across navigable water from one state to another, is, in effect, a grant of the mere use of the soil needed for the structure, and not an assumption of exclusive jurisdiction over such territory. Cession of the soil by the state in which the land lies is, therefore, not necessary to the exercise of the privilege.
4. SAME—CORPORATIONS—CITIZENS OF ANOTHER STATE—FOURTEENTH AMENDMENT.
   The New Jersey act of April 6, 1886, prohibiting any person or corporation from erecting any bridge, etc., over or in any part of the navigable waters where the tide ebbs and flows, and separating that state from other states, without permission from the legislature of that state, is unconstitutional so far as it is sought to be put into operation against the Staten Island Rapid Transit Company, a corporation of New York, claiming to exercise the privilege conferred upon it by the act of congress of June 16, 1886, of erecting and maintaining a railroad across Staten Island sound, or "Arthur Kill."
5. EMINENT DOMAIN—LITTORAL RIGHTS—STATE AND FEDERAL JURISDICTION.
   The shore and lands under water of the navigable streams and waters of New Jersey, which, prior to the Revolution, belonged to the king of Great Britain as part of the *jura regalia* of the crown, passed to the state at the close of that war, but the state succeeded to them as trustee of the people at large; and, the right of the state therein not being such property as is susceptible of pecuniary compensation, it is not "private property," within the meaning of Const. U. S. amend. 5, providing that private property shall not be taken for public use without just compensation.

On Bill for Injunction.

John P. Stockton, Atty. Gen., *Barker Gummere*, and *Cortlandt Parker*, for informant.

A. Q. Keasbey and *W. W. Macfarland*, for defendants.

BRADLEY, Justice. This case was commenced by information filed by the attorney general of New Jersey, in the court of chancery of that

[1] As to what is included under the term "commerce," within the meaning of the clause of the constitution granting the power to congress "to regulate commerce," see Head-Money Cases, 18 Fed. Rep. 135, and note; Memphis & L. R. R. Co. v. Nolan, 14 Fed. Rep. 534; Norfolk & W. R. Co. v. Com., 6 Atl. Rep. 45.

state, praying for an injunction to restrain the defendants from erecting a bridge across Arthur kill, between New Jersey and Staten island, in the state of New York, upon the lands of the state situate on the shore, and under the waters of said kill. The chancellor granted a preliminary injunction upon the bill and affidavits. The defendants have removed the case to this court, as one arising under the constitution and laws of the United States, and have filed an answer. Motion was then made to dissolve the injunction; but, after argument, the parties stipulated to submit the case as upon final hearing on bill and answer. There are no controverted facts in the case.

The Staten Island Rapid Transit Railroad Company, a corporation of New York, one of the defendants, claims the right to build the bridge in question, and to occupy the lands under water necessary for the support of its piers, under an act of congress, approved June 16, 1886, entitled "An act to authorize the construction of a bridge across the Staten Island sound, known as 'Arthur Kill,' and to establish the same as a post-road." This act declares:

"Section 1. That it shall be lawful for the Staten Island Rapid Transit Company, a corporation existing under the laws of the state of New York, and the Baltimore & New York Railroad Company, a corporation existing under the laws of the state of New Jersey, or either of said companies, to build and maintain a bridge across the Staten Island sound, or Arthur kill, from New Jersey to Richmond county, New York, for the passage of railroad trains, engines, and cars thereon, and to lay on and over said bridge railway tracks for the more perfect connection of any railroads that are or shall be constructed to the said sound at or opposite said point; and in case of any litigation concerning any alleged obstruction to the free navigation of said sound on account of said bridge, the cause may be tried before the circuit court of the United States of either of said states in which any portion of said obstruction or bridge touches, and that all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage over the same, and in the use of the machinery and fixtures thereof, and of all the approaches thereto, for a reasonable compensation, to be paid to the owners of said bridge under and upon such terms and conditions as shall be prescribed by the secretary of war upon hearing the allegations and proofs of the parties, in case they shall not agree.

"Sec. 2. That said bridge shall be constructed as a pivot draw-bridge, with a draw over the main channel of the sound at an accessible and navigable point, and with spans of not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw; and said spans shall not be less than thirty-two feet above mean low-water mark, measuring to the lowest member of the bridge superstructure; and provided also, that said draw shall be opened promptly, upon signal, except when trains are passing over the said bridge, for the passage of boats whose construction shall not be such as to admit of their passage under the draw of said bridge when closed; but in no case shall unnecessary delay occur in opening the said draw after the passage of trains; and the said company or corporation shall maintain, at its own expense, from sunset to sunrise, such lights or other signals on said bridge as the light-house board shall prescribe.

"Sec. 3. That any bridge constructed under this act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post-route, upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war

of the United States than the rate per mile paid for their transportation over the railroads or public highways leading to said bridge; and the United States shall have the right of way for postal telegraph purposes across said bridge.

"Sec. 4. That the plan and location of said bridge, with a detailed map of the sound at the proposed site of the bridge, and near thereto, exhibiting the depths and currents, shall be submitted to the secretary of war for his approval, and, until he approve the plan and location of said bridge, it shall not be built; but, upon the approval of said plan by the secretary of war, the said companies, or either of them, may proceed to the erection of said bridge in conformity with said approved plan; and, should any change be made in the plan of said bridge during the progress of the work thereon, such change shall be subject likewise to the approval of the secretary of war. If the secretary of war shall at any time deem any change or alteration necessary in the said bridge so that the same shall not obstruct navigation, or if he shall think the removal of the whole structure necessary, the alteration so required, or the removal of the whole structure, shall be made at the expense of the parties owning said bridge. And if said bridge shall not be finished within two years from the passage of this act, the rights and privileges hereby granted shall determine and cease.

"Sec. 5. That the right to alter, amend, or repeal this act is hereby expressly reserved."

The said Staten Island Rapid Transit Railroad Company proposes to build a bridge across Arthur kill, under and in conformity with this act, to connect its own road on Staten Island with another railroad through and across the state of New Jersey, for the purpose of interstate transportation; and, in pursuance of that design, has adopted a site for the location of the bridge, from a certain point in the city of Elizabeth to Staten island; and has caused the plan and location of said bridge, with a detailed map of the sound at and near the same, (as required by the act,) to be submitted to the secretary of war, who has approved the same.

The company, by its engineer and contractors, (who are made co-defendants in the case,) proceeded to make preparations for laying the piers and erecting the bridge according to the plan thus approved. Thereupon the attorney general of New Jersey, deeming the property rights and sovereignty of the state in danger of violation from the erection of the proposed bridge, filed the present information to prevent it.

The information states the ordinary doctrine that the state is owner of the shore and land under water of all navigable streams and arms of the sea within its borders; that this ownership was a part of the *jura regalia* of the king of Great Britain, by virtue of which he was seized and possessed of an estate in fee-simple absolute in said lands; and that, at the Revolution, this state, in its sovereign capacity, succeeded to the rights of the crown, and that this right of supreme dominion had never been ceded or surrendered to the United States; and that, without such cession or surrender, the United States could not take possession of said lands, or authorize other parties to do so, except by making compensation therefor, as provided in the fifth amendment to the constitution; and that, at the place of location of the proposed bridge, their ownership of the soil, on the part of the state, extended from ordinary high-water mark to the center line of the sound, being the boundary line between New Jersey

and New York, as settled by agreement in 1833, and confirmed by act of congress, June 28, 1834.

The information further states that this ownership on the part of the state has been practically exercised by it for more than a century past, by regulating the enjoyment and disposition of the lands under the navigable waters within its limits, passing laws for the preservation and protection of the oyster fisheries therein, and authorizing the construction of wharves, with solid filling, to certain prescribed limits beyond low-water mark, and that for these privileges the grantees are required to pay and have paid a certain compensation to the state. It is contended by the informant that the act of congress cannot be construed as intending to give any authority to take any portion of said lands without compensation; that said act must be construed as a mere license or permission to erect the proposed bridge, so far as congress, the conservator of navigation, is concerned, leaving the companies to obtain from the state the usual authority to build the bridge on the territory and lands of the state; but that if the act should be construed as giving authority to erect the bridge without the consent of the state, and without compensation for taking its lands therefor, then it is violative of the constitution of the United States, not only for authorizing the lands of the state to be taken without compensation, but for enlarging the powers of a corporation created by the state itself, (if the bridge should be built by the Baltimore & New York Railroad Company,) and authorizing it to do what, by its own charter and other laws of the state, it is prohibited from doing.

The information further contends that the other corporation defendant, the Staten Island Rapid Transit Company, is not a corporation of New Jersey, and has no authority from the state to exercise any corporate franchises therein, and cannot lawfully do so, except by the comity of the state, which has not been accorded to it; that, instead of any such comity having been exercised, the said company is expressly prohibited from exercising any such powers or franchises as that of building said bridge by an act of the legislature of New Jersey, passed April 6, 1886, which prohibits any person or corporation from erecting any bridge, viaduct, or fixed structure over or in any part of the navigable waters where the tide ebbs and flows, and separating said state from other states, without permission of the legislature of New Jersey first given by statute for that purpose, and that no such permission has ever been asked or given.

The answer of the defendants does not advance any material new facts, except to state that the Baltimore & New York Railroad Company has nothing to do with the proposed building of the bridge, and that the Staten Island Rapid Transit Railroad company proposes to build it as a connecting link in a line of railroad extending from the bay of New York across the soil of the states of New York, New Jersey, Pennsylvania, and other states, as an instrument of commerce among the states, and claims the right to do so under the act of congress before recited.

The first question to be examined is the true construction of the act of congress on which the case arises,—the informant contending that it

is merely permissory in its character; and the defendants, that it gives authority and power to build a bridge, without reference to any authority from the state. This question need not detain us long. The words of the act are broad enough to confer the authority, if congress had power to confer it. The language is: "It shall be lawful for the Staten Island Rapid Transit Railroad Company," etc., "to build and maintain a bridge across the Staten Island sound, or Arthur kill." This is the ordinary language used for conferring authority. Had the state legislature passed a law in these terms, there could not be a doubt of its sufficiency to give authority. And there are expressions in the act which imply that plenary authority was intended to be given. The minute directions laid down as to the manner of construction and use of the bridge imply this. The third section declares "that any bridge *constructed under this act, and* according to its limitations, shall be a lawful structure," etc.; implying that the construction of the bridge, when built, would be under the act. If congress had no power to authorize the construction of the bridge, independent of state legislation, the act would, of course, be properly construed as permissory in its character, ancillary to, or confirmatory of, state legislation which might be adopted for the purpose of authorizing such a bridge. In other words, the act, within the scope of its terms, may have such effect given to it as comports with the power of the legislative body which enacted it; just as a deed of conveyance may operate as a grant, a bargain and sale, a release, or a confirmation, according to the interest of the grantor on the one hand, and of the grantee on the other. The true construction of the act, therefore, depends on the power of congress, which will be examined hereafter.

Another question of a preliminary character relates to the capacity and right of the defendant, the Staten Island Rapid Transit Railroad Company, to perform any acts and transact any business as a corporation in New Jersey. It is argued that corporations, as such, have no legal existence outside of the state by whose laws they are created, and cannot transact business in another state except by the comity of its laws, which are not accorded in the present case. This doctrine is subject to much qualification. The habits of business have so changed since the decision in the case of *Bank of Augusta* v. *Earle*, 13 Pet. 519, and corporate organizations have been found so convenient, especially as avoiding a dissolution at every change of membership, that a large part of the business of the country has come to be transacted by their instrumentality; while their most objectionable feature, the non-liability of corporators, has in most instances been abrogated in whole or in part; and to deny their admission from one state to another in ordinary cases, at the present day, would go far to neutralize that provision in the fourth article of the constitution which secures to the citizens of one state all the privileges and immunities of citizens in another, and that provision of the fourteenth amendment which secures to all persons the equal protection of the laws. So strongly is this felt that, in the recent case of *Santa Clara Co.* v. *Southern Pac. R. Co.*, 118 U. S. 394, 396, 6 Sup. Ct. Rep. 1132, the doctrine that corporations are not citizens or persons, within the protective language

of the constitution, was unanimously disapproved, and the court expressly held that they are entitled, as well as individuals, to the equal protection of the laws, under the fourteenth amendment of the constitution.

It is undoubtedly just and proper that foreign corporations should be subject to the legitimate police regulations of the state, and should have, if required, an agent in the state to accept service of process when sued for acts done or contracts made therein. In reference to some branches of business, like those of banking and insurance, which affect the people at large, they may also be subject to more stringent regulations for the security of the public, and may be even prohibited from pursuing them except upon such terms and conditions, not unlawful in themselves, as the state chooses to impose. But in the pursuit of business authorized by the government of the United States, and under its protection, the corporations of other states cannot be prohibited or obstructed by any state. If congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union. And, in carrying on foreign and interstate commerce, corporations, equally with individuals, are within the protection of the commercial power of congress, and cannot be molested in another state by state burdens or impediments. This was held and decided in the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 204, 5 Sup. Ct. Rep. 826, and affirmed in the recent case of *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118; and although the decision in *Paul* v. *Virginia*, 8 Wall. 168, conformed to the doctrine of *Augusta Bank* v. *Earle*, the following striking language was used by the court, to-wit:

"At the time of the formation of the constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended, in the grant of power to congress, to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentality by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations."

We may fairly supplement this language by adding that, when the constitution was adopted, it could not have been supposed that the regulations of commerce to be made by congress might be of no avail to commercial corporations, or, at least, might be rendered nugatory with regard to them, in consequence of state restrictions upon their power to act as corporations in any other state than that of their origin.

At all events, if congress, in the execution of its powers, chooses to employ the intervention of a proper corporation, whether of the state, or out of the state, we see no reason why it should not do so. There is nothing in the constitution to prevent it from making contracts with or conferring powers upon, state corporations, for carrying out its own le-

gitimate purposes. What right of the state would be invaded? The corporation thus employed, or empowered, in executing the will of congress, could do nothing which the state could rightfully oppose or object to. It may be added that no state corporation more suitable than the defendant could be empowered to build the bridge in question in this case, since one-half of the bridge is in the state of New York, and the railroad of the defendant is to connect with it on the New York side.

In our judgment, if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise. The objection that congress cannot confer powers on a state corporation is untenable. It has used their agency for carrying on its own purposes from an early period. It adopted as post-roads the turnpikes belonging to the various turnpike corporations of the country, as far back as such corporations were known, and subjected them to burdens, and accorded to them privileges, arising out of that relation. It continued the same system with regard to canals and railroads, when these modes of transportation came into existence. Nearly half a century ago, it constituted every railroad built, or to be built, in the United States, a post-road. This, of course, involved duties, and conferred privileges and powers, not contained in their original charter. In 1866, congress authorized every steam-railroad company in the United States to carry passengers and goods on their way from one state to another, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination. The powers thus conferred were independent of the powers conferred by the charter of any railroad company. Surely these acts of congress cannot be condemned as unconstitutional exertions of power.

In the present case the corporate capacity of the Staten Island Rapid Transit Railroad Company is admitted by making it a defendant. It is not excluded from the state by any want of comity in the laws of the state. Its alleged want of power under those laws to build the bridge in question, does not arise from anything peculiar to it as a foreign corporation, but from the general prohibition of the state law of April 6, 1886, which is applicable to all persons and corporations, and declares "that no bridge, viaduct, or fixed structure shall be created by any person or corporation over or in any part of the navigable waters separating this state from other states, where the tide ebbs and flows, without express permission of the legislature of this state, given by statutes for that purpose." This prohibition, in its broadest sense, inhibits the erection of such a bridge as is described therein, by congress itself, or (which is the same thing) by any person or corporation acting under the authority of congress, and, of course, is to that extent void, if congress has power to erect such a bridge. But if it is not to be taken in this broad sense, but as subject to the condition in law of being inoperative as against the paramount power of congress, then the authority of the defendant is unaffected by

it, inasmuch as the defendant has express power from congress to build the bridge. So that we are brought back to the question of the power of congress to build the bridge, and whether that power is independent of the consent and concurrence of the state government. And, in our judgment, this question must be answered in the affirmative.

The power to regulate commerce among the several states is given by the constitution in the most general and absolute terms. The "power to regulate," as applied to a government, has a most extensive application. With regard to commerce, it has been expressly held that it is not confined to commercial transactions, but extends to seamen, ships, navigation, and the appliances and facilities of commerce. And it must extend to these, or it cannot embrace the whole subject. Under this power, the navigation of rivers and harbors has been opened and improved, and we have no doubt that canals and water-ways may be opened to connect navigable bays, harbors, and rivers with each other, or with the interior of the country. Nor have we any doubt that, under the same power, the means of commercial communication by land as well as by water may be opened up by congress between different states, whenever it shall see fit to do so, either on failure of the states to provide such communication, or whenever, in the opinion of congress, increased facilities of communication ought to exist. Hitherto, it is true, the means of commercial communication have been supplied, either by nature in the navigable waters of the country, or by the states in the construction of roads, canals, and railroads, so that the functions of congress have not been largely called into exercise under this branch of its jurisdiction and power, except in the improvement of rivers and harbors, and the licensing of bridges across navigable streams. But this is no proof that its power does not extend to the whole subject in all its possible requirements. Indeed, it has been put forth in several notable instances, which stand as strong arguments of practical construction given to the constitution by the legislative department of the government. The Cumberland or National Road is one instance of a grand thoroughfare projected by congress, extending from the Potomac to the Mississippi. After being nearly completed, it was surrendered to the several states within which it was situate. The system of Pacific railroads presents several instances of railroads constructed through or into different states, as Iowa, Kansas, and California. The main stem of the Union Pacific commences at Council Bluffs, in Iowa, and crosses the Missouri by a bridge at that place erected under the authority of congress alone. In 1862, a bridge was authorized by congress to be constructed across the Ohio river at Steubenville, between the states of Virginia and Ohio, to be completed, maintained, and operated by the railroad company authorized to build it, and by another company named, "anything in any law or laws of the above-named states to the contrary notwithstanding." 12 St. 569.

Still, it is contended that, although congress may have power to construct roads and other means of communication between the states, yet this can only be done with the concurrence and consent of the states in

which the structures are made. If this is so, then the power of regulation in congress is not supreme; it depends on the will of the states. We do not concur in this view. We think that the power of congress is supreme over the whole subject, unimpeded and unembarrassed by state lines or state laws; that, in this matter, the country is one, and the work to be accomplished is national; and that state interests, state jealousies, and state prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no states.

It is very true that in some cases of bridges authorized to be erected, and other things authorized to be done, congress may have required that the consent of the state should be first obtained. But the power of the United States cannot depend on the consent of the states; it is only to be found in the constitution. The consent of a state may sometimes facilitate the execution of a power, as the consent to the use of the prisons, court-houses, and other public buildings of the state; but it can never confer power. Particular states have sometimes consented to the employment of their courts and judicial machinery by the officers of the United States for condemning land for public purposes. But, if the United States had no power to take land by condemnation, such consent could not give it. So where, in any case, congress may have authorized the construction of a railroad or a bridge upon the condition of obtaining the consent of the state, it is clear that such consent was not required for the purpose of supplementing the power of congress to authorize the structure to be made, but rather for the purpose of manifesting a disposition of comity and good-will towards the state. For, if congress had not the power to authorize the structure, consent could not give it. All those cases, therefore, in which congress has given such authority, whether with or without the consent of the state, are precedents for affirming the power of congress. They are all instances of practical construction of the constitution in favor of it.

The most strenuous objection, however, to the exercise of the power in this case, and in the manner proposed, is based on the fact that the piers of the bridge are to rest, and the bridge is to stand, on land which belongs to the state, and that no compensation is proposed to be made for the taking thereof. It is contended that, if the land of the state can be taken at all, (which is denied,) it can, at most, only be taken, like other private property, after just compensation has been made.

First, it is denied that the land of the state can be taken at all without voluntary cession, or consent of the state legislature. If this is so, we are brought back to the dilemma of requiring the consent of the state in almost every case of an interstate line of communication by railroad, for hardly a case can arise in which some property belonging to a state will not be crossed. It will always be so at the passage of a navigable stream. This shows that the position cannot be sound, for it brings us to a *reductio ad absurdum*. It interposes an effectual barrier to the execution of a constitutional power vested in congress. It overlooks the fundamental principle that the constitution, and all laws made in pursuance thereof, are the supreme law of the land; for, if the consent of a

state is necessary, such state may always, in pursuit of its own interests, refuse its consent, and thus thwart the plain objects and purposes of the constitution. One argument for the position is that no part of the territory of one sovereign can be acquired by another except by conquest or cession; and therefore, in a case like the present, where conquest is out of the question, it can only be acquired by cession; and this conclusion is supposed to be affirmed and provided for in our federal system by the seventeenth paragraph of section 8, art. 1, Const., which gives to congress power to exercise exclusive legislation "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." It is argued that this is the only constitutional method by which the United States government can obtain the possession and use of lands within a state, especially of lands belonging to the state.

The argument, however, is directed to the acquisition of territory, with exclusive jurisdiction over the same, and is entirely sound in that regard. But it does not touch the question as to the power of the United States to acquire the mere use of land without exclusive jurisdiction therein. Nearly all the powers of government are exercised over territory in which the United States and the several states have concurrent jurisdiction. It is only in exceptional cases that the United States desires to have exclusive jurisdiction, and a consequent cession of territory. It is very true that the consent of the state legislature is required in order to give the United States this exclusive jurisdiction. But that is all. It is not required when exclusive jurisdiction is not sought. On the contrary, the government, if it sees fit, may condemn land for its purposes without the consent of the state. Thus it was decided by the supreme court in the case of *Kohl* v. *U. S.*, 91 U. S. 367, that the government of the United States may exercise the right of eminent domain within a state, for the purpose of condemning land for the use of a post-office building, and may, for this purpose, resort to its own courts. In such a case, there cannot be a doubt that the post-office building could be erected and used by the government without asking the consent of the state legislature. Such consent would, indeed, be necessary to vest in the United States exclusive jurisdiction over the post-office building and grounds; but it would not be necessary to enable the government to use the property for the purposes for which it was acquired. And so of any other property wanted for a public purpose; the consent of the legislature is not necessary to its acquisition, or to its use; but only to the exclusion of state jurisdiction over the place. That jurisdiction, if allowed to remain, will extend to the punishment of crimes committed against state laws therein, and to the service of state process, but, of course, cannot interfere with the execution of the United States laws, nor with the performance, by United States officers and agents, of the duties devolved upon them.

In short, cession by a state is only necessary to extinguish its jurisdiction, in whole or in part, and is not necessary to the use of land by the United States for public purposes,—subject, like all lands within

the limits of the Union, to the concurrent jurisdiction of both governments; that of the United States being supreme. The laws of the latter are supreme everywhere, in the states as well as in the territories of the United States; but have exclusive force, within the states, only in such places as have been ceded by them.

The argument based upon the doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes. And as one of these purposes is the regulation of commerce among the several states, and as that involves the needs and ways of intercommunication, it follows that congress may provide for these necessities whether the states co-operate and concur therein or not.

But, *secondly*, it is contended that if the United States can constitutionally take the land of the state, as well as that of the citizen, for public purposes, without consent, it can only do so in the same manner, and subject to the same conditions, namely, that of making just compensation. It is urged that the language of the fifth amendment of the constitution is applicable to the case, and is imperative. This language is "nor shall private property be taken for public use without just compensation." It is insisted that the property of the state in lands under its navigable waters is private property, and comes strictly within the constitutional provision. It is significantly asked, can the United States take the state-house at Trenton, and the surrounding grounds belonging to the state, and appropriate them to the purposes of a railroad depot, or to any other use of the general government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the state holds the state-house is quite different from that by which it holds the land under the navigable waters in and around its territory.

The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain as part of the *jura regalia* of the crown, and devolved to the state by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were held by the state, as they were by the king, *in trust* for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facil-

ities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large. It is true that to utilize the fisheries, especially those of shell-fish, it was necessary to parcel them out to particular operators, and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. It is also true that portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder.

Such being the character of the state's ownership of the land under water,—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce,—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the constitution. The fifth amendment provides only that *private property* shall not be taken without compensation; making no reference to public property. But, if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the water-way, is at all a diversion of the property from its original public use. It is not so considered when sea-walls, piers, wing-dams, and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to the navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself, and of all the navigable waters of the country? It is commerce, and not navigation, which is the great object of constitutional care.

The power to regulate commerce is the basis of the power to regulate navigation, and navigable waters and streams, and these are so completely subject to the control of congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States had or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no state can place any obstruction in or upon any navigable waters against the will of congress, and congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power "to regulate commerce." Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the states extends, not only

to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of congress, may be necessary or expedient.

Entertaining these views with regard to the power of congress over the whole subject of the regulation of commerce among the several states, including that of the navigable waters of the country, and the lands under the same, as subsidiary to that end, we have no hesitation in declaring our opinion to be that the authority given by the act of June 16, 1886, to build the bridge in question, and, for that purpose, to erect the necessary piers of such bridge upon the lands under water of Arthur kill, is valid and constitutional, and does not injuriously affect any property or other rights of the state of New Jersey. This conclusion resolves also the other questions remaining unanswered, with regard to the true construction of the act, and the capacity of the defendant the Staten Island Rapid Transit Railroad Company to perform the acts necessary to execute the authority given by congress.

The information is dismissed, with costs, and the injunction heretofore granted is dissolved.

NEW ORLEANS & MEMPHIS PACKET CO. *v.* JAMES. PLANTERS' TRANSP. CO. *v.* SAME. GREENVILLE & N. O. PACKET CO. *v.* SAME.[1]

(*Circuit Court, E. D. Louisiana.* June 1, 1887.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—CORPORATIONS.

Article 236 of the constitution of Louisiana, which provides that no foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the state upon whom process can be served, is null and void, being an attempt on the part of the state to interpose a restriction on navigation, and therefore in conflict with the provisions of the act of congress approved seventeenth February, 1793, passed in pursuance of a clear authority under the constitution of the United States.[2]

T. L. Bayne and *Geo. Denegre*, for complainants.
W. F. & D. C. Mellen, for defendant.

BILLINGS, J. To the plaintiffs' claim defendant interposes the exception that the plaintiffs, chartered or existing under the laws of the state

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

[2] A state statute cannot be so construed as to limit the right of any foreign corporation to make contracts in the state for carrying on interstate commerce. Cooper Manuf'g Co. v. Ferguson, 5 Sup. Ct. Rep. 739.

Any control or regulation by a state of the navigation of its waters is an encroachment upon the powers of congress. Ferry Co. v. Com., 5 Sup. Ct. Rep. 826. Respecting interstate commerce in general, see Pearson v. International Distillery, (Iowa,) 34 N. W. Rep. 1, and note.

of Kentucky, have failed to comply with the provisions of article 236 of the constitution of the state of Louisiana, which provides that no foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the state upon whom process may be served. Held, that the provision of the constitution of Louisiana referred to, being an attempt on the part of the state to interpose a restriction on navigation, and therefore in conflict with the provisions of the act of congress approved February 17, 1793, passed in pursuance of a clear authority under the constitution of the United States, is null and void. *Sinnot* v. *Davenport*, 22 How. 227.

Exception overruled, and judgment rendered in favor of plaintiffs in each cause.

HICKORY FARM OIL CO. *v.* BUFFALO, N. Y. & P. R. CO.

(*Circuit Court, W. D. Pennsylvania.* August 13, 1887.)

1. FOREIGN CORPORATIONS—RIGHT TO HOLD REAL ESTATE—EFFECT OF DEED.
   Under the Pennsylvania act of April 26, 1855, (1 Purd. 361,) which forbids a foreign corporation to "acquire and hold" real estate, a deed of conveyance of land to such a corporation is not void. It passes the title, and the corporation may hold the land subject to the commonwealth's right of escheat.
2. SAME—RIGHT OF OBJECTION.
   The commonwealth alone can object to the legal capacity of a corporation to hold real estate.[1]

Ejectment. Question of law reserved.

John Dalzell, for plaintiff.

J. D. Hancock, for defendant.

ACHESON, J. By consent of the parties, a verdict was taken in favor of the plaintiff, subject to the opinion of the court as to the law, upon the following agreed state of facts:

"(1) It is admitted that the plaintiff has a good record title to the land described in the writ, which is part of a larger tract, containing in all about 400 acres, purchased by and conveyed to plaintiff in 1864.

"(2) That the plaintiff is a corporation, organized under the laws of New York, in the year 1864, under the provisions of an act of the legislature of

[1] The commonwealth alone can take advantage of the want of capacity in a corporation to take and hold land. Bone v. Canal Co., (Pa.) 5 Atl. Rep. 751; Railroad Co. v. Lewis, (Iowa,) 4 N. W. Rep. 842.

When a corporation is incompetent by its charter to take a legal title to real estate, a conveyance to it is not void, but only voidable, and the sovereign only can object. It is valid until assailed in a direct proceeding for that purpose. Land Co. v. Bushnell, (Neb.) 8 N. W. Rep. 389.

Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in direct proceedings by the state. Jones v. Habersham, 2 Sup. Ct. Rep. 336.

Where a foreign corporation has the power to acquire real estate, so far as necessary for business, its acquisition of realty cannot be assailed in a collateral proceeding as an act *ultra vires*. Such a question can be raised by the state only, and in a direct proceeding. Barnes v. Suddard, (Ill.) 7 N. E. Rep. 477.

the state of New York entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes,' passed February 17, 1848, and the several supplements thereto.

"(3) The articles of association of said corporation contain, *inter alia*, the following paragraph: '(11) The objects for which said company is formed are to acquire by purchase, lease, or otherwise, and to hold and convey lands in the mineral oil producing regions of Pennsylvania, and elsewhere, and to carry on the business of mining and boring for petroleum or mineral oils, and other mineral products of such lands, and extracting the same from the earth.'

"(4) If the court shall be of opinion that, under the law, the plaintiff is entitled, upon the facts as recited, to recover, then judgment to be entered on the verdict for the plaintiff; otherwise judgment to be entered for the defendant *non obstante veredicto*."

By the fifth section of the act of assembly of the commonwealth of Pennsylvania of April 26, 1855, (P. L. 329; 1 Purd. 361,) it is enacted that "no corporation other than such as shall have been incorporated under the laws of this state, nor shall any foreign government, potentate, or power, hereafter acquire and hold any real estate within this commonwealth, directly in the corporate name, or by or through any trustee or other device whatsoever, unless specially authorized to hold such property by the laws of this commonwealth." And by the ninth section of said act (1 Purd. 719) it is provided that all property hereafter "acquired and held" by corporations forbidden by said act to hold the same, or held contrary to the intent of the act, shall escheat to the commonwealth; and, upon the same being adjudged to have escheated under judicial proceedings by *quo warranto*, it shall be taken into possession, and disposed of as in cases of property escheated for defect of heirs.

The question of law arising upon the agreed state of facts is whether the plaintiff, in view of the above recited provisions of the act of April 26, 1855, by its purchase of the land in controversy, and the conveyance to it of the title thereto, acquired the legal estate therein. If the plaintiff has the legal estate in the land, it can of course recover, for the defendant has shown no title whatever, but, as against the plaintiff, is a mere intruder.

The leading case in Pennsylvania on the subject of the effect of a conveyance of real estate to a corporation forbidden by law to "purchase *and hold*" the same, is that of *Leazure* v. *Hillegas*, 7 Serg. & R. 313, in which it was held that such corporation might purchase and take title to the real estate; its title, however, like that of an alien, being defeasible at the pleasure of the commonwealth. That case, and the later case of *Goundie* v. *Water Co.*, 7 Pa. St. 233, settle the principle that the commonwealth alone can object to a want of capacity in a corporation to hold land. In *Runyan* v. *Lessee of Coster*, 14 Pet. 122, (a Pennsylvania case in its facts singularly like the present case,) the supreme court of the United States, following the ruling in *Leazure* v. *Hillegas*, sustained the right of a foreign corporation to maintain an action of ejectment for land which it was not licensed to hold under the laws of Pennsylvania, the commonwealth not having exercised its right of escheat.

The supreme court of Pennsylvania had occasion to consider the act of April 26, 1855, in the case of *Slate Co.* v. *Savings Bank*, 8 Wkly. Notes Cas. 430, and therein declared that it was a mortmain act, disabling foreign corporations from acquiring and holding real estate, but the commonwealth only can take advantage of the disability, and that it was not intended that a deed to a foreign corporation should be void so as not to pass the estate of the grantor. Evidently these cases are decisive in favor of the plaintiff's right, upon the agreed facts, to maintain this action.

The court, then, being of opinion that under the law the plaintiff is entitled, upon the facts agreed on, to recover the land described in the writ of ejectment, it is ordered that judgment be entered on the verdict in favor of the plaintiff.

EASTMAN *v.* CLACKAMAS CO.

(*Circuit Court, D. Oregon.* September 5, 1887.)

1. COUNTIES—DEFECTIVE HIGHWAYS—BRIDGES.
   By the law of Oregon, a county has charge and supervision of all the public roads therein, and, by means of road-districts, supervisors, and local taxation, is provided with the means to open and keep them in repair, and is therefore on principle liable at common law for any injury to person or property resulting from its act or omission in the construction or maintenance of a bridge on such highway.[1]
2. CONSTITUTIONAL LAW—"REMEDY BY DUE COURSE OF LAW."
   Section 10 of article 1 of the constitution of the state declares that "every man shall have remedy by due course of law for injury done him in person, property, or reputation." At and long prior to the formation and adoption of the constitution the statute of Oregon gave any person an action against a county for an injury to his rights arising from some act or omission thereof, which statute was continued in force by section 7 of article 18 thereof. *Held*, that such remedy for such injury, or its equivalent, was secured to the party by the constitution, and therefore it is not in the power of the legislature to deprive him of it.
3. STATUTORY CONSTRUCTION—REPEAL.
   A statute of Oregon passed in 1854 gave an action against a county for an injury arising from its act or omission, which was continued in force after the adoption of the constitution by section 7 of article 18 thereof, and on the adoption of the Code of Civil Procedure, in 1862, the provision was carried into section 347 thereof; but on February 21, 1887, the legislature amended said section so as to omit such provision, without making any express provision as to any existing right of action thereunder. *Held* that, in the absence of any express provision to that effect, the act of 1887 ought not to be construed so as to affect or take away any such rights, and did not affect this action then pending in this court for damages for such an injury.
4. HIGHWAYS—NOTICE OF DEFECT.
   A supervisor of roads is the agent of the county within his district, and notice to him of a defect in a highway therein is notice to the county; and what he may know of such defect in the diligent discharge of the duties of his office he has notice of, and the county also.

(*Syllabus by the Court.*)

[1] See note at end of case.

Frank V. Drake, for plaintiff.
T. A. McBride and *William H. Effinger*, for defendant.

DEADY, J. This action is brought by the plaintiff, who is a citizen of California, against the defendant, a public corporation of this state, to recover damages for an injury sustained by the plaintiff in his person and property, in the sum of $7,390, on June 20, 1886, in crossing a bridge on road 100 in district 58, in Clackamas county, by reason of its defective and insecure structure and condition. The answer of the defendant consists of specific denials of every material allegation in the complaint except the citizenship of the defendant, and a hypothetical allegation to the effect that if the plaintiff did fall from said bridge it was the result of his own negligence. The plaintiff replied, denying negligence on his part. The cause was tried by the court without the aid of a jury; and on the trial a stipulation was filed to the effect that the plaintiff in his reply had alleged in due form that the defendant was estopped to deny that the road in question is and was, at the date of the injury complained of, a county road and public highway, and that the defendant had in like manner pleaded in its answer the act of February 21, 1887, entitled, "An act to amend section 347 of the Code of Civil Procedure," subject to any legal objection thereto.

I find the material facts of the case to be as follows:

From the records and files of the county court of Clackamas county it appears that in January, 1876, a petition, duly signed, was presented to said court for the location and establishment of a county road, commencing at the intersection of the Oregon City and Portland road, and the old immigrant road leading to Philip Foster's, near the center of section 13, in township 2 S., of range 4 E.; running thence, in a southeasterly direction, about 13 miles, to Salmon river, near the residence of Edwin Bates, on the N. E. ¼ of section 26, in township 2 S., of range 6 E., with proof by the affidavit of one of the petitioners that due notice had been given of said petition; that thereafter, during the same year, said road was duly located, surveyed, and established as county road 100, and entered on the county map of roads and road-districts, in said county, and has since been opened and regularly worked by the supervisors of road-district 58, appointed by said court; that in 1880 and 1881 a wooden bridge was built by certain of said supervisors on the line of said road, with the road tax of said district, across Beaver creek, the same being about 80 feet long, having three stringers 5 feet apart, 12 feet wide, and from 12 to 15 feet above the stream and ravine through which it flows, curving to the left from the eastern end, without railing, and covered in the center with loose plank 2 inches thick and 12 inches wide, and at each end with puncheons, on the north or lower ends of which loose logs were laid lengthwise the bridge; that, from the opening of this road to the commencement of this action, the supervisors of road-district 58 made regular returns of the tax by them collected and expended on this road, including this bridge, with the charges for their services, to the county court of Clackamas county, which were regularly audited and settled.

On June 20, 1886, while the plaintiff was traveling from Eastern Oregon to Portland, by the way of the Barlow road, across the Cascade mountains, in a buggy drawn by two horses, with John Morgan as a companion, he came down the stream to the eastern end of this bridge, and, following the road, turned shortly onto it, on a descending grade. At the time bushes and small trees had grown up on either side of the bridge, and particularly on the upper or left side, so that the foliage obscured the surroundings, and prevented, in connection with the curve in the bridge, an uninterrupted view of the roadway thereof. The bridge was somewhat lower on the upper than the lower side, and about 30 feet from the eastern end a plank had slipped to the left as far as the middle stringer or been broken off there, leaving a hole in the right-hand side of the roadway about 4 feet long and 12 inches wide. When the team came to this opening the off horse shied or crowded to the left, thereby pushing the near one to the edge of bridge in the dense ingrowing and overhanging foliage, when the animal, unconscious of the danger, stepped off the bridge, and fell to the bottom, drawing the other horse and buggy after him. As the horses shied, Morgan jumped out of the buggy, but the plaintiff, who was driving, went over with the team into the creek below, falling with his head and shoulders between two logs, from which situation he was soon rescued by Morgan. The buggy was badly cracked, bent, and strained, the harness was much broken, and the horses considerably scratched and bruised. The plaintiff was painfully bruised on the left side, and suffered a fracture of the ulna or lower bone of the left arm, between the middle and lower third.

With the assistance of a person living in the vicinity, the horses and buggy were gotten out of the creek, and put together, and the plaintiff and his companion drove on a few miles to a place called Sandy, where they spent the night, and the next day they drove to Portland, a distance of about 25 miles. Here the plaintiff put his team in a livery stable for care for two months at a cost of $1 per day, at the end of which the outfit was disposed of for $175, the same having cost at Walla Walla, a few weeks before, $425; that is, $200 for the buggy, $175 for the horses, and $50 for the harness. On the day after his arrival in Portland the plaintiff, his arm being badly swollen, and, as he thought, broken, visited a physician, who told him he could not tell then whether his arm was broken or not, and advised him to put it in a sling, and bathe it with a certain liniment, which he did for ten days or two weeks; when he went to another physician, who told him his arm was broken, and also a rib, and set the former, and put it in splints; and afterwards introduced him to a third physician, who said so much time had elapsed he could not tell what to do for him; when he went to a fourth one, who says he treated his arm for a month or two, during which time he reduced the fracture, and put it into splints, where the plaintiff says it remained until last spring. The defendant having in its answer and otherwise denied that the plaintiff's arm was broken, on the trial the arm was submitted to the examination of several physicians, two of whom were called by the defendant, and they all agreed there had been a fracture of the ulna, followed by delayed union; that the ends of the bone

were now held together by a cartilaginous formation, which in all probability will ossify in time, and produce a good arm.

The plaintiff at the time of the accident was engaged in taking orders for portraits in crayon and pastel, which he makes, and had received $800 worth of the same, that he was unable to finish on account of his injuries, without the aid of solar prints and hired help, the cost of which consumed his profits; and he paid surgeons for attendance during the illness consequent on such injuries $125.

On the oral argument of the case, one of the counsel for the defendant made and insisted on the point that this is not a lawful county road, and therefore the county is under no obligation to keep the bridge in repair. The statute (Laws Or. p. 721, §§ 1–3) provides "that all county roads shall be under the supervision of the county court," and no such road shall be established except by its authority. "All applications for * * * locating county roads shall be by petition to the county court, * * * signed by at least twelve householders of the county residing in the vicinity" of said proposed road, specifying the *termini* and intermediate points of the same. An application for a county road shall be accompanied by proof that notice thereof was posted at the place of holding the county court, and also in "three public places in the vicinity of said proposed road thirty days previous" thereto. In this case the proof of notice indorsed on the petition states that one notice was posted "on the court-house door, and three in the vicinity of the road" described in the petition, but does not show that such notices were signed by any one, or that the places where they were posted are "public" places. The contention of counsel is that it should not only appear that the places where the notices were posted are "public" places, but they should be named, so that the court and persons interested in the matter can determine or ascertain whether they were properly posted or not.

In *Minard* v. *Douglas Co.*, 9 Or. 206, the supreme court held that notice of such an application is invalid unless signed by the petitioners, and suggested that the proof should designate the places where the notices were posted. See *Burns* v. *Railway Co.*, 8 Sawy. 543, 15 Fed. Rep. 177. But the question in *Minard* v. *Douglas Co.* arose between the latter and a private person whose land was sought to be subjected to the easement of a county road, by the judgment of the county court in a proceeding of which he claimed he had not legal notice. In the case under consideration the county wants to escape or avoid its responsibility as curator of county roads, on the ground that a road that was in fact established by its court more than 10 years ago, and has ever since been recognized by it and the inhabitants thereof as a lawful county road and public highway, is not *de jure* a county road, because, forsooth, in establishing it, the county court acted without legal notice to the persons through whose lands it is laid, not one of whom, however, has any complaint to make in the matter. In my judgment this is bad law and worse morals. The county having formally laid out and opened this road, and built this bridge thereon, and thereby authorized and invited the public to travel over it, is estopped, when any person seeks redress

for an injury sustained by its negligence in the construction or maintenance of said bridge, to say the road is not a lawful one,—we committed an error in the proceeding for its establishment.

In *Mayor* v. *Sheffield*, 4 Wall. 189, it was held, in the language of the syllabus: "Where a corporation is sued for an injury growing out of negligence of the corporate authorities in their care of the streets of the corporation, they cannot defend themselves on the ground that the formalities of the statute were not pursued in establishing the street originally;" and "if the authorities of a city or town have treated a place as a public street, taking charge of it and regulating it as they do other streets, they cannot, when sued for such injury, defend themselves by alleging want of authority in establishing the street."

Nor is this all in this connection. By the proviso to section 1 of the act of October 24, 1882, (Sess. Laws, 60) which is substantially a re-enactment of the proviso to section 1 of the act of October 29, 1870, (Laws Or. 721,) it is declared "that all roads, viewed, surveyed, and recorded by order of any county court of this state, subsequently to October 29, 1870, and the said road has not been defeated by remonstrance, as now provided by law, or has not been made or declared vacated by existing laws, shall be, and the same are hereby, declared public highways."

And although it was held by this court in *Burns* v. *Railway Co.*, 8 Sawy. 543, 15 Fed. Rep. 177, that a road "viewed, surveyed, and recorded" by order of a county court, without notice of the application therefor, is void, as against any person whose land is thus attempted to be charged with a public easement, and could not be made legal, as to him, by any act of the legislature, yet it may well be held that, so far as the county is concerned, the road is thereby legalized. And in any view of the matter, in my judgment, it cannot defend itself in an action for damages resulting from an injury caused by its neglect to properly care for such road, on the ground of a defect in the notice of the application for its establishment. This point is not made in the printed brief for the defendant, filed since the oral argument, and it may be that counsel, on further reflection, have concluded to abandon it.

The next point made in the defense is that, admitting the legality of the road, the duty of the county to keep the bridge in good condition, and the injury to the plaintiff by reason of its neglect of this duty, the plaintiff is without remedy, because at common law no action would lie in such case against the county, and the legislature, since the commencement of this action, have repealed the statute giving the right to maintain one.

In *Russell* v. *Men of Devon*, 2 Term R. 667, (*tempus* 1788,) it was held in the king's bench that an action would not lie by an individual against the inhabitants of a county, for an injury sustained in consequence of a bridge being out of repair, which was chargeable to the county. The decision of the court was placed by Lord KENYON on the ground that the inhabitants of the county were not a corporation, and had no corporate fund out of which satisfaction of a judgment could be made; that if the action was allowed, and the plaintiff had judgment, it might be

satisfied out of the property of any one of the men of Devon, and the result would be "an infinity of actions" among the defendants for contribution. This was in fact an action against an unorganized mass. An English county was not a corporation. It had no board or court which stood for the inhabitants and administered their local affairs. It had no power of taxation, and therefore had no corporate fund. It was merely a convenient division of the kingdom, comprising a number of *quasi* corporations, such as parishes, hundreds, or wapentakes, for judicial and representative purposes, in which the king, in his executive character, was represented by the vice-comes, or sheriff, on whom, in process of time, the civil administration was almost wholly devolved. 1 Bl. Comm. 116, 339; Whart. Law Dict. "County."

The duty of keeping the highways, including the bridges thereon, in repair, devolved on the parishes in which they were. It was accomplished by means of a tax on the property and persons of the parish, paid either in labor or money, and applied under the direction of the surveyor of ways. By the act of 22 Hen. VIII. *c.* 5, this burden, in the case of bridges outside of any town, was devolved on the county at large; the justices of the county, or any three of them, being authorized to cause the repairs to be made at the expense of the inhabitants thereof; and this undoubtedly was the condition of the bridge in *Russell* v. *Men of Devon*. The inhabitants of the county had no authority to repair the bridge, or to raise means to do it with, any more than the inhabitants of one of our road-districts. They were only bound to contribute labor or money for that purpose, as they were required by the justices. 1 Bl. Comm. 357; Shear. & R. Neg. § 248.

Following the case of *Russell* v. *Men of Devon*, or the provisions of their own statutes, most of the American courts have held that a county is not liable in damages for an injury sustained by any one in consequence of failing to keep in repair a highway or bridge, while they have been generally agreed that a town incorporated under a special statute or charter, with authority over the streets and bridges within its limits, and the power to raise money by taxation for that purpose, is so liable, unless otherwise provided by statute. Dill. Mun. Corp. (2d Ed.) § 785; *Rankin* v. *Buckman*, 9 Or. 253.

The reason given for this distinction—that the inhabitants of a town incorporated under a special statute consent thereto, while a county exists, without the consent of its inhabitants, simply as a subdivision of the state—shows that it is a distinction without any substantial difference.

In 1 Thomp. Neg. 618, the author, after premising that the ground of the judgment in *Russell* v. *Men of Devon* is not sound when applied to counties in the western states, says:

"These counties are political bodies, having a common administrative board, elected by voters of the county, by which the business of the county is transacted. Through this board the county contracts and is contracted with, sues and is sued. Many counties issue negotiable securities in large amounts. Their administrative boards possess a limited power of taxation for county

purposes. In these respects no substantial difference is perceived to exist between them and chartered municipal corporations. The argument that a liability should attach to the latter, and not to the former, because the latter are supposed to accept their charters voluntarily, while the duties and obligations annexed to the former are imposed on them involuntarily, is based on an assumption, in most cases, untrue in point of fact, and is, even where the premises are correct, fantastical and destitute of sense. There is no sound distinction between the sanction of an obligation voluntarily assumed by a public body and that of an obligation which the legislature, in the due exercise of its powers, has imposed upon it."

In Iowa, Maryland, Indiana, and Pennsylvania the counties or townships charged with the duty of maintaining highways, and provided with the means of doing so, are held liable for injuries resulting from neglect in this respect. *Brown* v. *Jefferson Co.*, 16 Iowa, 339; *Baltimore Co.* v. *Baxer*, 44 Md. 1; *House* v. *Commissioners*, 60 Ind. 580; *Dean* v. *Township*, 5 Watts & S. 545; *Mahanoy* v. *Scholly*, 84 Pa. St. 136.

And the modern English local boards and trustees, that are charged with the care and maintenance of highways and provided with the means of raising funds for the purpose, are now held liable, in their corporate capacity, for an injury caused by their negligence or that of their servants. *Trustees* v. *Gibbs*, L. R. 1 H. L. 93.

A county in Oregon, through the instrumentality of its county court, has the charge and supervision of all public roads within its limits, and to this end may divide the county into road-districts, and appoint a supervisor of roads for each one, who is authorized, by statute, to assess, within certain limits, taxes on the property and persons liable to perform road labor in his district, and to collect and apply the same in money or labor on the roads therein. And in case the ordinary tax is not sufficient to open a new road, or remove casual obstructions from any one, or repair a bridge, he may make any additional assessments on the property and persons of the district for such purpose. A supervisor must keep an account of all money and labor received by him, and the expenditure and disposition thereof, and return the same to the county court annually for examination and settlement. In short, the supervisor is the direct agent of the county, as represented by the county court, in all matters pertaining to the opening and maintaining the public highways therein. Laws Or. *c.* 50, tit. 1. In addition to this, by subdivision 4, § 870, Code Civil Proc., the county court is directly authorized "to provide for the erection and repairing, within the county, of public bridges upon any road or highway established by public authority." Upon this state of the obligation and power of the county, it is liable, in my judgment, for an injury sustained by any one in consequence of its failure to keep a highway or bridge thereon in reasonable repair; and, on principle, the common law will furnish a remedy therefor as in the case of an incorporated town. By section 4 of the act of January 7, 1854, (Laws 1854–55, p. 168,) concerning "actions by and against public officers and public bodies," an action was authorized to be brought against any county in the then territory, either upon a contract, "or for an injury to the rights of the plaintiff, arising from some

act or omission" of said county, which was continued in force after the adoption of the constitution by section 7 of article 18 thereof; and by section 347 of the Code of Civil Procedure, which took effect on June 1, 1863, it was re-enacted and continued with some verbal alterations.

On February 21, 1887, an act was passed, entitled "An act to amend section 347 of title 4 of chapter 4 of the Code of Civil Procedure, relating to actions by and against public corporations and officers," which restrains the right to maintain an action against a county to cases arising on contract. Objection is made to the constitutionality of the act, because the subject is not expressed in the title, as provided in section 20 of article 4 of the constitution. It may be admitted that there is no such act as that described in the title to this one. But "section 347 of title 4 of chapter 4 of the Code of Civil Procedure, relating to actions by and against public corporations and officers," is in legal effect simply section 347 of such Code. The superfluous matter neither helps nor hurts it. This action was commenced on November 15, 1886, and on February 7, 1887, a demurrer to the complaint was overruled; and the act amending section 347 of the Code of Civil Procedure, so as to leave this class of actions unprovided for, followed on February 21st, thereafter.

And now it is contended by counsel for the defendant that the effect of this act is to take away plaintiff's right of action, and therefore this action can no longer be maintained. On the other hand, counsel for the plaintiff contends (1) that, as there is no mention in the amendment of pending actions or existing rights of action, it ought not to be construed to operate retrospectively, so as to affect them; and (2) that the right to maintain this action is a vested one, which the legislature cannot take away.

The fourteenth amendment declares that the state "shall not deprive any person of * * * property without due process of law." Assuming, as I do for the present, that the plaintiff's right of action, whether vested or not, is not "property," within the meaning of this amendment, there is nothing in the constitution of the United States or of this state prohibiting the passage of retrospective laws by the latter, provided they do not impair the obligation of contracts, or partake of the character of *ex post facto* laws. Subject to these qualifications, the state may pass retrospective laws, and thereby divest vested rights, without violating the constitution of the United States. *Watson* v. *Mercer*, 8 Pet. 110; *Charles River Bridge* v. *Warren River Bridge*, 11 Pet. 539; *Carpenter* v. *Com.*, 17 How. 461; *Locke* v. *New Orleans*, 4 Wall. 172; Cooley, Const. Lim. 370. And the state constitution goes no further in this respect than to prohibit the passage of laws impairing the obligation of contracts or *ex post facto* laws,—such as affect retrospectively crimes or their punishment. Const. Or. art. 1, § 21.

This is a civil action to recover damages for a tort; and a law affecting the right to maintain it, or taking it away, neither impairs the obligation of a contract, nor partakes of the character of an *ex post facto* law. And admitting that the right to maintain this or an equivalent action for the redress of this wrong is a vested one, of which the plaintiff ought not

to be wantonly deprived, it is clear the legislature may do so, if it will, unless the constitution of the state is in the way.

Section 10 of article 1 of the constitution of the state provides: "No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay; and *every man shall have remedy by the course of law for injury done him in person, property, or reputation.*" In my judgment, the latter clause of this section has an important bearing on this case. To begin with, it may be admitted that the remedy guarantied by this provision is not intended for the redress of any novel, indefinite, or remote injury that was not then regarded as within the pale of legal redress. But whatever injury the law, as it then stood, took cognizance of and furnished a remedy for, every man shall continue to have a remedy for by due course of law. When this constitution was formed and adopted, it was and had been the law of the land, from comparatively an early day, that a person should have an action for damages against a county for an injury caused by its act or omission. If this then known and accustomed remedy can be taken away in the face of this constitutional provision, what other may not? Can the legislature, in some spasm of novel opinion, take away every man's remedy for slander, assault and battery, or the recovery of a debt? and, if it cannot do so in such cases, why can it in this?

Contemporaneous construction is always resorted to for the interpretation of constitutions made in the orderly and peaceful progress of organized society. What was the law, practice, or usage at the time is assumed to have been known to the framers of the constitution, and the people who adopted it; and the phrases, capable of a larger or smaller application, as used therein, are properly interpreted by reference thereto. For instance, although the constitution requires justice to be "administered openly and without purchase," no one doubts that, in the light of contemporaneous usage, the parties to legal proceedings may be required to contribute specially to the expense thereof, or that, in a certain class of cases, the general public, in the interest of public morals and decency, may be excluded from the court room. Cooley, Const. Lim. 312. For these reasons, in my judgment, the legislature cannot, in the face of this constitutional provision, deny to any one a remedy by due course of law for an injury arising from the wrongful act or omission of a county, and therefore the amendment of section 347 of the Code of Civil Procedure is null and void. But I am content to rest the decision of this case on the conclusion that the amendment of section 347 does not and was not intended to affect the plaintiff's right of action. It is a fundamental rule in the construction of statutes that they shall only affect future cases, unless the contrary intent is plainly expressed. The very essence of a new law is a rule for future cases.

In *Dash* v. *Van Kleeck*, 7 Johns. 503, Mr. Chief Justice KENT held that a statute ought never to be construed so as to "defeat a suit already commenced upon a right already vested," "if it be susceptible of any other" construction; and said: "It is a principle in the English common law, as ancient as the law itself, that a statute even of its omnipotent parliament is not to have a retrospective effect."

In *Helmore* v. *Shuter*, 2 Show. 16, a case cited with approbation by Lord MANSFIELD in *Couch* v. *Jeffries*, 4 Burrows, 2460, and by Mr. Chief Justice KENT in *Dash* v. *Van Kleeck*, *supra*, it was held, in an action brought after June 24, 1677, on a parol promise made before that time, that the same was not within the statute of frauds and perjuries of 29 Car. II, *c.* 3, § 4, which enacts "that from and after June 24, 1677, no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless such agreement, or some memorandum thereof, shall be in writing." The court said "that the act could not have a retrospect to take away an action to which the plaintiff was before entitled."

Upon this point counsel for the defendant cite and rely on the cases of *Butler* v. *Palmer*, 1 Hill, 324, and *Iron Co.* v. *Pierce*, 4 Biss. 327, in the former of which it was decided that the right of a judgment creditor under a particular statute to redeem from a mortgage sale, at any time within a year therefrom, may be lessened by a statute passed after such right was acquired, but which left a reasonable time thereafter in which such redemption might be made. This is nothing more than the familiar rule that a statute of limitations may be made applicable to existing causes of action, provided a reasonable time thereafter is allowed in which to commence action thereon. In the course of the opinion, however, Judge COWEN, as usual, discusses a good many cognate questions, and among other things says (1) that where a statute repeals another which imposed a penalty, the right to the penalty becomes extinguished, even though a prosecution therefor has been commenced; (2) inchoate rights, derived under a statute, are lost by its repeal, unless saved by express words; (3) but it is not so with civil rights that may stand independent of the statute, or have ceased to be executory and become executed; and (4) positive statutes, not merely repealing ones, should not be construed so as to interfere with previously existing contracts or rights of action, unless the intent to do so is expressed therein.

In the case of *Iron Co.* v. *Pierce* it was held that the repeal of a highly penal statute which made the officers of a corporation, in case they neglected to make certain reports, individually liable for all corporate debts contracted while they were such officers, whether the creditor was thereby injured or not, took away all existing rights of action thereunder, including one on which an action was brought before the passage of the repealing act. It is admitted that in the case of what are called penal statutes there has been a more marked disposition on the part of the courts to hold that a repeal thereof destroys or takes away all existing rights of action thereunder without any express declaration to that effect. But the rule is an arbitrary one, and never had anything to commend it, except in the United States an undue sympathy for wrongdoers, and in England an early prejudice among common-law judges against "statute-made law." By act of February 25, 1871, (16 St. 432; Rev. St. § 13,) congress abrogated it, and declared that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability, incurred under such statute, unless the repealing

act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

In *Couch* v. *Jeffries*, 4 Burrows, 2460, which was a *qui tam* action for a penalty, the question was whether a statute, (9 Geo. 3, *c.* 37,) passed subsequent to the commencement of the action allowing delinquents by September 1, 1769, to pay stamp duties on indentures of apprenticeship, and thus escape the penalty for such delinquency, affected the case of an action for such penalty already commenced. The court of king's bench unanimously determined that it did not. In delivering the opinion of the court, Lord MANSFIELD said:

"Here is a right vested, and it is not to be imagined that the legislature could by general words mean to take it away from the person in whom it was so legally vested, and who had been at a great deal of cost and charge in prosecuting. They certainly meant future actions. Otherwise it would be punishing the innocent instead of the guilty. It can never be the true construction of this act to take away this vested right, and punish the innocent pursuer of it with costs."

Neither is the statute under consideration a penal one. It merely gives a party a remedy for an injury sustained by him through the negligence or wrong-doing of another, in which he may recover only such damages as he can show he has sustained.

Admitting, then, that the common law does not give the plaintiff a remedy against the defendant for this injury, and that the action is only authorized by section 347, Code Civil Proc., which is so far repealed, yet it is neither logical nor just to assume that the legislature also thereby intended to take away all existing rights of action when in fact it made no provision on the subject. That such was the private purpose of those who procured the passage of the amendment after the demurrer to the complaint was overruled, is possible. But there is no evidence that such was the intent of the legislature, or that attention was called to the subject. Why the act should even have been amended at all, as it was, is not apparent. It had been in force here for nearly 33 years—the life of a generation—without question or objection, so far as appears. It is a wholesome and just enactment, by which the counties are required to compensate individuals for losses sustained through their neglect to keep their highways in repair, and now found in the statutes of most of the states.

It is also urged that the amendment, even on the defendant's construction of it, does not leave the plaintiff remediless, as he may have an action against the supervisor, and, if so, why not against the county court? But a remedy against the supervisor, or even the persons who constitute the county court, however worthy they may be, would, in many, if not most, cases, be equivalent to threshing empty straw. If travelers and others who sustain injuries by reason of defective highways can have no remedy against any one except these officers personally, they might as well have none.

A question is also made in the case as to whether the county had no-

tice of the particular defect in this bridge—the hole in the roadway—which was the immediate cause of the accident. The evidence tends to show, and would justify a finding to that effect, that one of the county commissioners, who lived in the vicinity, had his attention called to it a short time before the occurrence, and that the supervisor who lived in the neighborhood must have known it, though he resigned a short time before, and another had not then been appointed. Notice to the supervisor is notice to the county, and what he may know in the diligent discharge of the duties of his office he has notice of and the county also. *Mack* v. *City of Salem*, 6 Or. 275; *Heilner* v. *Union Co.*, 7 Or. 83. The supervisor is the agent of the county, appointed by it to attend to the highways in his district, with ample means at his command to make all needed repairs. I think every person who held the office of supervisor in this district, from the erection of the bridge to the commencement of this action, must be deemed to have had notice that this bridge was in a defective and dangerous condition. It never was properly constructed or finished. I know it will not do to exact of sparse neighborhoods in a new country the strength, durability, and finish in the construction of bridges that obtain in old and densely populated ones. But the legislature has spoken on the subject. Section 4 of the act of December 19, 1865, (Laws Or. 723, § 40, note,) provides that, when it appears to the county court from the representations of the supervisor, that a bridge of ten feet or more span is needed on any highway, it shall be built in a good, substantial manner, "and covered with sound plank at least two inches thick, and not less than twelve feet long, and *well spiked down*," and the county shall pay the supervisor the cost of such plank and spikes. This section is placed in a note to the compilation, because it appeared to the compiler that it might have been repealed by an inadvertence. And, if it had been, its value as an expression of opinion, as to what is a reasonable roadway for such a bridge as this, would not be impaired. But the supreme court in *Milling Co.* v. *Lane Co.*, 5 Or. 269, has since said that the act is in force.

The roadway on this bridge was never spiked, or otherwise fastened, than by laying loose logs irregularly along the end of the planks on one side of the bridge. The planks, being loose, naturally worked to the lower side of the bridge, and hence the hole in the roadway that was the immediate cause of this accident. So far, this was a defective structure of which the supervisors of the district had or might have had notice, with which the county is chargeable. Indeed, a bridge of this length and height ought to have had a railing on either side. The cost of a railing is nothing compared to the additional safety it gives to a bridge. And I think it is common knowledge that there are but few if any bridges in this country, of even half the length and height of this one, that are without railing.

It is also contended, in mitigation of damages, that the plaintiff's negligence, subsequent to the injury, is the cause of the delayed union of the bone. The burden of proof in this matter is on the defendant. The opinion of experts and authors (Ham. Surg. 250; 1 Gross, Surg.

927,) is that delayed union of a fracture of the ulna is not uncommon, and is attributable to various causes, compatible with good treatment, some of which are very obscure. The defendant is liable for the injury, including the delayed union, unless the latter is plainly the result of gross negligence or mistreatment since the fracture occurred. I think the plaintiff did the best he could for himself under the circumstances, and with the limited means at his command.

The plaintiff claims that this is a case for vindictive or exemplary damages; but there is no element of that kind in this case.

Considering the pain, physical and mental, suffered by the plaintiff, the injury to his team and buggy, and the expense of medical treatment and loss of time, and not altogether overlooking the expense and delay he has been put to in asserting his claim against the defendant, I assess the damages at $1,500, for which sum, and the costs and disbursements of the action, the plaintiff is entitled to judgment.

NOTE.

That *quasi* municipal corporations, as counties, are not liable in a civil action for injuries arising from failure to keep in repair highways or bridges within their limits, unless such action is expressly given by statute, even though the duty to repair is enjoined by law, see Barnett v. County of Contra Costa, (Cal.) 7 Pac. Rep. 177; Woods v. Colfax Co., (Neb.) 7 N. W. Rep. 269; Arline v. County of Laurens, (Ga.) 2 S. E. Rep. 833. A county is not liable for an injury caused by the negligence of its commissioners in failing to maintain in repair a sidewalk on the court-house premises. Dosdall v. County Com'rs of Olmsted Co., (Minn.) 14 N. W. Rep. 458. On the other hand, that counties are liable for injuries caused by negligence in constructing and maintaining bridges, see Ferguson v. Davis Co., (Iowa,) 10 N. W. Rep. 906; Huff v. County of Poweshiek, (Iowa,) 15 N. W. Rep. 418; Cooper v. Mills Co., (Iowa,) 28 N. W. Rep. 633; Board v. Montgomery, (Ind.) 9 N. E. Rep. 590. But such liability does not extend to injuries caused by the negligent construction and maintenance of ditches. Green v. Harrison Co., (Iowa,) 16 N. W. Rep. 136; Nutt v. Mills Co., Id. 536.

OSBORNE *v.* CITY OF DETROIT.

(*Circuit Court, E. D. Michigan.* October 25, 1886.)

1. MUNICIPAL CORPORATION—LIABILITY FOR DEFECTIVE WAY—EVIDENCE—PREVIOUS ACCIDENT.
   In an action for injuries occasioned by a defective sidewalk, it is not error to permit a witness to testify that, about two months before the accident, he and his wife met with an accident at the same place.
2. SAME—EXPERIMENT BEFORE JURY—UNSWORN EXPERT.
   Where the plaintiff claimed to be paralyzed by the fall, it is not error to permit her medical attendant, who had not been sworn, to demonstrate her loss of feeling to the jury, by thrusting a pin into the side plaintiff claimed to be paralyzed.
3. SAME—CONDITION OF SIDEWALK NEAR BY.
   Evidence is properly admissible as to the condition of the sidewalk in the immediate neighborhood of the spot where the accident occurred, if it be so near the place of the accident that a person examining the walk there would be likely also to notice the defect where the accident occurred.
4. SAME—SUBSEQUENT REPAIR.
   It is also competent to show that the walk was repaired about a week after the accident, as tending to show that the walk was out of repair at the time of the accident.

5. SAME—STATUTE LIMITING RECOVERY—RETROSPECTIVE OPERATION.
A statute passed after the accident had taken place, limiting the amount of recovery in such cases, was held to be prospective only, and having no bearing upon the plaintiff's right to recover full damages. A statute should be held to operate prospectively only, unless its terms show clearly a legislative intent that it should have a retroactive effect.

6. SAME—CITY PROPERTY OCCUPIED BY AGENTS OF STATE.
The accident occurred upon a sidewalk in front of property belonging to the city, but in charge of the police commissioners, who were appointed by the governor of the state. *Held*, that it was the duty of the city to keep the sidewalk in repair, and that such duty was not lessened by the fact that the lot was occupied by agents of the state.

7. SAME—CONTRIBUTORY NEGLIGENCE.
The testimony showed that plaintiff walked along the street without paying attention to the sidewalk, and that it was notoriously rotten, so that any one could see the earth beneath the plank. *Held*, that the question of contributory negligence was for the jury.

8. SAME—PROXIMITY TO POLICE STATION.
There was no error in calling the attention of the jury to the fact that the accident occurred in front of the police station, and within sight of the officers whose duty it was to have charge of the station.

9. SAME—DELAY IN CALLING PHYSICIAN.
The fact that the plaintiff did not send for a physician until some time after the accident had occurred, was held proper evidence of contributory negligence to go to the jury, but not conclusive.

10. SAME—AMOUNT OF RECOVERY.
Where the plaintiff suffered a complete paralysis of the right side, *held*, that a verdict of $10,000 was not excessive.

(*Syllabus by the Court.*)

On Motion of Defendant for a New Trial.

F. H. Caufield, for plaintiff. *H. M. Duffield*, for defendant.

BROWN, J. The plaintiff in this case obtained a verdict of $10,000 for personal injuries received by her in falling upon a defective sidewalk upon the north side of Church street in this city, between Michigan and Trumbull avenues. Defendant now moves for a new trial upon the following grounds:

1. The admission of the testimony of Bateson in regard to the accident to himself and wife, and the precautions they took afterwards. Bateson testified, in substance, to the defective condition of the walk at that place, and that about two months before the accident he and his wife met with a slight accident there, and that after that they always walked in single file. We take it that similar accidents, occurring in the same neighborhood, may be shown as evidence, not only of the actual condition of the walk, but as tending to show notice to the city. It is true that the Massachusetts cases hold that this evidence is not admissible, upon the ground that it raises a collateral issue which the defendant is not called upon to try, and he therefore may well claim to be surprised. The weight of authority, however, is decidedly the other way. See *Delphi* v. *Lowery's Adm'x*, 74 Ind. 521, in which all the former cases are reviewed. So far as the federal courts are concerned, the question has been put at rest by the case of *District of Columbia* v. *Armes*, 107 U. S. 519, 2 Sup. Ct. Rep. 840, which was also an action for damages received by a person from a fall caused by a defective sidewalk in the city

of Washington. Upon the trial, a policeman who saw the deceased fall on the sidewalk, and went to his assistance, after testifying to the accident, was allowed to state that he had seen persons stumble over there, and remembered sending home in a hack a man who had fallen there, and that he had seen as many as five persons fall there. See, also, *City of Chicago* v. *Powers*, 42 Ill. 169; *Railroad Co.* v. *Ruby*, 38 Ind. 294; *Quinlan* v. *Utica*, 74 N. Y. 603; *Dougan* v. *Transportation Co.*, 56 N. Y. 7; *Kent* v. *Town of Lincoln*, 32 Vt. 591; *Darling* v. *Westmoreland*, 52 N. H. 401; *Moore* v. *Burlington*, 49 Iowa, 136.

2. That the court erred in permitting the exhibition of the plaintiff and her condition to the jury by Dr. Gaylord. The doctor, who had not been sworn, exhibited the plaintiff to the jury, and thrust a pin into the right side of her face, her right arm and leg, and, from the witness' failing to wince, the jury were asked to infer that there was a complete paralysis of her right side. Objection was made to this upon the ground that the doctor was not sworn as to the instrument he was using, nor was the plaintiff sworn to behave naturally while she was being experimented upon. It is argued that both the doctor and plaintiff might have wholly deceived the court and jury without laying themselves open to a charge of perjury, and that plaintiff was not even asked to swear whether the instrument hurt her when it was used on the left side, or did not hurt her when used on the right side; in short, that there was no sworn testimony or evidence in the whole performance, and no practical way of detecting any trickery which might have been practiced. We know, however, of no oath which could be administered to the doctor or the witness touching this exhibition. So far as we are aware, the law recognizes no oaths to be administered upon the witness stand except the ordinary oath to tell the truth, or to interpret correctly from one language to another. The pin by which the experiment was performed was exhibited to the jury. There was nothing which tended to show trickery on the part of the doctor in failing to insert the pin as he was requested to do, nor was there any cross-examination attempted from the witness upon this point. Counsel were certainly at liberty to examine the pin and to ascertain whether in fact it was inserted in the flesh, and, having failed to exercise this privilege, it is now too late to raise the objection that the exhibition was incompetent. It is certainly competent for the plaintiff to appear before the jury, and, if she had lost an arm or a leg by reason of the accident, they could hardly fail to notice it. By parity of reasoning, it would seem that she was at liberty to exhibit her wounds if she chose to do so, as is frequently the case where an ankle has been sprained or broken, a wrist fractured, or any maiming has occurred. I know of no objection to her showing the extent of the paralysis which had supervened by reason of the accident, and evidence that her right side was insensible to pain certainly tended to show this paralyzed condition. In criminal cases it has been doubted whether the defendant could be compelled to make profert of his person, and thus, as it were, make evidence against himself. The authorities upon this subject are collated in 15 Cent. Law J. 2, and are not unequally di-

vided, but we know of no civil case where the injured person has not been permitted to exhibit his wounds to the jury.

In *Schroeder* v. *Railroad Co.*, 47 Iowa, 375, it was held not only that the plaintiff would be permitted, in actions for personal injuries, to exhibit his wounds or injuries to the jury, but that he might be required by the court, upon proper application therefor by the defendant, to submit his person to an examination for the purpose of ascertaining the extent of such injuries, and upon refusal might be treated as in contempt. See, also, *Mulhado* v. *Railroad Co.*, 30 N. Y. 370.

But, even considering the testimony to have been improper, as there was not the slightest evidence offered by the defendant tending to show that the plaintiff was not completely paralyzed, (and in fact this was substantially admitted upon argument to the jury,) the defendant could not have been prejudiced by the testimony. We are not authorized to infer that the sympathies of the jury were moved to a greater degree by this exhibition than by the uncontradicted testimony that the plaintiff had suffered a complete paralysis.

3. That the court improperly allowed the testimony of the witness Moore as to the condition of the sidewalk from the rear of the station to the intersection or junction of Michigan avenue and Church street. The lot in front of which the accident occurred was a triangular piece of ground belonging to the defendant, the west 50 feet of which was occupied by a police station, and the east 25 feet of which belonged to the same parcel of ground, but was not occupied. It was shown that the accident occurred about half the distance from the front to the rear of the building. The witness Moore was permitted to testify, not only as to the condition of the walk immediately adjoining the station-house, but also to the fact that the easterly end of the walk in front of the vacant portion of the lot was in a very bad condition, and that, as policeman, he had reported to Sullivan, the inspector of streets, that it was out of repair. The evidence tended to show that, while there were several planks loose immediately where the accident occurred, the easterly end of the walk, beginning about 25 feet from that spot, and extending about 25 feet to Michigan avenue, was in a worse condition. The court was and still is of the opinion that plaintiff was not confined to proving the condition of the walk at the exact spot where the injury occurred. Bearing in mind that the duty of keeping this entire walk in repair was cast upon the city, not only by virtue of its charter, but by virtue of its actual ownership of the lot in front of which the walk lay, we think that evidence of the bad condition of this walk anywhere from Michigan avenue to Trumbull avenue was competent. Of course, there should be reasonable discretion exercised in admitting evidence of the condition of the walk near the accident, but we think, in any case, if it be so near the place of accident that a person examining the walk, or responsible for the condition of the walk in that neighborhood, would be likely also to notice the defect at the spot where the accident occurred, it would be competent. In this case there can be little doubt that, had the city performed its duty in repairing the easterly end of the walk, its performance

of such duty would have led to a knowledge of the defect which was the immediate cause of the accident. *Weisenberg* v. *Appleton*, 26 Wis. 56; *City of Ripon* v. *Bittel*, 30 Wis. 614; *Gude* v. *Mankato*, 30 Minn. 256, 15 N. W. Rep. 175; *Aurora* v. *Hillman*, 90 Ill. 61, 90; *Boucher* v. *New Haven*, 40 Conn. 456; *Cusick* v. *Norwich*, Id. 376.

The case of *Ring* v. *Cohoes*, 77 N. Y. 83, cited by the defendant, is not in point. In the case of *McCool* v. *Grand Rapids*, 58 Mich. 41, 24 N. W. Rep. 631, which was an action for injuries received by a horse in stepping on a cobble stone, of which there were several scattered about the streets, Mr. Justice CHAMPLIN, in delivering the opinion of the court, observed, *obiter*, that the proof showed that the horse was injured by stepping upon a single stone, and that the existence of other stones in the street had nothing to do with the injury. The remark was not necessary to the decision of the case, and the question as to the existence of other stones apparently did not arise. We do not understand the learned judge as having decided that the existence of other stones in the street might not have been evidence of notice to the city. But in any event the case is not entitled to great weight as authority, as the judges were equally divided in opinion.

4. That the court erred in admitting the testimony of the witness Austin as to the condition of the walk after the accident. The witness first testified as to the physical condition and state of health of the plaintiff prior to and up to the time of the accident, and, for the purpose of fixing the time when he heard of the accident, he said he went with the plaintiff's husband to the spot where the accident occurred about a week afterwards, and found that the walk had been repaired. We think that the testimony that the walk had been repaired was some evidence tending to show that the walk was out of repair at the time of the accident, and was in the nature of an admission which was competent to go to the jury. If not, the testimony was merely immaterial, and worked no injury to the defendant.

5. That the court erred in refusing to charge that, the act of 1885 having abrogated the common-law liability of the city, plaintiff could not recover; and also that under the act of 1885, if the plaintiff could recover at all, she could not recover to exceed the sum of $1,800.

The history of the law of Michigan upon the question of liability for injuries received upon defective sidewalks may not be out of place here. In *City of Detroit* v. *Blakeby*, 21 Mich. 84, it was held by a divided court that, in the absence of a statute to that effect, the cities of this state were not liable for damages received by defective sidewalks, and that remained the law of the state until 1879, when the first act was passed. The federal courts, however, had felt themselves bound by precedents of the supreme court, and had established a different rule, the consequence of which was that aliens and non-residents were permitted to recover for such injuries when citizens of this state could not do so. In 1879 an act was passed making all townships, villages, and cities liable to persons sustaining bodily injury upon any of the public highways or streets by reason of neglect to keep such highways and streets, and "all bridges,

cross-walks, and culverts" on the same in good repair. In the case of *Detroit* v. *Putnam*, 45 Mich. 263, 7 N. W. Rep. 815, it was held that the act of 1879 did not allow damages for injuries sustained by reason of defective sidewalks. In 1885 an act was passed to amend the act of 1879, in which the word "sidewalk" was inserted with the words "highway, street, bridge, cross-walk, and culvert," and new sections were introduced, limiting the amount of recovery upon the basis of population, and providing that "the common-law liability of townships, villages, and cities in this state for such injuries is hereby abrogated." This act was approved June 17, 1885, but did not take effect until August 17th.

The accident in this case took place November, 1883; suit was begun September, 1884; and in June, 1885, the case was first tried upon plea to the jurisdiction. We think it clear that the act should be construed as prospective only in its operation. There were doubtless many other cases pending in the federal courts and in the courts of the state at the time this act took effect, and, if it were intended that the act should apply to these cases, no doubt the legislature would have so declared. Not only is there nothing in the act indicating that its operation was intended to be retroactive, but it was not even given immediate effect, as would almost certainly have been the case if it had been intended to operate upon actions already commenced, or causes of action theretofore accrued. We understand the law to be well settled, as stated by Mr. Justice Cooley in his Constitutional Limitations, 370, that "it is a sound rule of construction to give a statute a prospective operation only, unless its terms show a legislative intent that it should have a retrospective effect." See, also, *Clark* v. *Hall*, 19 Mich. 369; *Smith* v. *Auditor General*, 20 Mich. 398; *Harrison* v. *Metz*, 17 Mich. 377.

Indeed, we consider it extremely doubtful whether, if the law were intended to be retroactive, it would not be in conflict with the constitution. *Kay* v. *Railroad Co.*, 65 Pa. St. 269. Wood, Retroactive Laws, § 172, and cases cited; *Bucher* v. *Railroad Co.*, 131 Mass. 156; *Frasier* v. *Tompkins*, 30 Hun, 168.

6. That the court refused to give defendant's third request, under which it claimed immunity, because the property in front of which the accident happened was in the custody and power of the police commissioners. The facts were that the entire lot and the station-house standing thereon belonged to the city, and was in charge of the police department. The witness Robinson testified that the vacant part of the lot was a sort of lawn, which the police also had the care of; that the sidewalks were put down by the city; and there was no evidence that the police department laid the walks or assumed the care of them. It is true the police commissioners are appointed by the governor, and may perhaps be considered the officers or agents of the state rather than of the city; but the station-houses they occupy remain the property of the city, although within the custody and control of the police. Had this accident happened by the negligence of the police as custodians of such property, it is entirely possible that this action would not have lain against the city; but Church street, upon which the accident occurred,

is one of the public thoroughfares, which it is the duty of the city to keep in repair the same as all other streets, and this duty is not lessened by the fact that the lot in front of which this walk was laid was occupied by agents of the state, any more than it would have been if occupied by a private individual. The walk was originally laid at the expense of the city, and it was peculiarly incumbent upon the defendant to keep it in repair. By section 307 of the charter it is provided that the board of public works, a recognized agent of the city, shall supervise the grading, repairing, and improving of all streets within the city, and by section 308 that they shall supervise the laying down of all sidewalks and cross-walks. No exception is made of streets upon which police stations are located, or of the sidewalks opposite such station; nor is it anywhere provided that the police commissioners shall either pave the streets, build sidewalks, or repair them in front of their stations. We understand it to be the law that where authority is given to repair streets and sidewalks, and means are furnished to make the repairs, the corporation is charged with the duty, and upon it rests the liability for damages consequent upon this neglect of duty. Cooley, Torts, 625.

In *Barnes* v. *District of Columbia*, 91 U. S. 540, it was held that the District of Columbia, as a municipal corporation, was liable for injuries caused by the defective condition of its streets, although the streets were by act of congress placed under the control of a board of public works appointed by the president, and removable by him; the court saying that such a board was not an independent organization, but represented the municipality, although the municipality had no voice in the appointment of its members. This is a much stronger case against the defendant than the present one. See, also, *Rehberg* v. *Mayor, etc.*, 91 N. Y. 137.

7. That the court refused to charge that plaintiff was guilty of contributory negligence upon her own testimony, and that of Bateson and Moore.

This testimony, putting it in its strongest light for the defendant, shows that she walked along the street from Michigan avenue without paying any attention to the walk; that it was notoriously rotten, so that any one could see the earth beneath the planks. The witness Moore states that the dangerous condition of the walk could be seen from Michigan avenue without going on to Church street. The testimony, however, shows quite clearly that the worst part of the walk was at the easterly end, from 25 to 50 feet east of the spot where the accident occurred. At this spot there seems to have been a hole in one side of the walk, and several planks loose, so that the defect was visible to a person passing. While this evidence undoubtedly tends to show contributory negligence, we do not think it so conclusive as to have justified the court in directing a verdict for the defendant. There are undoubtedly cases of this kind where this course may be properly taken, and in several actions of this description we have felt justified in directing a verdict for the defendant upon this ground; but the evidence ought to be so clear as to withdraw the question from the region of reasonable doubt. For instance, if this

accident had occurred to Bateson, who made use of this walk three or four times a day for months before, and to whom its condition was notoriously defective, so much so that he and his wife were accustomed to walk there in single file, we should have felt authorized to withdraw the case from the jury upon that ground; but the plaintiff here was not acquainted with the walk, was carrying a large market basket on her arm at the time, and had never had her attention directed to its condition.

It also appears to us very doubtful whether, admitting her guilt of negligence, such negligence could in any just sense be said to have proximately contributed to the accident. She had passed over the most dangerous portion of the walk, and was tripped up, not by stepping upon a rotten plank herself, but by the act of Bateson in stepping upon one end, and thus causing the other end to spring up directly in front of the plaintiff. This was not her fault. Even if she knew the sidewalk was unsafe, this would not, in an ordinary case, be conclusive evidence of contributory negligence. Whart. Neg. §§ 402, 403; *Lyman* v. *Hampshire*, 140 Mass. 311, 3 N. E. Rep. 211; *Gilbert* v. *Boston*, 139 Mass. 313; *Whittaker* v. *West Boylston*, 97 Mass. 273; *Looney* v. *McLean*, 129 Mass. 33; *Weed* v. *Ballston Spa*, 76 N. Y. 329; *Dewire* v. *Bailey*, 131 Mass. 169; *Lowell* v. *Watertown*, 58 Mich. 568, 25 N. W. Rep. 517.

There is also a recent English case, the name of which has escaped me, in which it was held that a passenger upon a sidewalk was not ordinarily bound to look at the walk, but was entitled to presume that it was in good condition and repair.

8. That the court called the attention of the jury to the fact that the accident occurred in front of the police station, and within sight of the officers whose duty it was to have charge of the station. This instruction was justified by the testimony of the witness Moore, (himself a policeman,) who swore that it was a part of his duty as policeman to take notice of these defects, and report them to the board of public works or to another agent, whose duty it was to see the sidewalks were in a proper condition. This testimony was not only uncontradicted, but was not objected to, and we think is sufficient upon this point. While neither the city charter nor ordinances may have imposed this duty upon the police, if, in administration of the city government, it was the practice of the police to notify the board of public works of the existence of these defects, the court might properly call the attention of the jury to it. If there was any portion of the sidewalk which it was the peculiar duty of the city to keep in repair, it was in front of their own property, and within sight of the officers who made it a part of their daily duties to report these defects.

9. There was no error in submitting the question to the jury whether the plaintiff had been guilty of contributory negligence in failing to send for a physician sooner, nor in the illustration which was put to the jury as pertinent to this question. The plaintiff was a mature, but not an old, woman; had always enjoyed excellent health, and the pain she suffered when she first returned home was not such as to excite any alarm. Had she been a physician herself, or a person of greater age or experience in

these matters, the evidence of negligence would have been stronger, but it is very clear it should not have been taken from the jury.

10. There was no error in charging that the burden of proof of contributory negligence was upon the defendant. This was settled in *Railroad Co.* v. *Gladmon*, 15 Wall. 401; in *Secord* v. *Railroad Co.*, 18 Fed. Rep. 221; and in *Conroy* v. *Oregon Const. Co.*, 23 Fed. Rep. 71. There is nothing inconsistent with this case in *Hayes* v. *Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. Rep. 369.

11. Considering the physical wreck of the plaintiff, the damages were not excessive; at least not so excessive as to justify the court in setting aside the verdict upon that ground.

The motion for a new trial must be denied, and judgment will be entered upon the verdict.

FRENCH SPIRAL SPRING CO., Limited, *v.* NEW ENGLAND CAR TRUST and others.

(Circuit Court, D. Connecticut. 1887.)

1. ORDERS—CONSTRUCTION.
   The defendants accepted an order of a third person in favor of plaintiffs to the amount of $2,300, payable out of certificates due the third person under a contract between him and the defendants, and specified in the order, "the same not to be due until September 1st." *Held*, the words, "the same not to be due," referred to certificates, and not to the order, and that defendants paid at their peril any person other than plaintiffs for work, the certificates for which, under the contract, would not become due until on and after September 1st.
2. CORPORATIONS—BY-LAWS—CORPORATE CONTRACT.
   An acceptance of an order by the New England Car Trust, to pay money already provided for by a contract with the company, does not come within article 4 of the articles of association of the car trust, providing that, in order to bind the company, all contracts involving liabilities for the payment of money shall be in writing, and signed by at least three members of the board of managers.

Intervening Petition in *Brassey* v. *New York & N. E. R. Co.*

Henry M. Rogers, for petitioner.

Simeon E. Baldwin, for defendant.

SHIPMAN, J. The question in this case arises upon the petitioner's demurrer to the defendant's answer. The New England Car Trust entered into a contract with Blain Bros., by which the latter agreed to make and to furnish to the car trust 500 cars, to be delivered to its trustee at the average rate of 48 cars per week, beginning on May 15, 1883, and the car trust agreed to pay for the same at the rate of $446.31 per car, payable in its certificates, as the cars were delivered in lots of 10, within one week after the receipt of three specified documents. Blain Bros. desired to purchase springs for said cars from the petitioner, but said company

refused to sell said springs upon the sole security of said Blain Bros., but agreed to sell them unto the said firm, provided they would assign to the petitioner a portion of the price to be paid by said car trust to them upon the delivery of said cars, and provided the order making said assignment should be accepted in advance by the said car trust. Thereupon Blain Bros. delivered to the spring company the following order upon the New England Railroad Company, the company which was to lease and purchase said cars from the car trust:

HUNTINGDON, PA., June 30, 1883.

DEAR SIR: Please pay the French Spiral Spring Co., Limited, or order September 5th inst., twenty-three hundred dollars (2,300) out of the proceeds of our settlement for coal cars to be furnished your company upon our present contract, it being understood we have sixty days' time upon the purchase.

Very respectfully, BLAIN BROS.

S. M. FELTON, Jr.,
General Manager N. Y. & N. E. R. R. Co., Boston.

The car trust returned to the spring company the following acceptance:

BOSTON, July 14, 1883.

French Spiral Spring Company, Limited, Pittsburgh, Pa.—GENTLEMEN: In answer to your favor of the second instant, inclosing order from Blain Bros., the managers of the New England Car Trust accept the order for certificates to the amount of twenty-three hundred dollars, (2,300,) payable out of certificates due Blain Bros. under the contract between Blain Bros. and said car trust; the same not to be due until September 1st. * * *

Yours, truly, WILLIAM CALEB LORING, Secretary.

Blain Bros. delivered no cars to the car trust after August 24, 1883, on which date they had delivered in all 370 cars. On August 29, 1883, the car trust paid for the last lot of cars, 10 in number, which were delivered on said August 24th, by which payment it paid in full, according to the terms of said contract, for all said 370 cars, and neither on September 1st nor on September 5th owed Blain Bros. anything.

The question in the case arises upon the terms of the acceptance. The petitioner claims that it was a present acceptance for the sum of $2,300 due Blain Bros., but, if not, that it was a present acceptance for the sum of $2,300, payable on September 1st, the money to be payable in certificates. The defendant says that it was an acceptance for $2,300, payable only in certificates which were to become due to Blain Bros., under the contract, on and after September 1st. On June 30th, the date of Blain Bros.' order, they were delivering cars under a contract for the purchase of 500 cars, which contract called for an average delivery of 8 cars per working day, and which provided for the payment by the car trust, as the cars were delivered in lots of 10, within one week after the receipt of the specified papers. Ninety-five cars had then been delivered. More than one payment per week would, under the contract, naturally be made. Blain Bros. were to have 60 days' credit, and payment to the spring company was to be by the terms of the order, on September 5th. The car trust accepts the order "payable out of cer-

tificates due Blain Bros. under the contract between Blain Bros. and said car trust, the same not to be due until September 1st." This was an acceptance of an order payable September 5th, out of a fund which was to become due from week to week, if the contract was performed; and, in case of its non-fulfillment by Blain Bros., they were liable in a specified sum, as damages. Under these circumstances, the car trust accepts the order payable in certificates, due under the contract, the same not to be due until September 1st. The intent of the acceptance was that the payment was to be made in certificates which were to become due Blain Bros., but were not to be due until September 1st. By the acceptance, the car trust promised to pay, but only from those certificates, if any, which became due on and after September 1st. The words "due under the contract" do not imply that the certificates were due at the date of the acceptance, or that payment was to be made out of any certificates thereafter to be due, but mean that payment was to be made out of certificates due Blain Bros. under the contract, when the order was payable, and the words, "the same not to be due," refer to the certificates, and not to the order, and mean that the order was payable out of those certificates which were to become due on and after September 1st, and not out of any certificates which should become due before that date. The acceptance was an agreement to pay in certificates which became due on and after September 1st.

On the twenty-fourth of August, Blain Bros. delivered at Huntingdon, Pennsylvania, 10 cars. Certificates for $4,463.10 were due from the car trust for those cars, within one week after the receipt of the invoice of them, the bill of sale, and a certificate of the general manager of their acceptance. The answer does not show that the certificates for these cars were not due on September 1st, and, allowing the ordinary time for transmission of the papers by mail, it would seem that they would not naturally have been due under the contract until September 1st. On August 29th, 30 certificates which paid for previous deliveries, and the last 10 cars, were delivered to the assignee of Blain Bros. I think that, by the terms of the acceptance, the car trust paid, at its peril, to any other person than the spring company, for any cars, the certificates for which did not become due under the contract until September 1st. The answer sets up the fact that article 4 of the articles of association of the car trust, which was an unincorporated association, provided that "all contracts relating to the business of the association, involving liabilities for the payment of moneys, shall be in writing, and shall be signed on behalf of the association by at least" three members of the board of managers, and by the person with whom such contract shall be made, and that this acceptance was signed by the secretary only, and consequently was not binding upon the association. The contract with Blain Bros. was signed by three managers. The acceptance was not, within the intent of the articles of association, a contract involving a liability for the payment of money, but was simply an assent and agreement in regard to the diversion of money already agreed to be paid into another channel. It did not create a liability for additional money. The demurrer is sustained.

PLINSKY *v.* GERMANIA F. & M. INS. CO.

(*Circuit Court, E. D. Michigan.* January 11, 1887.)

1. FIRE INSURANCE—FORFEITURE—INCREASE OF RISK.
An insurance policy provided that, if the risk should be increased by any means whatever within the control of the assured, without the consent of the company, the policy should be void. The property, which consisted of a stock of goods, was described as "contained in the first floor and basement of the building." *Held*, that a removal of the entire property from the first floor to the basement would not avoid the policy, though the risk were increased by such removal.

2. SAME—CONSTRUCTION OF POLICY—CONFLICTING CAUSES.
Where a policy upon a "stock of candies, confectionery, toys, fruit, and all such other stock as is usually kept for sale in confectionery stores," provided that such policy should "cease and determine if * * * fire-works should be kept temporarily or otherwise in the stocks of merchandise * * * insured herein," it was held that, if fire-works were usually kept in stocks of the kind insured, the written part of the policy would control the printed part, and the keeping of fire-works would not avoid the policy.

3. SAME—LOSS—FRAUDULENT BURNING.
Plaintiff was charged with the fraudulent burning of the property. The only evidence upon this point was that there was a social gathering in the store upon the evening before the fire; that plaintiff and her husband did not leave the place until 3 o'clock in the morning; that the husband closed the store for the night, took the key with him, and that they went directly to their house. The fire broke out a little after 6 in the morning, in the basement. The evidence was clear that some one had entered the building, and set the property on fire, and there was no evidence that the building had been broken into, or that any one but plaintiff's husband had the key to the outer door. *Held*, that there was no evidence that plaintiff herself was privy to the burning, and that she would not be affected by the fraudulent burning of the property by her husband.

4. WITNESS—DISCREDITING—DISCRETION OF COURT.
Plaintiff's husband was asked, upon cross-examination, whether he was not out upon bail, charged with an assault with intent to murder. *Held*, that such question was within the discretion of the court, and its exclusion could not be claimed as error.

(*Syllabus by the Court.*)

On Motion for a New Trial.

This was an action upon a policy of insurance upon the following property owned by the plaintiff, viz.:

"$250 on her stock of candies, confectioneries, toys, fruit, and all such other stock as is usually kept for sale in confectionery stores; $100 on her soda fountain, generators, and appurtenances belonging thereto; $400 on her store, ice-cream parlor, and shop furniture and fixtures, including brick oven and belongings; $125 on her saloon furniture and fixtures, beer-pump, mirror, bottles, and glass-ware; $10 on her awning outside of building; $25 on her stock of wines, beers, liquors, and cigars; and $100 on her pool-table, balls, and cues,—all contained in the first story and basement of the three-story brick building occupied by the insured as a confectionery store, bakery, saloon," etc.

The defenses were (1) that the risk had been increased by the removal of the entire property from the first story to the basement of the building in which it was kept; (2) that fire-works were kept in the stock con-

trary to the provisions of the policy; (3) that the property was burned with the assent and connivance of the insured.

The jury returned a verdict for the plaintiff, and defendant moved for a new trial upon the grounds stated in the opinion of the court.

George W. Radford, for the motion.

H. H. Swan, for plaintiff.

BROWN, J. 1. Exception was taken to the charge of the court, that if the plaintiff notified Duvernois, the local agent of the company in Detroit, that the property had been removed to the basement of the building, and he made no objection to such removal, the company could not defend upon the ground that such consent was not indorsed in writing upon the policy. This instruction may have been erroneous, although the authorities seem to be at variance upon the point; but in our opinion it is entirely immaterial, for the reason that the plaintiff was entitled to an instruction that, as matter of law, the removal of the goods to the basement was not an increase of risk, within the meaning of the policy. The language of the policy is that, "if the above-mentioned premises shall be occupied or used so as to increase the risk, * * * or the risk be increased by * * * any means whatever within the control of the assured, without the assent of the company indorsed hereon, the policy shall become void." The first clause of this provision, that if the premises shall be used and occupied, evidently applies only to buildings which have become the subject of insurance. The second provision must be construed in connection with the description of the location of the property as "contained in the first floor and basement of the building." It seems to us that this was a plain stipulation on the part of the company that the plaintiff should deal with her property as she chose, within the limits of the first floor and basement. She had no right to remove it from the building, nor to the second floor of the same building, but it could not reasonably be expected that the property would remain distributed between the first floor and basement precisely as it was the time the policy was executed. It was undoubtedly made with reference to the general practice of shop-keepers bringing goods up from the basement and placing them for sale on the first floor, and sending unsalable or deteriorated goods from the first floor to the basement, although it is possible that the risk might be sensibly increased by such transfers. If this may be done with respect to a part of a stock, I see no reason why it may not be done with respect to the whole of it. It would hardly be claimed that if the plaintiff had desired to place her entire stock in the basement on sale she would not have been at liberty to carry it to the first floor. So, if she saw fit to withdraw her entire stock from sale, I see no reason to doubt that she could send it down to the basement; there being no stipulation in the policy that any particular portion of the property should be kept either in the basement or upon the first floor. There can be no question that the insured, unless restricted in some way by the policy, might use, protect, and enjoy her property, as such property is customarily used, enjoyed, and protected;

and to infer, without an express provision or necessary implication arising out of the contract itself or public policy demanding it, that the insured surrendered all right to make the usual changes of or additions to her property as its safety or her convenience or comfort might suggest, is a construction too rigorous to be rational. May, Ins. 247; *Jolly* v. *Equitable Soc.*, 1 Har. & G. 295; *Shaw* v. *Robberds*, 6 Adol. & E. 75.

Within the literalism of the policy, the transfer of any portion of the goods from the first floor to the basement would be an increase of risk, and would avoid the policy, if the theory of the plaintiff be true that such removal of the entire stock had this effect. Wood, Ins. § 238.

There is much force, too, in the suggestion that there was no evidence of an increase of risk by the removal of this stock to the basement. The only testimony tending in that direction was that, by the removal to the basement, the goods became second-hand goods. This would not, of itself, increase the risk of an accidental burning; for it was not pretended that the goods were not as safe in the basement as upon the first floor. Conceding that it would increase the temptation to a fraudulent destruction of the property, it may well be replied that the company did not insure against such fraudulent destruction. Upon the theory of the defendant, the insolvency of the plaintiff or the suspension of her business in any way would depreciate her stock, or, to use the words of the witness, "make it second-hand goods," and thus operate to increase the risk of its fraudulent destruction. Upon this theory, the insolvency of a merchant would at once invalidate every policy of insurance upon his goods. It seems to us that the increase of risk contemplated by the policy was the introduction of new and hazardous goods, new or unusual methods of heating or lighting, or some other means which subjected the goods to an additional danger of an accidental fire.

2. The second objection is that the court admitted testimony that fire-works were usually kept in stocks of confectionery and toys, and hence that the keeping of such fire-works did not avoid the policy, notwithstanding its provision that it should "cease and determine if * * * fire-works shall be kept, temporarily or otherwise, in the stocks of merchandise * * * insured herein." This provision, too, must be construed in connection with the written portion of the policy, which insured "her stock of candies, confectionery, toys, fruit, and all such other stock as is usually kept for sale in confectionery stores." The rule in such cases is well settled that, if the prohibited article be usually kept in the stock insured, the written part of the policy shall control the printed portion, and the keeping of the prohibited article will not avoid the policy. The Massachusetts cases are the other way, but the law is too firmly settled to be disturbed. Wood, Fire Ins. 169, 170.

In this connection the case of *Steinbach* v. *Insurance Co.*, 13 Wall. 183, was relied upon by the defendant. This was a suit upon a fire policy upon a stock of fancy goods, toys, and other articles "contained in the brick building," etc., "and now in his occupancy as a German jobber and importer, privileged to keep fire-crackers on sale." The insured not only kept fire-crackers on sale, but fire-works, which were classed as

hazardous, and for which an extra premium was charged. The court held the policy to have been avoided, apparently upon the ground that the privilege to keep fire-crackers on sale was an exclusion of the right to keep other hazardous articles, notwithstanding the testimony that fire-works constituted an article in the line of business of a German importer. In this particular the case is distinguished from the one under consideration. If it were not, of course I should feel compelled to follow it, notwithstanding its authority was repudiated by the court of appeals of New York, (*Steinbach* v. *Insurance Co.*, 54 N. Y. 90,) and has been gravely doubted by other courts. See *Stout* v. *Insurance Co.*, 12 Fed. Rep. 554. If there had been a special provision in the written portion of the policy, permitting certain hazardous articles to be kept, we should have held, following this case, that there was an implied prohibition of other hazardous articles, upon the familiar principle, *expressio unius est exclusio alterius*. But we think that the undisputed testimony that fire-works were kept as an ordinary portion of a stock of confectionery and toys was clearly admissible.

3. There was no error in the instruction that there was no testimony connecting the plaintiff with the burning of the property. The only evidence upon this point was that there was a social gathering in the store upon the evening before the fire; that the plaintiff and her husband did not leave the place until 3 o'clock in the morning; that the husband closed the store for the night, took the key with him, and that they went directly to their house. The fire broke out a little after 6 in the morning, in the basement. The evidence was clear that some one had entered the building, and had set the property on fire, and there was no evidence that the building had been broken into, or that any one but the plaintiff's husband had the key to the outer door. The jury were instructed that, although there was evidence sufficient to be submitted to them that the husband had burned the property, it was not material in this case, as there was no evidence to connect the plaintiff with it,—to show that it was done with her assent or connivance; and that plaintiff would not be affected by the fraudulent burning of the property by her husband. Whether he set the fire before he left the building, or returned there after having gone to his house, was immaterial, without some evidence connecting her with the arson. While the facts were such as to excite a grave suspicion of the wife's connivance, they were not such as to legally entitle this defense to be presented to the jury. There can be no question of the legal proposition that the wife is not chargeable with the fraudulent conduct of her husband, notwithstanding he may have been her agent in the management of the property and the conduct of her business.

4. There was no error in ruling out the question to the witness Plinsky, whether he was not out upon bail charged with an assault with intent to murder. Whether such a question should be permitted or not we think was in the discretion of the court, and its exclusion cannot be claimed as error.

The motion for a new trial must be denied.

WELLS, FARGO & Co. *v.* OREGON RY. & NAV. Co.

(Circuit Court, N. D. California. August 8, 1887.)

1. SALE—JUS DISPONENDI—LIABILITY OF CARRIER FOR MISDELIVERY.
   Where a shipper attaches his bill of lading to a draft upon the consignee, he thereby expresses his intention to deliver the goods upon payment of such draft, and to retain control of them until such payment, and the carrier who, under such circumstances, delivers them while in transit to the shipper, is liable to the consignee who has duly taken up the draft.
2. DAMAGES—EXPENSE INCURRED IN PURSUIT OF PROPERTY—EVIDENCE.
   Under Civil Code Cal. § 3336, providing that, in an action brought by a consignee against a carrier for wrongfully delivering up goods in transit to a party other than the consignee, the measure of damages shall be the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money *properly* expended in pursuit of the property, it is incumbent on the plaintiff to show the circumstances under which the expenditure claimed by him to have been incurred was made, so that the court can decide whether it was proper.

Page & Eells, for plaintiffs.
Estee & Wilson and *Messick & Maxwell*, for defendant.

Ross, J. From August, 1885, to some time in the early part of 1886, the firm of Mills & Co. and one William Jones were dealing largely in wheat; Mills & Co. being located in San Francisco, California, and Jones at Walla Walla, Washington Territory. During the same period the plaintiffs herein were carrying on business as bankers in San Francisco, and defendant was engaged in the transportation of passengers and freight between various points in Oregon, Washington Territory, and California. At different times between the dates mentioned Jones sold wheat to Mills & Co. In doing so, the method adopted—except in one instance, which occurred early in their dealings, and which it is not important to notice further—was this: The respective parties would, by telegram or letter, agree upon a sale, whereupon Jones would ship the wheat on the defendant's cars, taking therefor a carrier's receipt, reciting defendant's agreement to deliver the merchandise to consignee or owner; Mills & Co. being therein designated as consignees. Jones would then draw a draft on Mills & Co. in the approximate amount of the purchase price,—not exceeding, however, according to the agreement of the parties, 95 per cent. thereof, in order to guard against shortage or damaged wheat; attach to it the carrier's receipt; discount the same with Baker & Boyer, bankers of Walla Walla, who would send the draft, with annexed receipt, to the First National Bank of San Francisco for acceptance and collection. That bank, on receipt of the papers, would notify Mills & Co. of their arrival; and Mills & Co. would accept the draft, and, on maturity, pay it with their check on Wells, Fargo & Co., duly certified; the check being certified and paid by Wells, Fargo & Co. pursuant to an agreement between them and Mills & Co. that they would advance the money upon the carrier's receipt, which, in each instance, was indorsed and delivered by

Mills & Co. to them. It was further understood between Mills & Co. and Wells, Fargo & Co. that the receipts should also stand as security for a general balance standing against Mills & Co. on the bank's books. Up to and including January 11, 1886, Jones had in this manner shipped and sold to Mills & Co. in the aggregate, 190,000 bushels of wheat, all of which was delivered by defendant to the order of plaintiffs. Subsequent to, but soon after, January 11th, the wheat in controversy in the present action was shipped by Jones, through defendant, to Mills & Co.; the carrier's receipts, in the same form as those previously given, (except that in one, for 390 sacks, Mills & Co., care of Taylor, Young & Co., Portland, Oregon, and in another, for 310 sacks, Mills & Co., Portland, were named as consignees,) were taken by Jones; drafts were drawn by him on Mills & Co. in the approximate value of the wheat; the carrier's receipts attached to them; and sent through Baker & Boyer to the First National Bank of San Francisco for acceptance and collection. These drafts were accepted by Mills & Co., and paid in the same way, and upon the same agreement, as the previous drafts; that is to say, with money advanced by Wells, Fargo & Co. upon the security of the carrier's receipts, which, as in the previous instances, were indorsed and delivered by Mills & Co. to them.

Of the wheat sued for, numbering in all 5,363 sacks, 1,023, it was proved on the trial, were properly delivered by defendant in San Francisco; and as to that lot, plaintiffs, on the hearing, conceded that they had failed to make good their claim. The remaining 4,340 sacks were never delivered to plaintiffs, and for those they contend they are entitled to recover.

After the wheat in controversy had been shipped in the manner stated, Jones came to San Francisco; and finding Mills & Co. insolvent, and that he had not been paid in full for the wheat sold and delivered prior to January 11, 1886, stopped in transit all of that in controversy, except the two lots consigned to Portland. Of those lots, that embracing 310 sacks, and consigned to Mills & Co., Portland,—at which place there was no such firm,—was upon request of Jones delivered by defendant to Caesar & Co. for Jones, and by him received; and that embracing 390 sacks, and consigned to Mills & Co., care of Taylor, Young & Co., Portland, was delivered by defendant to Taylor, Young & Co., at Portland, for Jones, and by him received. The remaining 3,640 of the 4,340 sacks yet in dispute were delivered by defendant directly to Jones, pursuant to notice given to, and demand made on, defendant by Jones, to the effect that he was the owner of the wheat, had not been paid for it, and that the consignees (Mills & Co.) were insolvent.

For the defendant nominally, but in reality for Jones,—he being the real party in interest,—it is contended that Jones contracted to sell Mills & Co. 190,000 bushels of wheat, the ownership of which passed to them at the time the wheat was delivered to the carrier, and for which he has never been paid in full; that the wheat in controversy was shipped by Jones through the mistake of his clerk "in running up figures;" that the drafts drawn by him on Mills & Co. were not drawn against any specific

shipment of wheat, but against his general account; and that the money of the plaintiffs that went to pay the drafts that accompanied and were annexed to the carrier's receipts for the wheat in controversy, and which was advanced upon the security of those receipts, was properly credited by Jones to the general account of Mills & Co., which still left a small balance due for the 190,000 bushels,—from all of which the deduction is attempted to be drawn that the wheat in controversy was never sold by Jones to Mills & Co., and that neither that firm nor the plaintiffs ever acquired any property or interest in it.

Although Jones, in his testimony, and his counsel, in their argument, frequently speak of a contract between Jones and Mills & Co., by which he agreed to sell them 190,000 bushels of wheat, the case clearly shows that no such contract was ever made. There were a series of contracts made between the parties for the sale by Jones to Mills & Co. of wheat, between August, 1885, and the eleventh of January, 1886, which, up to and including the last-mentioned day, aggregated 190,000 bushels. In no instance, however, was the sale consummated, as is argued by counsel for Jones, when the wheat was delivered to the carrier, but only when the draft that was drawn against the wheat was paid. Whether the property passes to the vendee upon delivery to the carrier depends upon the circumstances of the particular case. It never does when the vendor manifests the intention to retain the *jus disponendi*. In respect to the sales in question, that intention was clearly manifested by the fact that the vendor attached the carrier's receipts to the drafts, and deposited them with bankers who discounted the drafts; and this, as he himself testified, was purposely done "*for his own security*," and because he "wanted to know that they [Mills & Co.] would not get the receipts until they had paid the drafts." See Benj. Sales, (4th Ed.) §§ 381–399, and authorities there cited.

In view of these facts, no importance can be attached to the further statement of Jones that he did not draw against any specific shipment, but against his general account. He drew against the wheat in controversy, and attached to the drafts the shipping receipts therefor, in precisely the same way that he did in respect to the wheat shipped prior to January 11th; the evident purpose, and, indeed, the admitted purpose,—since it was done "for his own security,"—being to retain the ownership of the wheat until payment of the draft against it. It is not pretended that any of the wheat was shipped to Mills & Co. on commission; for Jones himself testified: "I did not intend to send them any I did not sell them." I can discover no distinction in the dealings of the parties between the shipments made prior and those made subsequent to January 11, 1886. Nor do I see how the statement that the wheat in excess of 190,000 bushels was shipped through the mistake of the clerk "in running up figures," can be reconciled with the undoubted fact that there never was a contract for 190,000 bushels, but a series of contracts, made by an offer on Jones' part to furnish a certain number of bushels, and an acceptance on the part of Mills & Co. to take the number mentioned at a given price; nor with the further fact that on the *sixteenth* of

January, after 190,000 bushels had been shipped and sold, Jones wrote to Mills & Co.: "I wired you last night, asking you if I was safe in buying on the basis of the last figure, 53;" and in the same letter notified them that he had drawn on them for $1,550, for 1,484 sacks, the same being a part of the wheat in dispute. In my opinion, all of the wheat in controversy, that is to say, 4,340 sacks, was sold by Jones to Mills & Co., and the ownership of the respective lots passed to them upon the payment of the respective drafts. That being so, there can be no doubt, in view of other undisputed facts, that the title to the wheat vested in the plaintiffs. *Bank of Rochester* v. *Jones*, 4 N. Y. 497. The extent of their interest therein need not be considered in this case.

It results from these views that, as to the 3,640 sacks, certainly, defendant was not justified in the delivery to Jones, and is consequently responsible to plaintiffs for the conversion. So, also, I think, is defendant responsible for the 390 and 310 sacks delivered to Taylor, Young & Co., and Caesar & Co., respectively. In each instance, without requiring the surrender of the shipping receipts which it had issued, and which it was shown at the trial were always treated by the company as negotiable, defendant delivered the property to others than those claiming under that title. For such misdelivery it must answer to the true owner. *The Thames*, 14 Wall. 107; *City Bank* v. *Railway Co.*, 44 N. Y. 141.

It only remains to consider the question of damages. By virtue of section 3336 of the Civil Code, plaintiffs are entitled to recover the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in pursuit of the property. The most satisfactory testimony in regard to the highest market value reached by Walla Walla wheat since February, 1886, is that of Sinclair, who fixes it at $1.58¾ per cwt.; and that value will be allowed, less freight at the rate of $8.70 per ton. Kavanaugh's testimony in regard to the highest value is too speculative. The evidence is insufficient to show that plaintiffs properly expended anything in pursuit of the property. The only evidence on that point is that of Wadsworth, cashier of plaintiffs, who was asked: "*Question.* Have you paid out anything in the pursuit of this property? *Answer.* We paid some fees, yes, sir; and some costs. *Q.* To what amount? *A.* My recollection is, $650,—we paid a fee; and about $50 costs. *Q.* $650 fees for what? *A.* Attorneys." It devolves upon the plaintiffs to show the circumstances under which the payments were made, so that the court may determine whether the money was *properly* expended or not.

Counsel for plaintiffs will prepare findings in accordance with this opinion, submit them to opposite counsel for such suggestions as they may think proper to make, and then to me for settlement.

SCHUTZ and others *v.* JORDAN and others.

(*Circuit Court, S. D. New York.* August 17, 1887.)

1. PRINCIPAL AND AGENT—PURCHASING AGENT—RATIFICATION BY—RETENTION OF GOODS SOLD.

In an action for goods sold and delivered, the evidence showed that defendants, engaged in a large mercantile business, employed a superintendent in their retail cloak and suit department, with authority to purchase goods as needed for that department, and to whom invoices of and all correspondence relating to such goods were intrusted; that defendants had discovered that the superintendent was inclined to carry more goods in that department than was desirable, and that he had been ordered to keep down the stock; that, when plaintiff's salesman applied to him shortly after for orders, he told him that he was already carrying more goods than the firm allowed, but that, if the plaintiffs would not have any statements of account or dunning letters sent to the house, the goods might be sent, and the invoices might be sent as usual, for they would come to him anyhow; and that he would pass the invoices as fast as he could. This scheme was communicated to the plaintiffs, and assented to by them, and, in pursuance thereof, large quantities of goods were shipped, received by the superintendent, some of the bills paid by his direction, and many of the goods disposed of in the usual course of trade. When defendants at last discovered what the superintendent had been doing, and with knowledge that plaintiffs claimed that all the goods had been sold to the house, they laid out all the goods remaining on hand which had come from plaintiffs, in order to ascertain whether any of them were goods which had not been paid for, but were unable to determine whether they were or not, and they were thereupon put back into the stock, and sold; that after the discovery other goods were received from plaintiffs, under the same arrangement, and were refused and returned. *Held*, that the defendants did not ratify the unauthorized acts of the superintendent by retaining and selling the goods after discovery, and that plaintiffs could not recover the price of them.[1]

2. SAME—KNOWLEDGE OF PRINCIPAL—MAILING INVOICE—COURSE OF BUSINESS.

In such action, it was sought to charge the defendants with knowledge by showing that the invoices for goods purchased by the superintendent under the unauthorized arrangement had been mailed to the defendants at their place of business. The jury were instructed that the fact that the invoices were so sent would not in law establish the fact that the defendants received them, and would not be proof of that fact, and that the presumption arising from mailing notices in cases of negotiable instruments did not apply. *Held*, in view of the evidence showing the course of business to be that such invoices were received by the superintendent, and not by the defendants personally, that the instruction was practically correct.

3. TRIAL—INSTRUCTIONS TO JURY.

In the trial of a case, a correct apprehension by the court of all the principles of law involved is not demanded; but it is sufficient if the instructions are correct, as applicable to the case presented, and that the court should not be wrong to the extent of misleading the jury.

Blumenstiel & Hirsch, for plaintiffs.
Stern & Myers, for defendants.

[1] As to what will constitute a ratification by a principal of the unauthorized acts of an agent, and the effect of such a ratification, see Nichols v. Shaffer, (Mich.) 30 N. W. Rep. 383, and note; Stillman v. Fitzgerald, (Minn.) 33 N. W. Rep. 564; Forcheimer v. Stewart, (Iowa,) 32 N. W. Rep. 665; Mortgage Co. v. Henderson, (Ind.) 12 N. E. Rep. 88; Metcalf v. Williams, (Mass.) 11 N. E. Rep. 700; Shinn v. Hicks, (Tex.) 4 S. W. Rep. 486; Thread Co. v. Manufacturing Co., (Pa.) 8 Atl. Rep. 794; Culver v. Warren, (Kan.) 13 Pac. Rep. 577.

WHEELER, J. This is an action for goods sold and delivered, consisting of cloaks and suits, to the amount of $32,604.99. On the trial the plaintiffs' evidence tended to show that they forwarded from their manufacturing establishment in New York, to the defendants' mercantile house in Boston, these goods to that amount, at various times between May, 1884, and August, 1885, on orders received by their salesman from the superintendent of the retail cloak and suit department of the defendants, who had given like orders before; that they sent invoices of the goods directed to the defendants, by mail, at the several times when the goods were sent; that they sent statements of accounts of the goods to the defendants by mail at some times, and particularly in August and December, 1884; and that the goods had not been paid for.

The defendants' evidence tended to show that the course of business in their house was such that goods bought and delivered were received by a person whose duty it was to keep a record of the packages, and forward them to the department where they belonged; that correspondence was received by a clerk, who sent invoices of goods bought where they would be received by the superintendent of the department for which they were bought, and all correspondence relating to goods bought to the buyer, and all statements of accounts for goods bought to a bookkeeper, who paid them when found to be correct; that the superintendent, when the invoices were received by him, would pass them as correct, if found to be so, and mark them as correct, and the person who received the goods would do the like, when they would go to that bookkeeper, and be entered on the books and be paid for according to the invoices so passed and received; that the superintendent of this department was inclined to carry more goods than the firm desired, and was directed to keep down the stock; that, when the plaintiffs' salesman applied to him for orders, he told him that he was already carrying more goods than the firm allowed, but that, if he would not have any statements of accounts or dunning letters sent to the house, the goods might be sent, and the invoices might be sent by mail as usual, for they would come to him anyhow, and that he would pass the invoices as fast as he could; that the salesman said he would report this to the plaintiffs, and afterwards said that he had done so, and they approved of this proposal; that all these goods were sent under that arrangement; that the invoices when received by him were kept from the members of the firm, and others who by the usual course of business would have known about them; that the statements of accounts sent by the plaintiffs in August and December, 1884, were for goods ordered by assistants of the superintendent, and sent in the usual course; that only one other statement was received by the book-keeper, who found that it was for goods which did not appear on the books, and sent it to the superintendent for explanation, who kept it, and reminded the salesman of the plaintiffs that it should not have been sent, and nothing further was done about it; that the plaintiffs called upon the superintendent to pass the invoices from time to time, and complained that they were delayed and getting old; and he requested them to send him some invoices of the goods without date,

which they did, and into some of which he put late dates, and passed them as correct, and procured the person who received goods bought to pass them by telling him they were all right, and sent them to the book-keeper to be paid, who paid them, and sent remittance sheets showing that they were paid as bills of a late date, which the plaintiffs received, but applied the payments to the charges of the amounts at the earlier dates when the goods were sent; that the goods as they were received were placed, by direction of the superintendent, among the other goods of the department for sale, and were sold, and the money received for them by the defendants, except to the amount of from three to five thousand dollars at cost prices, before this arrangement, or the fact that any goods not coming in the usual manner and appearing on the books of the defendants, was discovered; that goods from others to the amount, with these, of $252,000, were received into this department, on similar arrangements with the superintendent, and in like manner; that he marked down prices without entering them in a book kept for that purpose, and forced sales at the reduced prices, so that this management of the department resulted in great loss, but the goods received from the plaintiffs, and sold, brought as much on an average as they were charged at; that when the discovery was made all the goods remaining on hand which had come from the plaintiffs were laid out and examined by the superintendent and others, to ascertain whether any of them were goods that had not been paid for; that it could not be determined whether they were or not, and they were put back into the stock for sale, and were all sold or on hand there; that other goods sent by the plaintiffs after the discovery were refused and returned; that the defendant firm consisted at that time of four members; that their house was divided into 52 departments, and they had upward of 2,000 persons employed in conducting their business; that one of the firm, Marsh, and the person who had charge of receiving goods bought, had died before the trial.

The book-keeper who had charge of paying for goods testified to the course of business as stated; the superintendent, to the course of business and to the concealment of these transactions from the defendants, and how it was done; and two of his assistants testified to the disposition of these goods in the stock of the department, and to the marking down of goods and the results. The senior member of the firm testified that Marsh had charge of the wholesale department; that when there he and the other two members of the firm would go through this cloak and suit department, perhaps once a week, or every day, but did not examine the stock; that on every Saturday they had a statement furnished to them of the amount of stock on hand in each department, and of the amount at the corresponding time of the year before, and also every month a statement of the amount on hand then and at the corresponding time of the year before, and that they had no other knowledge on the subject; that the figures did not excite suspicion; that he was gone on a voyage round the world from the fore part of November, 1884, to about June 20, 1885, and that he had no information at any time of the receipt of any of these goods, or of the avails of them, until after the discovery;

that one of the other members of the firm was at the time of trial gone on a voyage round the world, and had been gone six months; and that he defended this suit because, in his opinion, the payment of the claims would involve a loss in that department. The testimony of the absent partner was not introduced, and the other one did not testify; and none other of the persons employed in the defendants' establishment testified in the case on the trial. The plaintiffs' evidence, in reply, tended to show that they could have determined whether the goods that remained after the discovery were of those paid for or not, if they had been called upon for that purpose; and that they were not so called upon.

The plaintiffs requested the court to charge the jury, in substance, among other things, that the burden of proof was on the defendants to establish the defense set up by them that the goods were sent upon this arrangement with the superintendent for concealment from them; that the jury would not be at liberty to find that the firm did not have knowledge of the goods sent during the absence of the senior partner, amounting to $23,386.66, upon his mere denial, without testimony from the other defendants; that if they, after the discovery, assumed ownership of any of the goods, such act would amount to a ratification sufficient to make them liable for all the goods, and especially for that part; and that the mailing of letters and other communications by the plaintiffs to them would be *prima facie* evidence that the letters and contents were received by them, in the absence of proof from each that they were not received.

The court directed the jury to return a verdict for the plaintiffs for the amount of one invoice of the goods received and retained after the discovery, amounting, with interest, to $117.77; and further charged the jury, in substance, that if the superintendent ordered these goods in the usual course, acting for the defendants, or gave the salesman to understand that he did, the plaintiffs were entitled to recover for the whole; that if he did not so order them, but lent himself in his position in the defendants' establishment to the plaintiffs for the purpose of getting their goods into the establishment of the defendants among the defendants' goods, without the knowledge and against the will of the defendants, and the plaintiffs or their salesman took advantage of the faithlessness of the superintendent to get the goods of the plaintiffs into the establishment of the defendants as if they were sold, against what they understood to be the will of the defendants, and without their knowledge, to be disposed of there as if bought, the arrangement, if carried out, would not amount to a sale of the goods so as to make the defendants liable for them as for goods sold; that the fact that the superintendent deceived the defendants was not important, unless the plaintiffs or their salesman concurred in the deceit, and acted upon it; that, if the goods were sent under the arrangement with the superintendent which the defendants' evidence tended to show, still, if these and other goods, sent by other persons under similar arrangements, came in such large quantities that, in view of all the circumstances, the defendants must have known that goods were being received as if bought beyond what were reported, and

their books showed, and they did not inquire where the goods came from, when in the exercise of due diligence they ought to have inquired, or did inquire and find out where they came from, and made no objections, but continued to let the goods come and be disposed of, and received the avails of them, the defendants would be liable for them as for goods bought, but that they were not to be held liable on this ground for not making inquiries which the plaintiffs or their agents intended that they should not make, and deceived them into omitting; that the fact that the senior partner was absent during a large portion of the time when the goods were being received was to be considered, with all the other evidence, as bearing upon the question whether the defendants must have known that more goods were being received than were reported; that in giving notice of protest of notes, and such cases, the fact that the notice was mailed to the person would be sufficient, but that when a party is to be affected with knowledge of what is in a letter the proof must go further, and show that it is received; that the fact that the plaintiffs mailed letters containing invoices and statements of accounts to the defendants would bear upon what the conduct of the plaintiffs was, and their good faith in this transaction, upon how they understood the matter, and were acting in regard to it, but would not in law establish the fact that the defendants received the letters and their contents, and would not be proof of that fact; that the fact that the defendants retained the goods, concerning which they could not determine whether they came from the plaintiffs or not, would not make them liable for any of the goods; and that the burden of proof was upon the plaintiffs to establish, by a fair balance of evidence, that the goods were ordered by the superintendent by virtue of his authority in the usual course, or that the defendants knew, or ought to have known, that these goods were being received from the plaintiffs, and permitted them to be received as if bought and disposed of; and that, if they failed to establish one or the other of these propositions, the verdict should be for the defendants as to these goods.

The plaintiffs excepted to these rulings as to the burden of proof; as to the goods received during the absence of the senior partner of the defendants' firm; as to the effect of retaining the goods and proceeds after the discovery; and as to the presumption of proof from the mailing of letters,—among other rulings. The jury returned a verdict for the defendants as to these goods, except those in the invoice, as to which a verdict for the plaintiffs was directed; and the plaintiffs rely upon these exceptions on this motion for a new trial.

The plaintiffs' declaration or complaint consists of one count merely, for goods sold and delivered. The defendants' plea or answer consists of the general issue or denial, and a statement of the facts which their evidence tended to show. If the statements in the answer are to be taken as true, until disproved, as it is understood they must be under this system of pleading, they do not, in connection with those in the complaint, make out a cause of action; neither did the proof of the facts which the defendants' evidence tended to show, in connection with the proof merely

that the goods were sent, and received and disposed of, without more, make out a cause of action. Those facts together did not show a sale and delivery of the goods, but showed that the plaintiffs attempted to make use of the defendants' establishment for the purpose of getting their goods into it, and disposed of there for money, and the money to the amount of the price of the goods returned to them, without the knowledge and against the will of the defendants. This would not show a sale and avoid it, but would show there was no sale. The plaintiffs had to show more if they could. They undertook to show an order from a duly-authorized agent, accepted by them. This made a case, if they could maintain it. The defendants did not deny the authority, but did deny the giving of the order. The latter was as essential to the plaintiffs' case as the former. They admit that, if the authority had been disputed, the burden of establishing its existence would rest upon them. There is, however, no difference as to burden between that and the other essential fact. The jury found that they had not sustained the burden in this respect, and that no order was given. Under the rulings, there was still left to them the chance to make out the sale, if they could, by showing that the defendants knowingly permitted the delivery of the goods, as if bought, to be continued, and kept and disposed of them as their own. This was not meeting an avoidance by the defendants of a sale of the goods to them, but was making out the sale itself. If the plaintiffs could not make out this part of their case, and the other part failed as it did, they had no case. A delivery of goods would not make a sale; and a delivery and acceptance would not, unless the acceptance was as of goods sold. The plaintiffs had to make out such an acceptance in order to sustain their allegation of a sale as to this part of their case. The court put the burden upon them of making out a sale in one way or the other. From time to time, during the trial, the preponderance of evidence on the issues shifted from side to side, so that, at those times, it might have been said that the burden of proof was shifted accordingly. But, when the evidence was all in, the question upon the whole was whether the plaintiffs had produced the fair balance of evidence necessary to make out the case which they undertook to make out. This question was left to the jury as to each aspect of the plaintiffs' case. To have required less would have left the plaintiffs a chance to recover without proving a right to recover. The authorities cited do not sustain, and the plaintiffs' counsel would not probably contend for, such a result. *Asher* v. *Bank*, 7 Alb. Law J. 43; *Caldwell* v. *Steam-Boat Co.*, 47 N. Y. 290; *People* v. *Thacher*, 7 Lans. 286, 55 N. Y. 535; *Dalrymple* v. *Hillenbrand*; 62 N. Y. 5; *Cowing* v. *Altman*, 71 N. Y. 435; *Nelson* v. *Woodruff*, 1 Black, 156; *Gay* v. *Parpart*, 106 U. S. 679, 1 Sup. Ct. Rep. 456.

These considerations afford something of a guide for the disposition of the question made respecting the goods sent and received during the absence of the senior partner of the defendants. If it belonged to the defendants to show that the goods came, and were there and disposed of, without their knowledge, then there was no direct testimony that the

two partners who did not testify did not, during the time in question, notice the goods, and become affected with the duty to inquire into their source, and how they came there. This consideration would, however, apply to the rest of the time as well as to that, and to the deceased partner Marsh, as well as to them, except that the testimony showed that he had charge of the wholesale department, and impliedly not of this branch of the retail department. But as it rested upon the plaintiffs, as has been seen, to prove, by circumstances or otherwise, knowledge, and not on the defendants to prove want of knowledge, but only to meet the plaintiffs' proof of knowledge, it was not necessary for them to prove want of knowledge at this part of the time by any particular persons or witnesses. The only difference in circumstances between this and other parts of the time was that, during this time, the senior partner who testified did not have opportunity for such observation of the amount of goods and situation as he had when there. This circumstance was laid before the jury with the rest, and appears to have had the importance given to it that belonged to it.

The ruling in respect to the effect of mailing letters, as evidence of their receipt and knowledge of their contents, is connected with this part of the case. The defendants insisted at the trial, and insist now, that if the goods were not ordered in the usual course, but were sent under the arrangement which they claimed existed, there was no sale to ratify, and that knowledge of the receipt of the goods would not make them liable as for goods sold; and they insist now that the submission of their liability to the jury in that aspect was wrong, and that, if it was done upon any erroneous ruling in respect to evidence bearing upon it, the plaintiffs had a chance to recover which they were not entitled to, and cannot complain that it was not made still more favorable. It is true that, if the transaction was as the defendants claimed and as the jury must have found, there was no sale growing out of that, as the case and the law applicable to it is now considered; but the case was not submitted to the jury as to this ground of liability, upon any idea of a prior sale that might be good if ratified, and would not be good of itself. If nothing had ever occurred between the parties, or those acting for them, before the goods were sent, and they were sent as if the plaintiffs understood they were sold, and received by the defendants, and retained with knowledge that they were so sent, the sending would be an offer of sale, and the receiving an acceptance which would constitute a sale, at a known price, if there was one, and at a reasonable price if there was no other. In this case the invoices and statements, if sent and received, gave the price. It appeared at the trial, and appears now, that the plaintiffs were entitled to have the case submitted to the jury upon this aspect of the law. If so, they were entitled to have it submitted upon correct views as to the effect of the evidence. The defendants claimed then, and insist now, that the ruling as to the effect of mailing letters was correct. It was important to the plaintiffs that it should be; for, if the jury could find that the defendants received the statements of accounts and invoices, that would go far towards finding knowledge that the

goods were sent. The ruling was made upon the supposition that the only presumption arising from the fact of mailing was that officers and persons engaged in transmitting the mail would do their duty. As was said by DEWEY, J., in *Bank* v. *Crafts*, 4 Allen, 447:

"In reference to the duty devolving upon the holders of commercial paper to give notice to indorsers, it has, for the purpose of facilitating the transmission of notices of that character, long been held that the putting a letter into the post-office is not only good *prima facie* evidence, but sufficient proof to establish the fact of giving notice. The receipt of such notice is not open to be controlled. But we do not understand that in other cases, where notice is required by the terms of the contract or force of a statute, the putting of a letter into the post-office is presumptive evidence of the fact of the receipt of such notice."

It appears, however, from an examination of the authorities cited in behalf of the plaintiffs, that there is the further presumption, arising from the usual course of business, as to getting or receiving letters from the mail by those to whom they are addressed. *Austin* v. *Hollad*, 69 N. Y. 571; *Huntley* v. *Whittier*, 105 Mass. 391; *Rosenthal* v. *Walker*, 111 U. S. 185, 4 Sup. Ct. Rep. 382; Best, Ev. § 403. If correct apprehension by the court of all principles of law involved is necessary to the correctness of a trial, there probably was error in this ruling; but correct instructions applicable to the case as presented, and that the court should not be wrong to the extent of misleading the jury, are all that seem to be requisite. *Schools* v. *Risley*, 10 Wall. 91; *Evanston* v. *Gunn*, 99 U. S. 660.

In *Huntley* v. *Whittier* the defendant requested the court to instruct the jury that mailing the letter in question was not sufficient notice, unless they were satisfied that the defendant received it. This request was complied with; but the court added that the mailing of the letter would be *prima facie* evidence that it reached its destination. This instruction was approved, and Mr. Justice GRAY, then chief justice of the supreme court of Massachusetts, in delivering the opinion of the court, said that the presumption arising was "a mere inference of fact founded on the probability that the officers of the government will do their duty, and the usual course of business." This statement of the foundation of the presumption is quoted with approval by Mr. Justice WOODS, in the opinion of the court in *Rosenthal* v. *Walker*.

The evidence in this case does not show that the free-delivery system of the post-office department prevailed in Boston at that time; but perhaps judicial notice should be taken of the size of that city, and of the fact that it was such that the law required free-delivery there, and of the existence of the delivery there. 1 Greenl. Ev. § 6; Rev. St. U. S. § 3865. If so, the letters would be delivered by the government carriers at the place of business of the firm, and not at the residences of the members of the firm. If not so, the presumption from the usual course of business that the firm would get letters addressed to it would be that it would get them to its place of business, and not that the members would get them at their residences. That place would be the destination of the letters in either event. If the question was whether the letters got there only, the

request of the plaintiffs would have been well founded, and the ruling clearly erroneous and misleading. But the question was whether the letters and their contents got to the members of the firm, who could control the superintendent, and not whether they got to the establishment. The invoices were, by the arrangement found, to go to the superintendent, and by the undisputed evidence they did go to him.

The only question left, upon the evidence, to which the presumption could be applied, was whether the statements of account which the plaintiffs' evidence tended to show were sent, and the defendants' book-keeper testified were not received, were received, and went to the defendants in person. If they were received at the establishment, the same course of business that would send them to the book-keeper would have sent them again to the superintendent for explanation, where the other one relating to goods not on the books was sent, and where all letters relating to goods bought were to be sent. There was no dispute about the fact of this course of business. The presumption arising from it as an inference of fact, as defined by Chief Justice GRAY, would not, as applied to the course of the mail in arriving at and being disposed of in this establishment, have carried the letters to the defendants in person, but away from them to the superintendent. The extent of the presumption must necessarily be controllable by the circumstances of the actual course of business when shown.

In *Groton* v. *Lancaster*, 16 Mass. 110, it was held that proof of sending a notice from the overseers of the poor of one town by mail, directed to those of another town, was not sufficient to show that it was received by the latter. The ruling contended for by the plaintiffs would have left the jury to find that the defendants themselves received the letters not only beyond, but contrary to, the presumption arising from the course of business shown in this case, while the ruling made, so far as applicable, merely confined them to it. However erroneous the supposition of the court as to the law on the subject of this ruling may have been, no misdirection of the jury which would mislead them in this case is made to appear.

The question made upon the ruling, as to the effect of what was done by the defendants with the goods found in their establishment that came from the plaintiffs, relates to the liability of the defendants in this action for all the goods sought to be recovered for, as well as for any of those goods in particular. Goods had been bought of the plaintiffs in the usual course, before any of those in question were sent, and also in August and December, 1884. The superintendent had passed bills, and procured money to be sent to them, in June, 1885, for some of those first sent under this arrangement; and those of the invoice of July 30, 1885, had been lately received. All of these, except the latter, had been paid for. The proportion of all of them to the whole quantity that came from the plaintiffs is so small that it might fairly be presumed that at least a considerable portion of those left were of the goods in question. The defendants' evidence that they could not ascertain whether any of them were goods not paid for must therefore be taken to mean that they could

not tell whether any particular cloaks or suits were not paid for, of those that were then there. Such of those as were there had not come there by any act of the defendants, or of any one authorized to act for them in getting goods there in that manner. They had not been sold to the defendants, but had been got there among the goods of the defendants' establishment by the procurement of the plaintiffs, and were situated as if the plaintiffs had personally taken them there, and left them, without the knowledge of any one connected with that establishment. The plaintiffs had, according to the finding of the jury on the other parts of the case, in undertaking to impose the disposition of their goods upon the defendants, so mingled them with the goods of the defendants that the defendants could not tell which were the plaintiffs'. The defendants could not return to the plaintiffs what belonged to them without sending the whole, which would include their own. The defendants knew that the plaintiffs claimed that all were sold to the defendants; the plaintiffs knew that the defendants claimed that they had not bought those in question. That the defendants knew that the plaintiffs could select those not paid for does not appear. By the civil law, if goods so mingled are retained by either owner, the other is left to his action for his share to be estimated. Just. lib. 2, tit. 1, § 28; Bract. bk. 2, *c.* 3. By the common law, if the goods cannot in fact be distinguished, and the intermingling was willful, with intent to defraud, the whole goes to the one whose property was invaded, and the other loses his right. 2 Bl. Comm. 405; Bac. Abr. "Trespass," E; Lord ELLENBOROUGH, C. J., in *Mayor, etc.*, v. *Wilson*, 5 East, 2, at page 7; 2 Kent, Comm. 364; *The Idaho*, 93 U. S. 575.

The question here, however, is not whether the plaintiffs lost their property in these goods by reason of their conduct, but whether the defendants became liable for these goods, as for goods sold to them by reason of theirs. But if the plaintiffs lost their right of property in the goods, the liability of the defendants to them would not be enhanced by anything which they did about the goods. The intermingling may not have been so willful and fraudulent as to affect the right of property. *Ryder* v. *Hathaway*, 21 Pick. 298; *Pratt* v. *Bryant*, 20 Vt. 333. If not, the plaintiffs could maintain no action for its detention without a demand for theirs. *Bond* v. *Ward*, 7 Mass. 127; *Sawyer* v. *Merrill*, 6 Pick. 477; *Shumway* v. *Rutter*, 8 Pick. 443.

The defendants owed to the plaintiffs no duty about the goods. The most they could do would be to request the plaintiffs to select their own, and take them away. They did not know that the plaintiffs could do that, so far as shown; and the claim of the plaintiffs that the goods were sold, and belonged to the defendants, would naturally lead them to suppose that the request would be unavailing if made. They are not estopped from denying a sale by any misleading of the plaintiffs by their course in this respect. At the time they were doing what they did about these goods, they were doing nothing about the others which the plaintiff claimed to have sold, and were expressly repudiating to the plaintiffs any liability for them as for goods sold. There was no attempted sale

to ratify; and the defendants had nothing to meet but the plaintiffs' claim that there was a sale, which has by the verdict been settled, for the purposes of this motion, to be unfounded. The defendants did not yield to that claim, as in the case of the invoice of July 30, 1885, and thereby make themselves liable, but repudiated it always, and so far with success.

The plaintiffs have not on this motion relied upon the sale of the goods and receipt of the avails prior to the discovery as bearing upon the liability of the defendants for those goods as for goods sold and delivered. This is not alluded to for the purpose of showing that anything has been waived or omitted on the part of the plaintiffs, but for the purpose of showing that it was not overlooked by counsel or court. In considering this point, it must be taken to be settled that those goods were sold, and the money for them received, by the defendants by the procurement of the plaintiffs, and without knowledge of the defendants, on their part, that the goods of the plaintiffs were being sold, or that money was being received for them. They, and all acting for them in those transactions, supposed that their own goods were being sold, and that all money received was theirs. Their superintendent was acting in these transactions for the plaintiffs, and not for them. The money was in the defendants' hands as if the plaintiffs, as before supposed, had put their goods into the defendants' establishment among the goods, without the knowledge of any one connected with it, intending that they should be sold, and the money received for them, and all had been so done. The plaintiffs may not have lost their right to the money, but it was not in the defendants' hands through any fault of theirs. They were under no obligation to do anything about it until called upon for it. An action could not be maintained for it until after a demand for it. 2 Greenl. Ev. § 120; *Bank* v. *Bank*, 40 Vt. 377; *Saville* v. *Welch*, 58 Vt. 683, 5 Atl. Rep. 491. The only thing which the defendants could do with the money was to keep it or send it to the plaintiffs. As they were not bound to do the latter, the omission to do it could not justly be claimed to affect their liability. Every advantage from this fact was claimed for the plaintiffs on the trial, and the questions arising on these claims were disposed of according to these views.

The defendants knew when they retained these goods after the discovery, and sold them or put them into their stock again for sale, that the plaintiffs claimed that they were sold; but they did not know how many of them the plaintiffs claimed they were still liable for, nor at what price. These goods were situated differently, in this respect, from those sent accompanied by a statement of account for them. The plaintiffs could not claim that they became liable for these goods at any price, or for any amount, for there was nothing to show any price nor any amount; nor that the defendants were liable for what those not paid for were reasonably worth, for there was no evidence as to how many there were of those particular goods not paid for, or what they were worth.

In *Pratt* v. *Bryant*, 20 Vt. 333, the plaintiff sought to recover the price of some wood which he supposed he had sold to the defendant, and

which he delivered, and it became mingled with other wood of the defendant, so he could not separate it, and which the defendant had not bought, and told the plaintiff he could take away, but to be careful and not take any other of the defendant's wood. The plaintiff did not take away any, because he could not tell which his was, and the defendant used the whole. The court held that he could not recover the price as for wood sold, but could only recover in trover, or, by waiving the tort, in *assumpsit* for the money, if any had been received; and the judgment for the plaintiff for the price was reversed, and judgment rendered for the defendant. That was a stronger case for the plaintiff than this; for there the plaintiff supposed he had sold the wood, while here, on the finding of the jury, the plaintiffs must have known there was no sale.

On the whole case, as presented, understood, and considered with reference to these points made on this motion, it is not made to appear but that the plaintiffs had a fair chance before the jury to obtain a verdict, if they could, for these goods, as if sold and delivered. That they failed is only attributable to the weakness of their case, and the strength of the defendants' case, on the questions involved in that aspect. Whether they have rights to be relieved by other remedies is not now in question.

Motion for new trial overruled, stay of proceedings vacated, and judgment on the verdict ordered.

BARBOUR *v.* STEPHENSON.

(*Circuit Court, D. Kentucky.* 1887.)

1. SEDUCTION—SUIT BY FATHER—MINOR DAUGHTER—PRESUMPTION.
   In an action by a father for the seduction of his daughter, the relation of master and servant, which is still necessary to ground the action, is presumed, if she is under age and under his control.
2. SAME—CONSENT OF DAUGHTER.
   In such a case the consent of the daughter is no defense to an action by the father for her seduction.
3. SAME—MEASURE OF DAMAGES.
   The damages a father may recover, in an action for his daughter's seduction, are not confined to the mere loss of services, and expenses attending her confinement, but may include compensation for all that he has felt and suffered in connection with the wrong.

Verdict for Plaintiff, $15,000.

De Jarnette & Dickerson, for plaintiff.

O'Hara & Bryan and *W. W. Cleary*, for defendant.

JACKSON, J., (*charging jury.*) The distinguished counsel having discharged their duty to their respective clients in this case, it now devolves upon the court and jury to perform their duties in the premises. The case, from its very nature and character, touches our sensibilities, and appeals to our sympathies, in the very strongest manner, but we

must not allow sympathies or prejudices in favor of or against either side to stand in the way of first ascertaining and determining the material facts on which the rights of these parties depend. You must not allow your sympathy or prejudice to run away with you, or to disregard the evidence. Your sworn duty is to decide this case on the evidence, under the law applicable to the questions involved as the court shall charge you, and with such comment as to the facts as the court may legitimately make.

Now, gentlemen, on entering upon your investigation of this case, when you retire to consider your verdict, you should first carefully review and weigh the whole evidence as to the material facts upon which the rights of these parties depend, without bias, prejudice, or sympathy. It devolves upon the plaintiff to esfablish to your satisfaction two facts, in order that he may recover: *First*, that the person seduced was his servant; and, *secondly*, that that seduction was accomplished as a matter of fact by the defendant. You will have no difficulty with the first branch of the case, it having been shown that the daughter in this case was in the family of the father, was under his control, and was under age, or a minor. The law presumes the relation of servant; that is, that the plaintiff had a right to her services, and that for the wrongful act of seducing her, whereby loss of her service resulted, he may recover. The old idea or theory was that the parent recovered only for the loss of service, together with such actual expense as he may have been subjected to in and about the daughter's confinement. But it may be said, to the credit of modern jurisprudence, that the law has advanced far beyond this relic of barbarism, and that now the damage resulting from such an injury is not confined to loss of service and attendant expenses, but reaches far beyond, and aims to give compensation to the wounded feelings of the plaintiff. According to the modern rule, the plaintiff goes through the *form* of showing that he was entitled to the daughter's service, in order to reach the higher plane of injury and wrong, for which he is entitled to compensation. This first element of the case to be established by plaintiff, viz., that the seduced person was his servant, is not contested by the defense, is fully shown by the undisputed evidence introduced, and you may therefore consider that branch of the case out of the way.

The controverted issue in the case turns upon the question whether, as a matter of fact, the defendant was the person who seduced or debauched the plaintiff's daughter, and was the father of the child of which she was delivered. That is the all-important fact to be determined by you. You must not concern or bother yourselves as to how the defendant may have accomplished the act, (if he did it,) or the precise hour of the day, or the exact place at which he did it. The question is, does the proof show to your satisfaction that the defendant was the father of the child the plaintiff's daughter gave birth to? That is the controverted issue and question of fact. Now, when you retire to consider and determine that material and vital fact, which you must determine for yourselves, (as the court can only aid you by some general rules relating

to evidence,) you must understand and bear in mind this leading proposition: that the plaintiff holds the affirmative of the issue, or what is called the burden of proof rests upon him, the defendant having denied the charge. The plaintiff must satisfy you, by what is called a preponderance of proof, that the wrong complained of was committed by the defendant. By the preponderance of proof the court does not mean the largest number of witnesses on a given point. Four or five witnesses may testify to a fact, and a single witness may testify to the contrary, but under such circumstances, or in such a manner, and with such an air and appearance of truth and candor, as to make it the most satisfactory or convincing to you that the *one* witness, with the opportunity of knowing the facts testified to, has told the truth of the matter. When you are thus satisfied that the truth lies with a single witness, or any other number, you are justified in returning a verdict in accordance therewith. This is what is meant by a preponderance of proof. It is that character or measure of evidence which carries conviction to your minds. You must be satisfied, gentlemen of the jury, from the whole evidence, that the defendant had carnal knowledge of the plaintiff's daughter, and, as a result of that connection, a child was born to her.

You are met in the very outset of your investigation with those unfortunate conflicts in the evidence which generally arise in cases of this character. As sensible men, you, as well as these lawyers, know that the fact of illicit intercourse or connection can rarely be established by direct or positive evidence of eye-witnesses to the overt act. Positive testimony, aside from the parties to the act, is not to be expected. The seduced person is a competent witness, and the plaintiff had the right to call his daughter as a witness. It would have been the subject of grave comment for him not to have called her, and given you an opportunity of hearing her statement of the matter. The defendant, in his own way and manner, has positively denied her statement. You cannot reconcile the testimony of these two witnesses, but must determine for yourselves, in connection with all the evidence, which you will believe. There are other conflicts in the evidence, bearing upon the main fact, which you should endeavor to reconcile and harmonize if you can. The court can only give you a few general rules as guides for weighing and deciding between testimony that cannot be reconciled.

When there is irreconcilable conflict in their statements, you can look to the intelligence of the witnesses; to their interests in the suit, or its result; to their relationship to the parties. A witness may be strongly biased by his or her relation to the litigants; and you should consider how far, if at all, such relationship has biased, controlled, or influenced such witness or witnesses in his or their testimony. You can also take into consideration the fact that the witness may be friendly to one side and hostile to the other. You can also look to the manner and bearing of the witness in testifying. Does the witness show a zeal in stating facts favorable to one side, and a reluctance in disclosing facts which would benefit the other? Does he testify in that frank, candid, and straightforward way which a witness should do under the solemnity of

an oath, or does he evade and equivocate? A witness may state facts reluctantly, and yet satisfy you that he or she is telling the truth. In the present case the young girl alleged to have been seduced might hesitate or be reluctant to detail all the particulars connected with or relating to the sexual intercourse. She is not to be immodest in order to be worthy of belief. You may look to the circumstances surrounding the witness, and the way he or she testifies in weighing their evidence. You may also look to their means of information, and their opportunity of knowing the facts whereof they testify. You should look to the consistency of their testimony. Is the statement of the witness consistent with itself? Is he consistent with himself, or does he contradict himself? Is he consistent with undisputed or well-established facts, about which you have no doubt? Is he corroborated or contradicted by other witnesses who, you are satisfied, have told the truth?

Now, gentlemen, take these general rules as guides with your own every day experience and apply them to the testimony given before you, and determine on which side of this case the truth lies. You are not permitted as a juror to go out of the jury-box and tell your associates what you may or might know about the matter in controversy, if anything, not having been placed upon the witness stand and subjected to cross-examination, which is the safest method known to the law of ascertaining the truth. But, while that is so, you may apply your experience in weighing and considering the statements made by witnesses, and in determining which side of conflicting and contradictory evidence best harmonizes with such experience and the probability of truth; and having thus satisfied yourself, your duty will be to decide accordingly. Do not lose sight of the real issue, which is, was the defendant the father of the child which the plaintiff's daughter gave birth to on the tenth day of July, 1885? As I have already stated, the plaintiff had the right to put his daughter on the witness stand to state the transaction as she alleges it occurred. She has done this, and you have not only heard her evidence, but have seen her manner of testifying, and it is for you now to test and determine the truth of her statement. The defendant has also been put upon the stand and positively contradicts every material statement made by her. You have seen his manner and bearing. Both testified under the solemnity of an oath, and one or the other has sworn falsely. It is for you to determine which has told the truth. In the issue that is presented here, the general character of the plaintiff's daughter for chastity is involved. The defense had the right to attack her general character for chastity, and to have broken down in that way any probability that defendant was the father of her child, even if he had had intercourse with her; but they have not done so,—that is, no attack has been made upon her general character for chastity; and the court instructs that you should allow no suspicion to cross your mind that she had previous intercourse with any other man who was the father of her child. It may be that I am stating that too strong, and I withdraw that statement or instruction. What I mean is that, not having attacked her general character for chastity, you cannot infer that she was

an improper or an unchaste woman or girl previous to the time she was begotten with child. You cannot infer that the child of which she was delivered was the child of the man Shehan who has been referred to during the progress of the trial. So let that go. You have no evidence in the case to lead you off on such a trail as that.

For the plaintiff, it is insisted that the daughter's testimony is corroborated in all essential particulars by the evidence of her mother, and by the testimony of her sister. The contention for the defendant is that his denial of the seduction is corroborated by the fact (as claimed) that there were people in and about his office on the twelfth of October, 1884, at or about the time when it is claimed that the act of seduction occurred; that there were people in his office, and his office-room was so exposed to and surrounded by visitors that it was improbable that the transaction took place as stated. There are some facts and circumstances about which there is no controversy. The girl did have a child on the tenth day of July, 1885. In the ordinary period of gestation, that child was begotten on or about the tenth or twelfth or middle of October, 1884. The child was begotten about the *time* stated by the plaintiff's daughter. It does not appear that the child was born prematurely; nor is it shown to have been different from the ordinary period of birth. It is a fact that the girl was on the premises the day of the alleged seduction. It is a fact, unquestioned, that the defendant was on the premises that day, and in the house where it is claimed the seduction took place. The mother and sister state that the plaintiff's daughter was called by the defendant to that house on that day. The daughter also states that she was called by the defendant, and went there by direction of her mother. The defendant denies their statement. No other witnesses on either side testify to that fact. Which do you believe? It is for you to determine. Defendant not only denies calling the girl to his office, but also denies that he had anything to do with her,—that he had any sexual intercourse with her then and there, or at any other time or place; and in corroboration of his statement seeks to show that Gideon Hughes, John Wynn, and John Gay, and perhaps others, were there on that day, and that it was improbable, if not impossible, that he could have accomplished the seduction under such surrounding circumstances. Three credible witnesses, Mr. Lancaster, Dr. Dougherty, and Mr. Harris, are brought in, and swear before you that Gideon Hughes' reputation in the neighborhood for truth and veracity is bad, that he is unworthy of belief, and that they would not believe him on oath. On that testimony, if you believe it, you have the right to discredit all that Gideon Hughes has stated, except in so far as he is corroborated by the testimony of other witnesses whom you do believe. All the witnesses stand before you as equally credible, except so far as they may have discredited themselves by false statements, or been discredited by other witnesses, or impeached.

The plaintiff's daughter says that she was called over to the defendant's office some time before dinner, or after her mother had commenced getting dinner, or while she was making preparations to get dinner. The

mother and sister make substantially the same statement. Gideon Hughes in his testimony, if you remember, says that he was at the defendant's office, on the day in question, from about 11 o'clock until 2 o'clock P. M. The witness Wynn says that he was there between 10 o'clock A. M. and 1 o'clock P. M. The colored man Gay says that he was at the boarding-house, about 80 feet distant from defendant's office, but does not remember to have been at the defendant's office. You must weigh this testimony and give it such consideration as you may think proper; but, gentlemen of the jury, you should not be misled by the question as to the exact hour at which the seduction was accomplished, if the act was committed by defendant. Of course, the daughter and her mother and sister have testified as to the time of day she went to defendant's office. You are not to find that the act was committed at any particular hour; but, assuming the evidence introduced by defendant to corroborate his denial to be true, the question is, was there, or was there not, an opportunity for defendant to have done the act complained of? Could he have done it before Gideon Hughes got there, assuming that Gideon Hughes got there about 11 o'clock A. M.? Can you find from the evidence that the act could or might have been accomplished before 11 o'clock, or can you find that Hughes got there at that hour? Apply your experience to these statements as to the exact hour a witness says he was at a particular place. How far can you rely upon the remembrance of a witness testifying to the exact hour at which he or she was in a particular office or place two or three years since? The thing for you to do, therefore, is to reconcile this conflict of evidence as to the precise hour of the act, under the testimony and the circumstances surrounding the parties. Could the seduction have occurred before Hughes got there? Could it have happened before Wynn got there? Could it have taken place while Gay was at the boarding-house? Does this evidence introduced by defendant to support and corroborate his denial, together with the surrounding circumstances, strengthen his denial, and render it improbable that the act could have occurred as stated by plaintiff's daughter, or can it be reconciled with her testimony?

It has been earnestly pressed upon you by counsel for the defense that you cannot find for the plaintiff without finding that the defendant committed a rape upon the daughter, for which offense he is now being prosecuted in the state courts. The court instructs you that the rape suit has nothing to do with this case. This is a suit by the plaintiff to recover $20,000 for the *seduction* of his daughter. It does not involve any question of rape; and the evidence as detailed before you does not involve the crime of rape at all. Under the evidence in this case, no court could convict the defendant of rape. The daughter, according to her own testimony, made no outcry; she made no immediate complaint; she made no such resistance as the law requires, but yielded a hesitating and reluctant consent, on her own statement of the affair. The law would not find the defendant guilty of the crime of rape—a felony punishable by death under the laws of Kentucky—under such circumstances. You have nothing to do with the question of rape. The question which you

are to determine is whether the defendant had carnal knowledge of the plaintiff's daughter at the times and places stated by her, and whether, as a result of that intercourse, a child was born to her. That is the vital question here. You need not bother yourselves as to whether the daughter consented. She could not consent, so far as the father, whose rights are alone involved in this suit, is concerned.

Now, gentlemen of the jury, you have the main question before you. Witnesses differ as to dates. They differ as to the time when the defendant returned to his place after the plaintiff reached there with his family early in October. Whether the defendant got there Friday morning or Friday night, Saturday morning or Saturday night, is wholly immaterial. These differences may test recollection, but the fact is not material. Nor is it material whether the second act of illicit intercourse took place two or three days or a week after the first; or after defendant had left the place and come back again, as the daughter stated on the stand. The material question is, did he have carnal knowledge of the girl, and was a child born to her on the tenth July, 1885, as the result of that connection? You may take these dates, or consider the testimony as to dates, and see how far the accuracy of a party's recollection is concerned or affected thereby. Do not be misled by them. The thing for you to look to and determine is, was the defendant guilty of the act charged?

Now, gentlemen of the jury, if you find (and the court has cautioned you to act without allowing any sympathy to bias your judgment, but to weigh the evidence, giving credit to the witnesses you believe have stated the truth) that the defendant was guilty of the act charged,—the seduction of the plaintiff's daughter,—then you are next to consider the question of plaintiff's damages. As I have already stated, the plaintiff, in such cases, was originally awarded damages on the theory of simply compensating him for the loss of his servant's service, together with the expense, labor, and care of her confinement. But, to the credit of our modern jurisprudence, the law has advanced beyond that relic of barbarism, and the father *now* is entitled, not only to compensation for loss of services and expenses attendant upon his daughter's confinement in such cases, but for all that he can *feel* from the nature of the injury. I do not put the case to you as involving vindictive damages, but I do put it to you as strongly as language can express it,—that if you find the defendant had sexual intercourse with the plaintiff's daughter, and, as a result of that intercourse, that a child was born to her July 10, 1885, the plaintiff is entitled to recover, as damages, all that you choose to give him for his wounded feelings, up to the limit of the sum claimed in his declaration, which is $20,000. A father, of course, feels a consolation in the virtue of his daughter. All right-thinking parents must understand that feeling. You may give the plaintiff damages in your discretion, up to the limit claimed in his declaration, for the loss of that comfort and consolation which he had a right to feel in the purity and virtue of his child. You may take into consideration his loss of hope in the future of his daughter, and compensate him for the same. You

may award him damages not only for his mental anguish in the disgrace of his daughter, but for his anxiety as to what is to become of her in the future. You may take into consideration his feeling of anxiety as to the effect of that daughter's example upon his other child. You may look to the loss to him and his family of social standing and position by reason of the daughter's disgrace. You may consider his mortification, humiliation, and sense of dishonor. The world, as we know, visits upon the girl or woman more severe condemnation for such acts than it does upon the man. She and her family are more or less slighted and ostracized. To a considerable extent, the hopes and prospects of the family, as well as the girl herself, are blighted. We need not stop to consider whether it is right or wrong for the world and society to deal more leniently with the man than the woman for such offenses against virtue and chastity. There may or may not be reason—sound reason—for such discrimination. The fact exists, and may be taken into consideration by you in estimating the injury which the father has sustained by the seduction of his daughter. So that, in respect to damages, it may be summed up in one general sentence or statement: That, if you find the defendant committed the wrong complained of, you may compensate the plaintiff, up to the limit claimed in his declaration, for all that he, as a father, may have felt and suffered for the wrong and injury he has received in the ruin of his daughter. . . . . .

Your first duty is to determime the question whether the defendant committed the act charged against him. Upon that branch of the case do not allow your sympathy or prejudice to run away with you; but, when you shall have found that fact, then this court cheerfully leaves to your determination what compensation you shall give to the injured father, and tells you that in awarding damages for his wounded feelings, his mental sufferings, his anxiety, his humiliation, and his sense of dishonor, you may go up to the very limits of the amount claimed by the plaintiff in his declaration.

Now, gentlemen, take the case and consider it. I do not think of anything else to which your attention should be called. . . .

. . . . . .

DIECKERHOFF and others *v.* ROBERTSON.

(*Circuit Court, S. D. New York.* August 16, 1887.)

CUSTOMS DUTIES—AMENDMENT OF BILL OF PARTICULARS—SECTION 3012, REV. ST.

A bill of particulars, required by section 3012, Rev. St. U. S., in an action brought against a collector of customs to recover excessive duties, may, under that section, be amended by increasing the amounts of such duties therein claimed, in case of reasonable excuse for a *bona fide* mistake; but the specific cause of error or mistake should be shown, and why the original was not made in proper form.

This action was brought June 20, 1885, against the defendant to recover an alleged excess of duties exacted of plaintiffs by him as collector

of customs. Thereafter the plaintiffs, under section 3012, Rev. St., served a bill of particulars of such duties claimed by them. Subsequently it was determined that the amounts of such duties claimed by them in the case of five importations was less than the real amounts exacted. They thereupon moved the court for permission to amend their bill of particulars by substituting the real amounts for the amounts claimed therein. The affidavit upon which this motion was based set out:

That, in the official adjustment of the items in the bill of particulars in the above action, it has been found that several errors have occurred in said bill of particulars, as will appear in the annexed schedule marked "A;" that the figures in column No. 2 are found to be the correct amounts, and should be substituted for those in column No. 1, and the bill of particulars amended accordingly.

SCHEDULE A.

Name of Steamer.	Date of Entry.	Amount No. 1.	Amount No. 2.
Oder	July 3, 1883	$ 10 00	$ 19 00
France	July 5, 1883	208 50	345 50
Main	July 9, 1883	8 50	13 00
Rhein	July 18, 1883	20 00	36 50
Werra	July 23, 1883	26 00	41 25

Edgar Ketchum, for the motion.

Stephen A. Walker, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., opposed.

Lacombe, J. This application, which is for leave to amend a bill of particulars in an action to recover excess of duties, may be best answered by quoting the decision of Judge Brown in *Levi* v. *Robertson*, (filed August 5, 1887.)

"Under section 3012, an amendment of bill of particulars may, I think, be made as in any other case of reasonable excuse for a *bona fide* mistake. But the specific cause of error or mistake should be shown, and why the original was not made in proper form. The within affidavit is insufficient. If allowed, it would in effect abolish section 3012 in part."

The affidavit on which this motion is made is also insufficient. Motion denied, without prejudice to a similar motion on additional affidavits.

In re CUMMINGS, etc.

(*Circuit Court, S. D. New York.* August 18, 1887.)

1. IMMIGRATION—UNDER CONTRACT TO LABOR—SCOPE OF ACTS.
   The act of congress of February 26, 1885, and the amendment thereto of February 23, 1887, clearly prohibit the immigration of aliens under a contract to labor in the United States, and an immigrant under such a contract may be prevented from landing. The claim that only the persons soliciting or encouraging the immigration are affected by the acts cannot be sustained.
2. SAME—EXCEPTION OF PERSONAL AND DOMESTIC SERVANTS—FARM LABORER.
   An immigrant arriving in this country, under a contract to labor on a dairy farm, the product of which, or a part thereof, forms an article of merchandise that competes with others in a similar business, and whose passage here has been paid by the agent of the employer, is not within the exception under the act of congress of 1885, § 5, which provides that the prohibition therein contained shall not apply to persons employed strictly as personal or domestic servants, etc.
3. SAME—EFFECT OF COLLECTOR'S DECISION—SECOND HEARING.
   The decision of the collector upon the *status* of an immigrant whose right to land in the United States is challenged on the ground that he is under a contract to labor, is conclusive, and not open to review in the courts on *habeas corpus*, if there was competent evidence before the collector on which to exercise his judgment; and, if *habeas corpus* proceedings are resorted to, and facts not previously placed before the collector are therein disclosed, the whole case may afterwards be again presented to the collector.

Writ of *Habeas Corpus*.

Harrington Putnam, for Cummings.

Stephen A. Walker, U. S. Atty., and *Abram J. Rose*, Asst. U. S. Atty., for the collector.

LACOMBE, J. The relator, Matthew Cummings, is an alien, and arrived here on the steam-ship Anchoria. Before sailing, a contract was made through one Latta, on behalf of W. A. Sudduth, a lawyer of Flemingsburgh, Kentucky, that Cummings was to labor for him in Kentucky as farm servant or dairyman, and the passage money of Cummings and his family was paid by Latta. As dairyman, the relator would have charge of a herd of 25 Jerseys. The collector, upon the facts before him, has determined that Cummings was prohibited from landing, under the acts of congress of February 26, 1885, and February 23, 1887. Under stipulation, the immediate return of Cummings was delayed in order to allow of the presentation of additional facts as to the character of service he was to render, which facts have been obtained by interrogatories to his employer in Kentucky.

In behalf of the relator it is contended:

1. That the act contains no punishment against the immigrant; that no person other than those soliciting and encouraging the immigration are within the prohibition of the act; and that, therefore, the amendatory act of 1887, which directs that the immigrants shall be sent back to the nations from which they came, provides a penalty for one who has committed no offense, and is therefore void. The acts are inartificially drawn, but, interpreted together, they plainly indicate an intention on

the part of congress to prohibit the immigration of aliens under a contract to labor, and, in view of the phraseology of the title to the act, that body seems to have prohibited their landing with sufficient clearness.

2. The relator further contends that he is within the exception of the fifth section, which provides that the acts shall not apply to persons employed strictly as personal or domestic servants. There was before the collector when he made his decision, legal and competent evidence of facts on which to exercise a judgment as to the *status* of the relator. Under these circumstances, the matter being within the jurisdiction of the collector under the act, further consideration of the case might be dispensed with under the authority of *In re Day*, 27 Fed. Rep. 678, and cases there cited. Upon all the proofs, however, as well those which were before the collector as those since supplied through the answers to the interrogatories, I am of the opinion that the relator is not within the exception; because it appears that his labor will (in part at least) be devoted to the production of merchandise (the surplus dairy products of the herd being sold on the market) which competes with the products of others whose entire attention is given to manufacturing such products. Manifestly, it was the intention of congress to exclude immigrants coming to this country under contract to perform such labor. The facts disclosed by the answers to the interrogatories, however, have never been placed before the collector, and therefore, under the authority of *In re Day*, 27 Fed. Rep. 681, the whole case may be again presented to him, if the relator so desires. Ordered accordingly.

Ex parte DORAN.

(*District Court, D. Minnesota.* August 29, 1887.)

USE OF MAILS—INDECENT LANGUAGE.

A creditor deposited in the mail letters inclosed in envelopes directed to a debtor, on one of which was indorsed: "Carry me back in due time to ——, the Regulator, for publication, 32 South Washington, Minneapolis, Minn. Persons who want us to collect from DEAD BEATS should send their accounts to 32 Washington avenue south, Minneapolis, Minn. Send five cents to insure postage for a large letter to the critter;" and on another: "Return in 10 days to ——, the Collector of BAD DEBTS, 32 Washington Av. S., Minneapolis, Minn. I am looking for an OLD BILL. The DEAD-BEAT COLLECTOR hires me to look them up." He also mailed a postal card addressed to the debtor, containing the following writing: "SIR: Considering how near you can come to fill a bill, I have decided to post you on all DEAD-BEAT lists I know of in the city, and have accordingly given the different agencies a chance at you." *Held*, that the creditor was not liable to prosecution under Rev. St U. S. § 3893, as amended, making it an offense for any person to deposit in the mail any "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," as the statute was intended to exclude from the mails only such writings as were impure or immodest, and tended to corrupt the morals of the people.

Petition for a Writ of *Habeas Corpus*.

T. Ryan, for petitioner.
Dan. W. Lawler, for the United States.

NELSON, J. The petitioner was arrested, charged with a violation of section 3893, Rev. St. U. S., and, after a preliminary examination before a commissioner of the United States circuit court, was held guilty of the charge. Upon his commitment which followed, he presents a petition for a writ of *habeas corpus*, alleging that he is unlawfully and illegally restrained of his liberty, and that the act which he is charged with doing is not an offense against the laws of the United States. The petitioner admits that he deposited in the mail certain writings, and a postal-card and envelopes upon which the following are indorsed:

[Envelope.]

EXHIBIT A.

Carry me back in due time to ——— ——— The Regulator, for publication, 32 South Washington, Minneapolis, Minn.

Persons who want us to collect from DEAD BEATS should send their accounts to 32 Washington avenue south, Minneapolis, Minn.

Send five cents to insure postage for a large letter to the critter.

Mr. D. J. COMLY, 8th & Jackson Sts., City.

[Envelope.]

EXHIBIT B.

Return in 10 days to ———————, The Collector of BAD DEBTS, 32 Washington AV. S., Minneapolis, Minn.

I am looking for an OLD BILL.

The DEAD-BEAT COLLECTOR hires me to look them up.

[Stamp.] St. Paul, Minn. July 18, '87. 3 P. M.

D. J. COMLY,
Cor. 8th & Jackson,
9 Corlies, Chapman & Drake,
City.

[Postal Card.]

EXHIBIT C.

JULY 18, 1887.

SIR: Considering how near you can come to fill a bill, I have decided to post you on all the DEAD-BEAT lists I know of in the city, and have accordingly given the different agencies a chance at you. F. B. DORAN.

Section 3893, as amended, enacts as follows:

"Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception, or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles, or things may be obtained or made, and 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, are 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 any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, * * * shall be deemed guilty of a misdemeanor, and shall for each and every offense be fined not less than one hundred nor more than five thousand dollars, or imprisoned at hard labor not less than one year, nor more than ten years, or both, at the discretion of the court." Supp. Rev. St. 229.

The claim made by the relator that the exhibits do not make out a case in which this court has jurisdiction, and that the law has not been violated, in my opinion, is true. To hold otherwise would necessitate a strained construction of this statute. The purpose of the act was to prevent the mails from being used to circulate matter to corrupt the morals of the people. The history of this legislation clearly shows that congress determined to exclude from the mails impure and immodest writings, and that rough and coarse language is not within the terms of the act. It is not the province of courts to extend the statutes so as to embrace cases not plainly and clearly within their terms; and, if there is a fair doubt whether the act charged is within the purview of the law, the person who committed it is entitled to the benefit of the doubt. The supreme court of the United States, in *Ex parte Jackson*, 96 U. S. 736, say: "In excluding various articles from the mail, the object of congress has not been to interfere with * * * the rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals." And, again: "All that congress meant by this act was that the mail should not be used to transport such corrupting publications and articles."

The writings deposited in the mail and complained of are not excluded mailable matter, and afford no cause for criminal proceedings.

The petitioner is discharged from custody.

WHEELER and others *v.* HART and others.

(*Circuit Court, N. D. New York.* August 23, 1887.)

PATENTS FOR INVENTIONS—DETACHABLE RADIATOR—STATE OF ART—RESTRICTION OF CLAIM.

In a suit for infringement of claim 1 of letters patent No. 245,157, granted Messrs. Goodenow & Owens, August 2, 1881, for an improvement in hot-air furnaces, consisting of "a furnace having a detachable radiator," "substantially as and for the purposes set forth," the specifications requiring that the radiator be attached by means of a flange, slots, and lugs, which securely lock it in position, and render it detachable by bringing the lugs opposite the slots, *held*, in view of the state of the art, and the language of the specifications, that this claim was not infringed by a furnace having a detachable radiator not secured by any such means, or equivalents therefor.

In Equity.

Bill for an infringement of claim 1 of letters patent No. 245,157, granted to Messrs. Goodenow & Owens, August 2, 1881, for an improvement in

hot-air furnaces. That claim is as follows: "A furnace having *secured* thereto a detachable radiator, which is provided with one or more horizontal flues opening from a dome leading from the furnace, * * * substantially as and for the purposes set forth." The specifications provided that the radiator should be seated in a sand-cup joint, and secured to the furnace by means of a flange, slots, and lugs, which securely locked it in position, it being made detachable by bringing the lugs opposite the slots. The alleged infringing furnace consisted, also, of a detachable radiator and dome, but the radiator was not secured to the furnace by lugs and slots, or by any other equivalent means of securing it against displacement by gas explosion. The defendants claimed that, in view of the state of the art, and the language of the specifications, claim 1 of the letters patent should be limited to the elements used for securing the radiator to the furnace, and denied the infringement.

Edwin H. Risley and *Edward Wetmore*, for complainants.

William Townsend, (*Walter D. Edmonds*, of counsel,) for defendants.

BLATCHFORD, Justice. The words of claim 1 of the Goodenow & Owens patent, "a furnace having secured thereto a detachable radiator," "substantially as and for the purpose set forth," require, by reference to the descriptive part of the specification, that the radiator shall not only be detachable, but shall be secured by the flange, N, the slots, N′, and the lugs, O, which, as the specification says, securely lock it in position, it being made detachable by bringing the lugs opposite to the slots. The state of the art also requires this interpretation of the claim. As the defendants' furnace contains no such means, and no equivalent means of securing the radiator in position, there is no infringement, and the bill must be dismissed, with costs.

EDWARD BARR CO., Limited, *v.* NEW YORK & NEW HAVEN AUTOMATIC SPRINKLER CO.

(*Circuit Court, S. D. New York.* August 18, 1887.)

1. PATENTS FOR INVENTIONS—RIGHT TO PRELIMINARY INJUNCTION—PRESUMPTION OF VALIDITY.
   To entitle a complainant to a preliminary injunction, restraining the infringement of letters patent, there must be a special presumption in favor of the validity of the patents, arising from an adjudication in a federal court, acquiescence by the public, or a successful interference in the patent-office.
2. SAME—FIRE-EXTINGUISHER.
   A preliminary injunction, restraining the infringement of letters patent No. 307,456, November 4, 1884, and No. 357,987, February 15, 1887, for automatic "fire-extinguisher," denied, as nothing appeared in the motion papers showing such a former adjudication, public acquiescence, or successful interference in the patent-office, between the parties or their privies.

3. SAME—PRESUMPTION—PARTIES TO—RESTRICTION OF—INTERFERENCE.
A presumption of validity arising from a successful interference in the patent-office only applies against the parties to the interference and their privies. It does not extend to litigants who do not make the infringing article under a grant from the interferer.

Philip R. Voorhees, for complainant.
Wetmore & Jenner, for defendant.

LACOMBE, J. This is an application for a preliminary injunction to restrain defendants from infringing two patents owned, in whole or in part, by complainant. Both these patents cover improvements in apparatus for the automatic extinguishment of fires. The first patent, No. 307,456, was granted November 4, 1884, to Frank Gray, and it is contended that one claim only of such patent is infringed. The other patent, No. 357,987, was granted February 15, 1887, to William S. Gray, (jointly with Frank Gray,) and it is contended that it is infringed in its entirety.

Before a preliminary injunction to restrain infringement of a patent is granted there must be a special presumption that the patent is valid. That presumption does not arise from the presentation of the unattended letters patent. It may be shown, however, by proof, that the patent has been suitably adjudicated in a federal court, and there held valid, or that its validity has been suitably acquiesced in by the public, or that the patent has successfully undergone an interference in the patent-office. When either of these facts appears, the validity of the patent will be presumed. Walk. Pat. § 665, and cases cited.

As to the first of these patents, (No. 307,456, to Frank Gray,) that namely for an independent pipe, there has been neither adjudication nor interference. The only proof of acquiescence is a general allegation in the bill; no facts bearing on this point are disclosed. Nearly three years have elapsed since its issue, but to what extent specimens of the patented article were made and sold by the patentees, or under their license, or, indeed, whether any one ever made or used such apparatus, does not appear. The complainant, therefore, has not made out such *prima facie* case as entitles him to a preliminary injunction under the first patent.

As to the second patent, there has been no adjudication, and the time since it was issued is so short that, without exceptional circumstances, (which are not shown,) it cannot be claimed that there has been general acquiescence. The complaint relies on a successful interference in the patent-office, to which one Bishop was a party. That such a successful interference is sufficient ground for presuming the validity of a patent is abundantly settled by authority, with one restriction; namely, that such presumption arises only against the parties to the interference, and their privies. In *Greenwood* v. *Bracher*, 1 Fed. Rep. 856; *Smith* v. *Halkyard*, 16 Fed. Rep. 414; and *Pentlarge* v. *Beeston*, 14 Blatchf. 354,—the defendants had been parties to the interference. In *Holliday* v. *Pickhardt*, 12 Fed. Rep. 147, the defendants were the representatives of Caro, who was a party to the interference, and whose product was before the patent-

office. In *Peck, etc., Co.* v. *Lindsay*, 18 O. G. 63, 2 Fed. Rep. 688, the interfering application was put in by one Webb; "patent to be issued to his assignees, Landers, Frary & Clark," who were defendants' vendors. In *Celluloid Manuf'g Co.* v. *Chrolithian Co.*, 32 O. G. 383, 24 Fed. Rep. 275, the plaintiff was the assignee of Sanborn, to whom the patent was granted after an interference declared between him and one Kanouse, "an aplicant for a patent for the same invention, for the benefit and at the expense of the defendants," who "were heard upon the questions involved in the interference case, and were privies to the judgment upon it."

No authority is shown for extending the principle invoked to cover litigants who do not manufacture the alleged infringing article under the grant, assignment, or permit of the interferer, and who did not, either personally or through the interferer, have the opportunity to be heard in the patent-office. In the case at bar, the defendants use, as part of their apparatus, a particular piece of mechanism invented and patented by Bishop, but concededly it has nothing to do with either patent sued on, and is no infringement. Bishop is also in defendants' employ, though in what capacity does not appear: certainly he is not an officer of the company. An affidavit sworn to by him has been read by defendants on this motion. Those facts, however, do not make them his privies. They do not claim the right to manufacture under any grant or permission from him, nor is there anything to show such a community of interest as would warrant the inference that his interference in effect secured to defendants their opportunity to be heard in the patent-office. Motion denied.

ANSONIA BRASS & COPPER CO. *v.* ELECTRICAL SUPPLY CO.

(*Circuit Court, D. Connecticut.* September 3, 1887.)

1. PATENTS FOR INVENTIONS—ELECTRIC INSULATOR—PRIOR STATE OF THE ART.
In letters patent No. 272,660, granted to Alfred A. Cowles, February 20, 1883, for an improvement in insulated electric conductors, the alleged invention was a fire-proof insulator. The wire, having been covered with a layer of fibrous material, was passed through a vessel of metallic paint, and a second layer of fibrous material was added while the paint was fresh, thus forcing the saturation of both layers. The non-combustibility is the result of filling the pores and interstices of the fibrous layers with the metallic paint. In previous English patents, paint had been applied to insulators in connection with inflammable materials, and solely for the purpose of protecting the insulators. It was not shown that, previous to the Cowles invention, paint had been knowingly used, except experimentally, to make a non-combustible insulator: *Held*, that the defenses failed, so far as based upon the previous English patents, and the known use of paint as a fire-proof covering for electric wires.

2. SAME—WANT OF INVENTION.
But it having been shown that, for the purpose of procuring perfect insulation, insulators had been previously composed of a double layer of fibrous material, each being separately painted, and the second layer being applied before the first was dry, *held*, that the Cowles patent was void for want of invention.

Joshua Pusey and *Charles E. Mitchell*, for plaintiff.
M. W. Seymour and *Benj. F. Thurston*, for defendant.

SHIPMAN, J. This is a bill in equity based upon the admitted infringement of letters patent No. 272,660, granted to Alfred A. Cowles, February 20, 1883, for an improvement in insulated electric conductors. The patentee's view of the state of the art at the date of the invention, and of the character and scope of the patented improvement, is given in the specification of the patent, which I quote at length, as follows:

"Before my invention, copper wires had been covered with one or two braidings of cords, and paraffine, tar, asphalt, and various substances had been employed for rendering the covering water-proof and furnishing a proper insulation. With conductors of this character several accidents occurred, in consequence of the conductor becoming heated and setting fire to the insulation. For this reason objections were made to insuring buildings against loss by fire where electric lamp wires were introduced. To render the conductor fire-proof, without interfering with the insulation, led me to invent and manufacture the insulated electric conductors to which the present invention relates, which conductors have gone extensively into use during about a year and a half before the date of this specification.

"I manufacture the said fire-proof insulation of the conductor in the following manner, reference being had to the annexed drawing, which illustrates the devices employed: The wire, *a*, is passed up through the head of a braiding-machine, and a layer of cotton or other threads is placed upon the wire in the ordinary manner. The braiding head, with spools, is indicated at *b*. The covered wire now passes in at the bottom of the vessel, *c*, through a suitable packing, *d*. This vessel, *c*, contains paint; preferably white lead or white zinc, ground in oil, and mixed with a suitable drier. The paint saturates the braided covering, and the surplus runs down the same back into the vessel, *c*, as the braiding progresses. I next apply a second braiding directly upon the paint. For this purpose a second braiding-maching head is employed, the same being shown at *f*. The threads that are braided upon the paint force the paint into the first braided covering, and at the same time the paint oozes through between the threads. Hence the paint is incorporated throughout the braided covering and fills up the pores. The braided covering is rendered even and consolidated by suitable means; such as one or two pairs of grooved rollers, *k*, *k*. In practical use it is found that the covering is of the most reliable character. It is compact and hard, the wire is perfectly insulated, and there is no possibility of inflaming the covering. With intense heat the threads may char, but they will not burn. For these reasons this insulated conductor is preferred to those before made.

"I remark that in the manufacture of this conductor it is preferable to reel the covered wire as it passes from the braiding and painting machine, and then remove the reel from the coil, and hang up such coil in a heated room until it is thoroughly hardened. More than two layers of braiding may be employed, the paint intervening between the layers. Winding with threads or cords may take the place of braiding. If desired, a coat of paint may be applied outside the outer layer of fibrous material, and this may be colored, so as to be used in distinguishing the wires. It is always preferable to braid the second or subsequent coats upon the paint when fresh; but I do not limit myself in this particular, as the paint may be dried, or partially so, before the next layer of braiding is applied. Paint may be applied to the wire before the first braiding. I am aware that wire has been covered with braided threads; also that India rubber, asphaltum, and similar materials have been

applied upon the covering either hot or cold; but one coating of such material was allowed to set or harden before the next layer of braided material was applied. Hence the asphaltum or similar material was not forced into the interstices; and, besides this, all these substances ignite by the wire becoming heated, or fire will follow along upon such covering. I have discovered that ordinary paint, composed of lead or zinc with linseed oil, is practically non-combustible, and it prevents the covering being ignited by the wire becoming hot, if there is a resistance to the electric current. Besides this, fire will not burn along the conductor, as is the case where the fibrous covering is saturated with asphaltum, India rubber, or similar material."

The claims of the patent are as follows:

"(1) The method herein specified of insulating electric conductors, and rendering the coating substantially non-combustible, consisting in applying a layer of fibrous material, a layer of paint, and a second layer of fibrous material upon the paint before it dries or sets, substantially as set forth; (2) an insulated and non-combustible covering for electric conductors, composed of two or more layers of cotton or similar threads, with paint that intervenes between the layers and fills the interstices of the covering, substantially as set forth."

The patentee's statement that after one coating of heated material, like India rubber or asphaltum, had been applied upon the first layer of braided covering of the wire, such coating was allowed to set or harden before the next layer of braided material was applied, is true, but it is not true that it was always so allowed to harden. The second layer of braided covering was often added to the wire while the first coating of water-proof material was in a wet or plastic condition.

Prior to the introduction of electric lamp lights into buildings, a principal object in the insulation of electric wires was their thorough protection against the effect of water or wet air, and therefore such substances as paraffine, gutta-percha, and India rubber were abundantly used to saturate the fibrous covering of the wire. The expert of the plaintiff sums up the state of the art at this date by saying: "It was old to make use of a fibrous covering to the metallic wire, and it was old to saturate that covering with water-proof materials,—such, for instance, as paraffine, pitch, tar, resin, in a melted condition, and also gutta-percha and India rubber in a solution, and in some instances even paint has been made use of. These substances had been used to insulate the conductor electrically, so that the current passing along the wire might not escape by contact of the covering with the support or with any conducting substances." He further truly says, in relation to the numerous English patents which are in the record, that paint had been used "in connection with electric conductors as a protection for an interior waterproofing coating of combustible material, in which case the paint formed or became part of an armor for the electric insulating material. I do not find any instance where the electric conductor itself was insulated, and the coating of fibrous material rendered substantially non-combustible, by paint laid in between the two layers of fibrous material, so that the particles of oxides or carbonates are pressed and bound into the fibers so as to fill the interstices thereof, as set forth in complainant's patent, and secured by the claims thereof."

These patents were generally for land or submarine telegraph cables. The wires which were generally introduced into dwellings or buildings were small wires for conducting an electric current of low tension, such as were necessary for annunciators, or for burglar alarms, and after the discovery of the useful properties of paraffine that article was almost universally used in this country to saturate the fibrous coverings of inside electric wires. When buildings began to be lighted by means of electric lamps, and it became necessary that wires for inside use should convey currents of high tension, the use of wires covered with inflammable non-conductors became dangerous. If, from any cause, the passage of the current was checked, and the wires became overheated, the inflammable covering melted or took fire, and endangered the safety of the building. The use of paraffine-covered wires inside buildings was forbidden by the board of fire underwriters in the city of New York. To guard against this danger, the patentee produced his patented conductor. The covering was not merely an insulator, but was a non-combustible insulator. It is a success, has superseded the use of paraffine-covered wire, and is universally used for inside wiring for electric lamps.

The English patents, a large number of which were introduced, are not an anticipation. They are all simply for electrical insulation, and are expedients to guard against the dangers from water, and not from fire. Where any of them use paint, such use is in connection with inflammable materials, and is simply as a protection for the water-proof covering. Neither was it shown that, before the date of the invention, which was in the spring of 1881, paint had been knowingly used, except experimentally, to make a non-combustible insulator. The defense based upon the English patents, and upon the known use of paint as a non-combustible material for covering electric wires, must fail.

The most important testimony which was offered by the defendant was that of Edwin Holmes, the president of the Holmes Burglar Alarm Telegraph Company, who had been engaged in that business for 25 years, and had thereby become familiar with the methods of the manufacture of electric wires. He testified as follows:

"*Interrogatory* 2. In your business has it been necessary for you to use insulated electric conductors? and, if so, please describe the manner in which those conductors were insulated, beginning back as early as you can remember. *Answer.* It has. When I first commenced using them, the wire was insulated by winding a thread larger or smaller, as the case might be, around the wire, and that thread was covered with paint. All of my wire was insulated in that way until paraffine was substituted for the paint. *Int.* 3. How was the paint applied? *A.* I think at first it was applied with a brush. I applied it by drawing it through a vessel containing paint, and then through a piece of thick rubber or gutta-percha, which removed the surplus paint, and left a smooth surface on the thread which covered the wire. * * * *Int.* 9. In your business did it ever become necessary to secure as perfect insulation of wire as possible, and, if so, what method did you take of accomplishing that result? In answering this question, please confine your answer to the use of fibrous material and paint. *A.* I did. I accomplished it sometimes by covering the wire with a thicker thread, and two coats or more of paint; sometimes by a thread covering, and a coat of paint on that. *Int.* 10.

Was that second fibrous covering and second coat of paint placed upon the first covering and paint while it, the first covering of paint, was in an 'undry' or 'unset' condition? (Complainant's counsel objects because the question is leading and suggestive. Question withdrawn, and the following interrogatory substituted therefor:) *Int.* 10. Please describe the condition of the first coating of paint when the second coating of fibrous material and paint was put upon it. *A.* The first coat was partially dried, so as to keep its place, but would admit of an impression from the next covering of thread. *Int.* 11. Please state a date anterior to which you are willing to swear positively you placed, as you have described in answer to Int. No. 9, the second covering of thread and the second coat of paint upon the wire, in order to perfect the insulation. *A.* I did it as early as 1860, to the best of my remembrance."

I cannot doubt that Mr. Holmes used wire covered with a double coat of thread; each layer being painted, and the second layer being applied before the first painted layer had become dry. It will be observed that the method of painting was not the method of the patent, and that the object was not to make the insulation fire-proof, because he abandoned the painted wire for paraffine wire. The object of the double coat was to produce perfect insulation.

In the spring of 1881, when the necessity had arrived for a non-combustible insulator, Mr. Cowles used first a double coated, outside painted wire, but, finding that the insulation was not perfect, next employed the process of recoating a coated and painted wire while the paint was still fresh. The question is whether the process was patentable; whether, when it was old to cover an electric wire with a double layer of thread, each layer painted, the second layer being placed upon an undried first layer, for the purpose of thoroughly insulating the wire, it was patentable to braid or wind the second layer upon a freshly painted layer, for the purpose of filling the interstices of the layers with a mass of paint, and thereby making the covering a non-combustible insulator.

At the date of the invention, the public had had an electric wire insulated by means of a double covering of painted thread, but the public did not know that such a covering was also non-combustible. Although it did not know it, it had had a non-combustible insulator; for I cannot doubt that Holmes' double covering was non-combustible in the same sense in which Cowles used the term. The thread covering of the Holmes' wire was loaded with paint. It may be said that two facts are assumed, without adequate proof,—one, that Holmes used the double covered and painted wire at all; and, next, that it was non-combustible. In reply to such a suggestion, it is manifest that the Holmes wire, either single or double covered, was one that would naturally be used in a business which required single wires, and that, in the multiform methods of insulation, his method was an obvious and simple one, as shown by the manner in which covering composed of braided and saturated thread was subsequently made. A less amount of evidence is required to satisfy the mind of so probable a fact than would be required in regard to a fact in its nature quite improbable. It is also true that Mr. Holmes' means of knowledge in regard to the manner of constructing his wires

were exceptionally good. In regard to the non-combustibility of the Holmes wire, I have no idea that the Cowles process is the only one which can make, by means of paint, a braided or wound thread covering non-combustible. The only requisite is to fill the interstices and pores of the thread with metallic paint. That the Holmes process upon the wires which he used was adequate for the purpose seems to me quite evident.

If Cowles had made his insulated covering in precisely the same manner that Holmes did, it could not have been successfully claimed that the fact that Cowles had discovered what neither Holmes nor the public knew, viz., that the Holmes covering was non-combustible, made the Cowles covering patentable. The public already had the article in use as a covering of an electric wire for purposes of insulation, and also had, in the article, the additional benefit of non-combustibility. The case is not that of *Colgate* v. *Telegraph Co.*, 15 Blatchf. 365, in which the patentee first applied to practical use his discovery that gutta-percha was a non-conductor of electricity. It was not shown that gutta-percha had ever been used to cover an electric wire, though metallic wires which were used for other purposes had been covered with it. The case rested upon the fact that the inventor first used gutta-percha as an insulator of electric wire.

The question then arises, was the change in the method or process a patentable one? Holmes wound the wire, then painted, then wound again, and repainted. Cowles wound, subjected the wound wire to a bath of paint, then wound upon the freshly painted coat. Any one of the various old methods by which the covering is compelled to absorb a quantity of paint could be selected. The one which Cowles adopted is one which had been known in the analogous process of insulating telegraphic cables and electric wires, and was familiar to the skilled mechanic in the art of manufacturing electric cables. I see, in the adoption of this method, only a skillful selection of one of a number of methods at the hand of the patentee, and neither the creation of a new method, nor the exercise of any inventive genius in the selection.

The conclusion is that Mr. Cowles met the need of the public by furnishing to it a safe and economical non-combustible covering for electric wires, but that the history of the article is such that he cannot be called an inventor, within the meaning of the statutes upon the subject of patents. The bill is dismissed.

NASHUA LOCK CO. *v.* NORWICH LOCK MANUF'G CO.

(*Circuit Court, D. Connecticut.* September 2, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT.

In letters patent No. 327,820, issued to Emery Parker, October 6, 1885, for an improved door-knob attachment, each knob had an independent shaft. One shaft, at its free end, had a shoulder, and was inserted in a hollow shank on the other shaft, conforming in shape to the spindle, except that on one side was an enlargement to allow the insertion of the spindle obliquely past a pin projecting inwardly from the side of the shank opposite the enlargement. The pin interlocked with the shoulder on elevating the knob. In letters patent No. 318,684, granted to Charles H. Beebe, May 26, 1885, the spindle, which at one or both ends was provided with a locking hook, was inserted in the knob-neck, one side of which was enlarged so as to allow the spindle to pass a locking-hook on the enlarged side of the neck. Elevation of the knob interlocked the hooks. *Held*, in view of the state of the art, that the Parker patent is limited to a device in which the enlargement is opposite the pin, and that the Beebe patent is no infringement.

Wm. Edgar Simonds, for plaintiff.
Charles E. Mitchell, for defendant.

SHIPMAN, J. This is a bill in equity based upon the alleged infringement of the first, second, third, and fifth claims of letters patent No. 327,820, issued to Emery Parker, October 6, 1885, for an improved door-knob attachment. The defendant manufactures door-knobs under letters patent No. 318,684, granted to Charles H. Beebe, May 26, 1885. The old form of connecting door-knobs to each other was by fastening the two knob shanks to the connecting spindle by side screws. Letters patent were issued December 12, 1882, to Milton C. Niles, for door-knob shanks, which were connected together upon a new principle. The shaft upon which the two knobs were mounted was divided into two parts. An aperture was made in the side of one of the shanks, which was a tubular one; the inner end of the opposite shank was made a little smaller than its fellow, so that it would enter the latter, and was provided with a short pin adapted to enter the aperture. Preferably, the end of the shank which contained the lug was oval shaped, so that it could be inserted, when held at an angle, into the other shank far enough to permit the pin to enter the aperture, and then could be brought into line with its fellow. The specification also says, and a drawing shows, that that side of the shank which is opposite the pin could also be cut down slightly, so as to present the appearance of a rabbet, leaving enough of the shank to enter and hold in the end of the opposite shank when the pin engages in the aperture. This was the better method of uniting the two shanks. The specification also shows that, for additional security, another lug could be made on the outside of one shank, which would enter into a corresponding notch on the edge of the inner end of the other shank. The principle of the device was that each knob had an independent shaft or spindle, and that the two shafts were fastened together by means of a lug upon one end of one shaft, interlocking

with an aperture or shoulder upon the end of the other shaft, the smaller shaft entering the larger one when inserted angularly.

The specification of the Parker patent describes the construction of so much of his device as is involved in the present controversy, as follows:

"The knob, *b*, is fast to one end of the spindle, and may be made integral with it, if desired, and the opposite end of the spindle preferably has on one edge a bevel, a^1, and also near this end one or more openings, a^2, that may be holes drilled through the spindle, as shown, or mere indentations made in any convenient way, so long as each affords a shoulder that serves as a means of engaging a lug on the shank of the other knob. This latter knob, *c*, has a hollow shank, *d*, the central opening, d^1, in which conforms to the spindle in outline and size in cross-section, except at the end of the shank, where the opening has an enlargement, d^2, on one side. On the side of the opening, within the shank, and opposite the enlargement, d^2, an inward projecting pin, d^3, is secured or formed on the wall of the opening. In Figs. 1 and 2 the relative position of these parts is illustrated, and the method of attaching the knob, *c*, to the shank is as follows: The spindle having been thrust through the hub of a lock or latch from one side, the removable knob, *c*, is held in the oblique position indicated by the dotted outline, and placed upon the end of the spindle, the enlargement, d^2, affording the spindle room to enter past the pin, d^3, until opposite an opening, a^2, in the spindle, and into which the pin is slipped by moving the knob, *c*, until its axis is in line with that of the spindle. * * * In order to make a close fit between the parts, the inner end of the shank on the side opposite to that bearing the lug has a rounded surface, d^4, and the lug, d^3, is also slightly beveled on the back side, to enable the parts to more readily press each other, and come to a firm bearing."

The claims which are said to be infringed are as follows:

"(1) A knob with a connected spindle, the latter having near its free end an engaging shoulder or opening, in combination with a removable knob having a shank with a spindle-socket, and an inward projecting lug or pin within the socket, the latter having an enlargement opposite the lug, all substantially as described.

"(2) In combination with a knob and connected spindle having the engaging shoulder or opening, a removable knob having a shank with a spindle socket, a rounded end on the shank, an engaging lug within the socket, and an enlargement opposite the lug, all substantially as described.

"(3) In combination with a knob and connected spindle having the engaging shoulder or opening and a beveled end, a removable knob having a shank with a spindle-socket, an engaging lug within the socket, and an enlargement of the socket, all substantially as described."

"(5) In combination with a lock-hub, having a spindle hole, a spindle adapted to fit loosely within said hole, and bearing near its free end an engaging shoulder or opening, and a removable knob having a shank with a spindle-socket, and an engaging shoulder within the socket, whereby the said spindle and knob may be removably connected to each other, and the rose or like means for holding said knob and spindle in alignment with each other, all substantially as described."

The Parker device adopts the principle of the Niles attachment, and unites the two shafts by inserting the end of the spindle into the hollow shaft of the spindle-socket, one being held in an oblique position until the entrance is effected, and locks them together by the slipping of a pin in the spindle-socket into a corresponding opening in the spindle.

If any inventive genius was called into exercise in a modification of the mechanical means which employ the simple principle which Niles introduced, the patent for such modification must be strictly confined to those details of construction which were the result of invention. The Parker device was a more simple and economical one than the Niles attachment, but the only thing which could make it patentable was the method of construction of the hollow shank, by which the full-sized spindle was permitted easily to enter the shank, and pass beyond the pin in its side, and which consisted in the enlargement or cut-away portion at the end of the hollow shank opposite the pin. If the pin was to be in the hollow shank, there must naturally be an enlargement at the end of the opening, the only question being as to the place of the enlargement, so that it cannot be that the claims include any enlargement of the spindle. The Parker device required that the full-sized spindle should pass beyond the pin, and then be made to engage with it, and a cut-away portion of the shank opposite the pin was a convenient way of effecting the desired method of construction. The patent is limited to a device in which the enlargement is opposite the pin. The Beebe device is a simple one. Its spindle is provided at one or both ends with a locking hook, and its knob necks have at their free ends a locking hook, which, by elevating the knob end of said neck or necks is slipped over the spindle hook. The knob neck, on the side containing its locking hook, is enlarged, which enlargement permits the entrance of the spindle hook.

There is no infringement, and the bill is dismissed.

OTT *v.* BARTH.

(*Circuit Court, N. D. Illinois.* July 5, 1887.)

PATENTS FOR INVENTIONS—IMPROVEMENTS IN SOFA BEDSTEADS—INFRINGEMENT. The second claim of a patent issued to William Ott, on the twenty-third January, 1887, for an "improvement in sofa bedsteads," which is as follows: "In combination with the sections, A and B, the folding rods, F, F, and head-boards, D and E, supporting the latter when extended to sustain the bolster, substantially as set forth:" *held* not to be infringed by a device which makes the folding rods rest upon the end-pieces of the lounge-frame, instead of upon head-boards, which are dispensed with.

C. P. Jacobs and *Dyrenforth & Dyrenforth*, for complainant.
William Zimmerman, for defendant.

BLODGETT, J. This is a bill in equity for an injunction and accounting by reason of the alleged infringement of a patent issued to the complainant on the twenty-third day of January, 1877, for an "improvement in sofa bedsteads." The improvement covered by this patent has reference to that class of sofas or lounges which may be opened or extended

so as to form a bed, and embraces two features: *First*, an adjustable head-piece,—that is, an arrangement whereby the head-piece of the lounge or sofa can be raised or lowered, within certain limits, at the will of the person using it; and, *secondly*, folding rests for the pillows or bolsters, when the lounge is used as a bed. The controversy in this case has reference solely to the latter feature, and does not involve in any way the adjustable head-piece.

Infringement is only charged in this case as to the second claim of the patent, which is in the following words:

"In combination with the sections, A and B, the folding rods, F, F, and head-boards, D and E, supporting the latter, when extended to sustain the bolster, substantially as set forth."

The lounge or sofa, under this patent, is constructed in two sections, the fixed section resting upon legs, and a folding section hinged to it so as to turn over in such manner that the under-side of the folding section should rest upon the top of the fixed section; and the folding rods, F, as they are called, consisting of iron rods bent U-shaped, the lower ends of which are pivoted to the sides of the frames of the respective sections, so that they can be folded down into the inside of the frames when the sections are closed together, for the purpose of forming a sofa or lounge, and folded outwardly when the lounge is to be used for a bed, so as to form a rest for the bolster or pillows used with the bed; one of the utilities, if not the main one, of these folding bolster rests, being to extend somewhat the length of the bed beyond the length of the sofa, as these folding rods, F, extend beyond the head of the sofa or lounge.

The defenses set up are (1) non-infringement; (2) that the patent is void for want of novelty.

The proof shows a large number, comparatively speaking, of prior devices for folding sofa beds, in which folding head-boards or head-pieces are shown; so that it may be assumed, as one of the established facts in this case, that folding bolster-rests or pillow-rests, for this class of beds, were not new with this inventor. In connection with the adjustable head-piece of this lounge, the patentee uses what he calls the head-boards, D and E, which are boards fastened to the head end of the lounge, outside of and to the end-pieces of the frames of the respective sections; and in describing the use of the folding rods, F, F, he says they may be turned up out of the recesses in the sections where they rest, when the sections are closed so as to rest on the head-boards, to sustain the bolster as shown in Fig. 1 of the drawings; and the illustration of this operation of these bolster-rests shows these folding rods resting upon the head-boards, D and E, extending beyond the head of the lounge, so that the bolster and pillows would be even with, if not beyond, the end-pieces of the lounge.

The defendant makes a lounge in which he uses folding-rods constructed and operating precisely like the folding-rods in the complainant's patent, except that instead of resting upon the head-boards, as shown in the complainant's patent, they rest upon the end-pieces of the lounge-frame; the only object of their resting upon the head-board or lounge frame being to hold these rods at the proper angle to sustain the

pillows or bolster in a comfortable position for the occupant of the bed. It is obvious that the end-pieces of the defendant's lounge perform the same function in his mechanism as do the head-boards in the complainant's device. In both cases the head-boards or end-pieces are only rests or fulcrums to hold the folding-rods at the proper angle. But the difficulty in this case—and it seems to me an insuperable one—is that the complainant has made these head-boards, D and E, elements in the claim of his patent which it is alleged the defendant infringes. This claim covers three elements: *First*, the sections, A and B, which are the folding sections of the lounge; *second*, the folding-rods, F, F; and, *third*, the head-boards, D and E; and the function of the head-boards of this claim is to support the folding-rods when extended to sustain the bolster.

It is so well settled that it hardly requires authorities at this time that the omission of one ingredient of a combination covered by any claim of a patent averts any charge of infringement based on that claim. Walker, Pat. § 349.

It is true, as already stated, that the end-pieces of the defendant's lounge perform the same office with reference to these folding-rods that is performed by the complainant's head-board; but the complainant has seen fit to make these head-boards elements of his patent. He has brought them into his combination as essential parts of it; and the defendant has merely left out these head-boards, and constructed his bed, by pivoting these folding-rods upon the sides of the frames of the sections, dropping them slightly lower down than the complainant's construction shows, and resting them upon the end-pieces of his frame. In other words, he has wholly dispensed with the head-boards shown in the complainant's patent. He has not substituted what is an equivalent for the head-boards in the complainant's combination, but has dispensed wholly with the head-board, and has used the end-pieces, which are not only in the complainant's lounge, but probably all other lounges, as the fulcrum on which his folding-rods rest; so that the defendant cannot be said, it seems to me, to use the combination covered by this second claim because he does not use the head-boards, but accomplishes the same result without their use. He throws the head-boards of complainant's patent away, and uses the portions of the structure which are left, without substituting anything in the place of the head-board which he has rejected. As is said in *Water-Meter Co.* v. *Desper*, 101 U. S. 335:

"It is a well-known doctrine of patent law that the claim of a combination is not infringed if any of the material parts of the combination are omitted. It is equally well known, if any one of the parts is only formally omitted, and and is supplied by a mechanical equivalent performing the same office and producing the same result, the patent is infringed."

Here the defendant omits one of the elements of the complainant's combination, and substitutes nothing for it, only using what he found in the complainant's lounge, and in other lounges with these head-boards left out. It seems to me, therefore, the end-pieces of these lounge-frames are not to be considered as the equivalent of the head-boards in this claim of complainant's patent. Complainant saw fit to make

these head-boards an element in his combination. They were in his lounge for other purposes, and he saw fit to appropriate them to the purpose of these folding-rods, and has a patent upon that in combination with the other parts of this lounge; and, having elected to make these head-boards an element in his combination, he can only claim an infringement when the head-board, or some colorable substitute for them, is used.

It is, perhaps, unfortunate for this patentee that he did not see that any rest which would hold the folding-rods at the proper angle was just as useful as the head-boards, and it would hardly seem possible that a mechanic looking at a drawing or model of his lounge could have escaped the observation that the folding-rods might rest just as well upon the end-pieces of the frames as upon the head-boards; and therefore he might, if he had seen fit to do so, have covered the idea of resting the folding-rods upon either the head-boards or end-pieces of his frame. In other words, any rest which would hold the folding-rods at the required angle might have been properly considered as his invention, if he had claimed it; but complainant saw fit to take his patent, so far as this feature of his device is concerned, upon the head-boards as an essential element of his structure, and the court can only protect him in what he has so claimed.

I am therefore reluctantly impelled to the conclusion that this defendant does not use the complainant's patent, so far as it is covered by the second claim. The bill is therefore dismissed for want of equity.

AUSABLE HORSE-NAIL CO. *v.* NEW HAVEN HORSE-NAIL CO. and others.

SAME *v.* NEW HAVEN NAIL CO. and others.

(*Circuit Court, D. Connecticut.* August 22, 1887.)

1. PATENTS FOR INVENTION — MANUFACTURE OF HORSESHOE NAILS — RESTRICTION OF CLAIM — COMBINATIONS.

   In an action for infringement of claim 1 of letters patent No. 139,332, granted the National Horse-Nail Company, as assignee of Robert Ross, May 27, 1873, for an improved machine for beveling and trimming horseshoe nails, consisting of a constantly revolving feed-screw, with a continuous and non-intermittent motion, *held* that, in view of the prior state of the art and the language of the specifications, the claim must be restricted to the particular elements of the combination therein, and that this claim was not infringed by a device for beveling and trimming horseshoe nails, which required an intermittent feed.

2. SAME.

   In an action for infringement of claim 2 of letters patent No. 177,237, granted Nelson W. Goodrich, May 9, 1876, for an improved machine for beveling and trimming horseshoe nails, consisting of a horizontal and intermittent carrier ring, operating on a stationary ring, and provided with teeth projecting downward below its lower surface, serving to retain it in place, as well also for carrying and holding the nail blanks to the dies, *held* that, in view of the prior state of the art, and the language of the specifications, the

claim must be restricted to the particular elements of the combination therein, and that this claim was not infringed by a device for beveling and trimming horseshoe nails, which consisted of a horizontal, intermittent carrier ring, without such projecting teeth.

In Equity.

This is an action for alleged infringements of letters patent No. 139,332, granted to the National Horse-Nail Company, as assignee of Robert Ross, May 27, 1873, and No. 177,237, granted to Nelson W. Goodrich, May 9, 1876, for an improved machine for beveling and trimming horseshoe nails. Complainants charged that the alleged inventions in these two patents were capable of conjoint use in one machine, and that the defendants had so used them, and prayed for an injunction and an accounting.

The Ross patent described a machine for beveling and trimming the points of horseshoe nails, and contained eight claims of novelty; but, under the complainant's proof, the infringement was restricted to the first claim, which was for a combination of a constantly revolving feed-screw, and a bar parallel to it, and point beveling dies, so arranged that, while the operation of the dies was intermittent, their movement was so timed as to operate on the nail blanks without practically stopping them in their passage through the machine.

The Goodrich patent also described an improved machine for beveling and trimming horseshoe nails, containing three claims; but by complainant's proof the infringement was restricted to the second claim, which was for a carrier consisting of a horizontal and intermittent carrier ring, resting on a stationary ring, and provided with teeth projecting downward below its lower surface, serving to retain it in its place on the stationary ring, and also adapted for carrying and holding the nails to the dies. The defendants' machine consisted also of an intermittent carrier ring, operating in a horizontal plane, but was not provided with the downward projecting teeth, and the beveling machine or dies operated while the nail blanks were held at rest. The defendants, in their answer and proofs, claimed that, in view of the prior state of the art, and the language of the specifications, each of the claims in this controversy is restricted to the particular elements of the combination therein recited, and deny that they employ these particular elements.

Gifford & Brown, for complainants.

Mr. Mitchell and *E. H. Rogers*, for defendants.

BLATCHFORD, Justice. Only claim 1 of the Ross patent, No. 139,332, is alleged to have been infringed, and only claim 2 of the Goodrich patent, No. 177,237, is alleged to have been infringed. In view of the state of the art, and of the language of the specification of the Ross patent, claim 1 of that patent must be restricted to the particular elements of the combination therein recited. The constantly revolving feed-screw of the Ross patent, with its continuous and non-intermittent motion, cannot be used in combination with the devices of the defendants' machine, which require an intermittent feed, and perform their operations while the nail

blanks are at rest. In view of the state of the art, and of the language of the specification of the Goodrich patent, claim 2 of that patent must be restricted to the particular elements of the construction therein recited. The "carrier" of claim 2 is the ring of claim 1, which rotates, and is provided with the downwardly projecting teeth. The defendants' ring has no such teeth.

Each of the two bills is dismissed, with costs.

AUSABLE HORSE-NAIL CO. *v.* ESSEX HORSE-NAIL CO. and others. (Two Cases.)

SAME *v.* SARANAC HORSE-NAIL CO. and others. (Two Cases.)

(*Circuit Court, N. D. New York.* August 22, 1887.)

Benj. F. Thurston and *Livingston Gifford*, for complainants.
Arthur v. Briesen, for defendants.

In these cases the same questions as in *Ausable Horse-Nail Co.* v. *New Haven Horse-Nail Co.*, *ante*, 92, were determined, and the same opinion filed.

CELLULOID MANUF'G CO. *v.* CELLONITE MANUF'G CO.

(*Circuit Court, D. New Jersey.* July 12, 1887.)

1. TRADE-MARK—NEWLY-COINED WORD.
   The plaintiff was incorporated in 1871, by the name of the "Celluloid Manufacturing Company," and from that time used its corporate name in the manufacture and sale of various compounds of pyroxyline, which it designated as "celluloid," to distinguish it from similar compounds made by others. The word "celluloid" was originally coined and used to a limited extent by certain individuals who assigned their interests in the same to the plaintiff, when incorporated, and the plaintiff from that time stamped said word on the articles manufactured by it, and registered the word in the patent-office in 1873, and again in 1883. The defendant was incorporated in 1886, by the name of the "Cellonite Manufacturing Company," the corporators having been previously associated under a different name, and prepared to manufacture and sell compounds of pyroxyline under the name of "cellonite," stamped with said word; which compounds they had previously designated as "pasbosene," and by other names. The plaintiff thereupon filed its bill to restrain infringement of its trade-mark. *Held*, that the similarity was sufficient, under the circumstances, to mislead an ordinarily unsuspecting purchaser, and that the plaintiff was entitled to the relief sought.
2. SAME—CORPORATIONS.
   In dealing with corporations, an unlawful imitation of a name is subject to the same rules of law which apply where the parties are unincorporated firms or companies.
3. SAME—ABANDONMENT.
   Where a word is coined and used as a trade-mark, and stamped on articles manufactured from a certain substance, the fact that such word subsequently

becomes the common appellative of such substance cannot impair the rights acquired in the word, and while others can use it to designate the product, they cannot apply it in any way as a trade-mark.

4. SAME.

The existence of companies doing business under the names of the "Celluloid Brush Company," the "Celluloid Collar & Cuff Company," and the like, which names refer to special branches of trade, cannot be set up to show acquiescence in the public use of the general word "celluloid."

Motion for Preliminary Injunction.

Rowland Cox, for the motion.

John R. Bennett, *contra*.

BRADLEY, Justice. The bill of complaint in this case states that the complainant was incorporated under the laws of New York in 1871, and has ever since that time used its corporate name in carrying on its business of the manufacture and sale of various compounds of pyroxyline, adapted to different uses and purposes, and that its name has become of great consequence in the good-will of its business, its standing, and the reputation of its goods; that, in order to designate its said manufactured product, and to distinguish it from similar compounds manufactured by others, the complainant, from the first, adopted and used the word "celluloid," which had never been used before, except to a limited extent by Isaiah S. and John W. Hyatt, by whom the word was coined, and who were engaged in the same manufacture at Albany, New York, and used the word as a trade-mark; and when complainant was incorporated the said Hyatts entered into its employ, and assigned to it all their rights relating to the business, good-will, and trade-mark; and complainant has ever since used the word "celluloid" as its trade-mark, by impressing or stamping it into the surface of the articles made from the manufactured product, whereby it has acquired a high reputation as denoting complainant's manufacture, and indicating goods of superior quality, as compared with like goods sold by other parties under the names of chrolithion, lignoid, pasbosene, etc.; that in 1873 complainant caused said word "celluloid" to be registered as a trade-mark in the United States patent-office, under the act in such case made and provided, and again registered in 1883, under the subsequent act. The bill then complains that the defendant, in order to deprive the complainant of its business and its rights, and to create an unfair competition, since the first day of January, 1886, has adopted the name of Cellonite Manufacturing Company, with intent that it should be mistaken for complainant's name, and intends to use it in the transaction of business similar to that of the complainant; that the similarity of names will embarrass and obstruct the business of the complainants, cause confusion and mistake, divert complainant's custom, reduce its sales, and deceive the public; that the defendant has commenced to erect works on an extensive scale for the manufacture of a compound of pyroxyline, to be put on sale under the name of "cellonite," a name purely arbitrary, and adopted to enable the defendant to sell the article as complainant's produce; that the corporators

who formed the defendant company had previously been engaged in the manufacture of pyroxyline compounds under the name of "pasbosene," "lignoid," "chrolithion," etc., but selected the new name, "cellonite," in order to trade upon the complainant's reputation, and to sell its product as the complainant's, and intends to stamp its goods with the word "cellonite," in imitation of the stamp on complainant's goods, in order to sell them as complainant's manufacture. The bill prays an injunction to prevent the defendant from using the word "cellonite," or any imitation of the word "celluloid." The allegations of the bill are verified by affidavits and exhibits.

The defendant has filed an answer, in which it denies that the complainant has any right to the exclusive use of the word "celluloid;" alleges that many companies use it in their names, as "Celluloid Brush Company," "Celluloid Collar & Cuff Company," etc., which have been allowed by complainant without objection. It admits the selection and use of the word by the complainant, but denies any exclusive right to the use of it, because it has become a part of the English language to designate the substance celluloid, and the impression of the word on the articles manufactured by complainant merely indicates the substance of which they are composed. It denies that the word "cellonite" was adopted for the purpose of imitating the name of complainant, or the name stamped on the complainant's goods. It avers that the word was adopted as far back as 1883, and has been continuously used ever since, not to imitate the word "celluloid," but selected as better describing the exact nature of the pyroxyline compound used by the defendant; the same being a compound of the well-known substances cellulose and nitre, "cellonite" being merely a compound derivative of those two words; that the defendant abandoned the use of the words "pasbosene," "lignoid," etc., because those words gave no information as to the chemical constituents of the compounds designated by them. It alleges that it has for four years been engaged in manufacturing and selling goods marked "Cellonite," and until now no attempt has been made to interfere with it. To show that the word "celluloid" is a word of common use, the answer cites various patents and books, (but all subsequent to 1873,) also the rules of the patent-office as to the classes of inventions, in which one of the sub-classes is "Celluloid."

The only verification of the answer is the oath of J. R. France, an officer of the company, who swears that the contents are true, so far as they are within his knowledge; and, so far as stated on information and belief, he believes them to be true.

The answer virtually admits that the corporators of the defendant had been engaged, before the formation of the defendant company, in the same manufacture, and had called their produce, "pasbosene," "lignoid," etc.; and that they adopted the word "cellonite," instead of those designated, for the reason, as the answer says, that it is more expressive of the constituents, *cellulose* and *nitre*. This is a somewhat singular explanation. The termination "ite," in chemistry, has a technical application nothing to do with the word "nitre;" and, notwithstanding

the denial of the answer, (which, however, cannot be regarded as verified by oath,) the inference strongly presses itself that the name was adopted on account of its similarity to "celluloid," as the complainant charges.

In alleging that the word "cellonite" has been used by the defendant since 1883, the defendant, which was not incorporated until May, 1886, identifies itself with the previous association, shown by the affidavits to have been called the "Merchants' Manufacturing Company," composed of the same corporators, who abandoned the old name, and assumed the new one, for some purpose or other. The explanation given for so doing is not entirely satisfactory. Here are two facts standing side by side: *First*, the fact that the Celluloid Manufacturing Company,—an old, well-established concern,—is doing a large and prosperous business, with a good-will resulting from many years of successful effort, and calls the product of its manufacture "celluloid," which has become such a popular designation that, as the defendant says, it has become incorporated in the English language; *secondly*, the fact that the Merchants' Manufacturing Company, which produces substantially the same article, and calls it by different names, "pasbosene," "lignoid," etc., (with what success we are not told,) suddenly changes its name to that of Cellonite Manufacturing Company, and calls its produce "cellonite." It will take a great deal of explanation to convince any man of ordinary business experience that this change of name was not adopted for the purpose of imitating that of the old, successful company.

It is the object of the law relating to trade-marks to prevent one man from unfairly stealing away another's business and good-will. Fair competition in business is legitimate, and promotes the public good; but an unfair appropriation of another's business, by using his name or trade-mark, or an imitation thereof calculated to deceive the public, or in any other way, is justly punishable by damages, and will be enjoined by a court of equity. The question before me is whether the law has been violated in the present case.

First. As to the imitation of the complainant's name. The fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the names of private firms or partnerships. The defendant's name was of its own choosing, and, if an unlawful imitation of the complainant's, is subject to the same rules of law as if it were the name of an unincorporated firm or company. It is not identical with the complainant's name. That would be too gross an invasion of the complainant's right. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law. Judged by this standard, it seems to me that, considering the nature and circumstances of this case, the name "Cellonite Manufacturing Company"

is sufficiently similar to that of the "Celluloid Manufacturing Company" to amount to an infringement of the complainant's trade name. The distinguishing words in both names are rather unusual ones, but supposed to have the same sense. Their general similarity, added to the identity of the other parts of the names, makes a whole which is calculated to mislead.

Secondly. As to the complainant's alleged right to the exclusive use of the word "celluloid" as a trade-mark, and the defendant's alleged imitation thereof. On this branch of the case, the defendant strenuously contends that the word "celluloid" is a word of common use as an appellative, to designate the substance celluloid, and cannot, therefore, be a trade-mark; and, *secondly*, if it is a trade-mark the defendant does not infringe it by the use of the word "cellonite."

As to the first point, it is undoubtedly true, as a general rule, that a word merely descriptive of the article to which it is applied cannot be used as a trade-mark. Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word "flour" as his trade-mark, and prevent others from applying it to their packages of flour. I am satisfied from the evidence adduced before me that the word "celluloid" has become the most commonly used name of the substance which both parties manufacture, and, if the rule referred to were of universal application, the position of the defendant would be unassailable. But the special case before me is this: The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown, and made it their trade-mark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted, it was clearly a good trade-mark. The question is whether the subsequent use of it by the public, as a common appellative of the substance manufactured, can take away the complainant's right. It seems to me that it cannot.

As a common appellative, the public has a right to use the word for all purposes of designating the article or product, except one,—it cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to and stamping it upon the articles. The complainant alone can do this, and any other person doing it will infringe the complainant's right. Perhaps the defendant would have a right to advertise that it manufactures celluloid. But this use of the word is very different from using it as a trade-mark stamped upon its goods. It is the latter use which the complainant claims to have an exclusive right in; and, if it has such right, (which it seems to me it has,) then such a use by the defendant of the word "celluloid" itself, or of any colorable imitation of it, would be an invasion of the complainant's right. As a trade-mark it indicates that the article bearing it is the product of the complainant's manufacture. If another party uses it in that way, it indicates a falsehood, and is a fraud on the public, and an injury to the complainant. The essence of the law of trade-marks is that one man has no right to palm off, as the goods or manufacture of another, those that are not his. This is done by using that other's trade-mark, or adopting any other means

or device to create the impression that goods exhibited for sale are the product of that other person's manufacture when they are not so.

The subject is well illustrated by the case of *McAndrew* v. *Bassett*, 4 De Gex, J. & S. 380. The plaintiffs produced a new article of liquorice, and stamped the sticks with the word "Anatolia," some of the juice from which they were made being brought from Anatolia, in Turkey. The article becoming very popular, the defendants stamped their liquorice sticks with the same word. Being sued for violation of plaintiff's trade-mark, one of their defenses was that no person has a right to adopt as a trade-mark a common word, like the name of a country where the article is produced. Lord Chancellor WESTBURY said:

"That argument is merely the repetition of the fallacy which I have frequently had occasion to expose. Property in the word, for all purposes, cannot exist; but property in that word, as applied by way of stamp upon a particular vendible, as a stick of liquorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public." Page 386.

Another case throwing light on the subject is that of *Singer Machine Manuf'g Co.* v. *Wilson*, 3 App. Cas. 376. There the defendant, a manufacturer and vendor of sewing-machines, inserted in his price-list, among other articles for sale, the "Singer Sewing-Machine," and sold machines by that name, but having his own trade-mark upon them. The plaintiff sued him on the ground that by a Singer sewing-machine was understood in the community a sewing-machine made by Singer, the inventor, or by the plaintiff, his assignee and successor in business. The plaintiff contended, therefore, that the advertisement was a fraud on the public, and an invasion of its exclusive right to the name "Singer." The defendant contended that the terms "Singer Sewing-Machine" meant a particular kind of machine, (which he described,) irrespective of who manufactured it; that the word "Singer" had come to be descriptive in its character, and would not have the effect attributed to it by the plaintiff. The judges who delivered opinions in the case, held that if the use of the name "Singer" gave the public to understand that the defendant sold machines made by the plaintiff, it was a wrong done to the plaintiff; but that if the name had come into common use as a name of a particular kind of machine, irrespective of the maker, the defendant had a right to use it in his advertisements in that sense, using his own trade-mark on the article itself; and it was held by all the judges that it was a matter to be determined by evidence whether the use of the name in the advertisement had the one effect or the other.

This, it will be observed, was a case of advertising, and not of imitating a trade-mark. Still, if it had the same effect, it was held to be equally culpable. The case does not decide that, if the word "Singer" had been the plaintiff's trade-mark, any change in its use would have affected such trade-mark, but does decide that an extension of its use might render the word harmless in an advertisement.

The defendant's counsel in the present case placed great reliance on the decision in *Cloth Co.* v. *Cloth Co.*, 11 H. L. Cas. 523. After carefully reading that case, I do not see that it necessarily governs the present. No question was made as to the names of the companies. The trade-mark there was a large circular label stamped upon the cloth, containing, within its circumference, the name of the former company which carried on the manufacture, and the places where it had been carried on, thus: "Crockett International Leather Cloth Company, Newark, N. J., U. S. A.; West Ham, Essex, England." Within the circle were, first, the figure of an eagle, displayed, under the word "Excelsior," and then certain announcements in large type, as follows: "Crockett & Co. Tanned Leather Cloth; patented Jan'y 24, '58. J. R. & C. P. Crockett, Manufacturers." The court held this label to be partly trade-mark and partly advertisement; and, as the cloth was not patented, and J. R. & C. P. Crockett were not the manufacturers, the court was inclined to agree with the lord chancellor that these statements invalidated the label as a trade-mark; but Lords CRANWORTH and KINGSDOWN preferred to place their decision against the plaintiff on the ground that the defendants' label did not infringe it. They pointed out differences in figure, and showed that the announcements were different; and the defendants' announcement being "Leather cloth, manufactured by their manager, late with J. R. & C. P. Crockett & Co.," without any reference to a patent, Lord KINGSDOWN said:

"The leather cloth, of which the manufacture was first invented or introduced into the country by the Crocketts, was not the subject of any patent. The defendants had the right to manufacture the same article, and to represent it as the same with the article manufactured by the Crocketts; and, if the article had acquired in the market the name of Crocketts' leather cloth, not as expressing the maker of the particular specimen, but as describing the nature of the article by whomsoever made, they had a right in that sense to manufacture Crocketts' leather cloth, and to sell it by that name. On the other hand, they had no right, directly or indirectly, to represent that the article which they sold was manufactured by the Crocketts or by any person to whom the Crocketts had assigned their business or their rights. They had no right to do this, either by positive statement, or by adopting the trade-mark of Crockett & Co., or of the plaintiffs to whom the Crocketts had assigned it, or by using a trade-mark so nearly resembling that of the plaintiff as to be calculated to mislead incautious purchasers."

It seems to me that the true doctrine could not be more happily expressed than is here done by Lord KINGSDOWN. There is nothing in the case, nor in the opinions of any of the judges, adverse to the claim of the complainant.

There is a case in the New York Reports (*Selchow* v. *Baker*, 93 N. Y. 59) which comes very near to that now under consideration. That was the case of "sliced animals," and other "sliced" objects, being a term used by the plaintiff as a trade-mark to designate certain puzzles manufactured and sold by them, in which pictures of animals, etc., on cardboard, were sliced up in pieces, and the puzzle was to put the pieces together and make the animal. The label "Sliced Animals," etc., was

used by the plaintiffs on all boxes of these goods sold by them. The defendants infringed, and the question was whether this kind of designation could avail as a trade-mark. Judge RAPALLO, in delivering the opinion of the court, after reviewing many cases on the subject, concludes as follows:

"Our conclusion is that where a manufacturer has invented a new name, consisting either of a new word or a word or words in common use, which he has applied for the first time to his own manufacture, or to an article manufactured by him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article."

This case is so directly in point that it seems unnecessary to look further. I think it perfectly clear, as matter of law, that the complainant is entitled to the exclusive use of the word "celluloid" as a trade-mark.

The only question remaining to be considered, therefore, is whether the defendant, by the use of the word "cellonite," as a trade-mark, or impression upon its goods as a trade-mark, does or will infringe the trade-mark of the complainant. Is the word "cellonite" sufficiently like the word "celluloid," when stamped upon the manufactured articles, to deceive incautious purchasers, and to lead them to suppose that they are purchasing the products of the same manufacturers as when they purchased articles marked "celluloid?" I think this question must be answered in the affirmative. I think that, under the circumstances of the case, the word "cellonite" is sufficiently like the word "celluloid" to produce the mischief which is within the province of the law. I say, under the circumstances of the case. By that I mean the previous nomenclature applied to the articles as manufactured by different persons. The complainant has always stamped its goods with the word "celluloid." Other manufacturers have called the product as manufactured by them by names quite unlike this, as "pasbosene," "lignoid," "chrolithion," etc.; so that a wide difference in designation and marking has existed between the complainant's goods and those of all others. The adoption now of a word and mark so nearly like the complainant's as "cellonite" cannot fail, it seems to me, to mislead ordinary purchasers, and to deceive the public.

The defendant, however, sets up two grounds of defense against the application for an injunction outside of the merits of the case: *First*, that the complainant has acquiesced in the use of the word "celluloid" in the names of a great number of other companies, several of which are enumerated in the answer, such as the "Celluloid Brush Company," the "Celluloid Collar & Cuff Company," and the like; and, by such acquiescence, has lost any right to complain of such use by other companies. But it is obvious that such special names, indicating confinement to a particular branch of the trade, are wholly unlike the complainant's

general name of "Celluloid Manufacturing Company." Besides this, it is altogether probable, as we gather from one of the affidavits, that these branch companies are mostly licensees of the complainant, and very properly use the word "celluloid" in their names. We think that this defense cannot justly prevail.

The other is of somewhat the same character,—supposed laches and acquiescence on the part of the complainant, in allowing the defendants themselves, for three or four years prior to the suit, to use the word "cellonite," stamped on their articles of manufacture, and in their business name. How the defendant could have done this before its own existence is difficult to understand. But, suppose it is meant that it was done by the corporators and predecessors of the defendant, there is no proof that it ever came to the knowledge of the complainant; and the fact that the previous name used under the former corporate organization was that of the "Merchants' Manufacturing Company" is sufficient to afford the complainant *prima facie* ground of excuse for not having learned of the alleged use of the word "cellonite," if it ever was used. I do not think that either of these defenses can avail the defendant. My conclusion is that the complainant, as the case now stands, is, in strictness, entitled to an injunction to restrain the defendant from using the name "Cellonite Manufacturing Company," or any other name substantially like that of the complainant; and from using the word "cellonite" as a trade-mark or otherwise, upon the goods which it may manufacture or sell, or any other word substantially similar to the word "celluloid," the trade-mark of the complainant.

But my great reluctance to grant a preliminary injunction for suppressing the use of a business name, or of a trade-mark, in any case in which the matter in issue is a subject for fair discussion, and admits of some doubt in the consideration of its facts, induces me to withhold the order for the present, on condition that the defendant will agree to be ready to submit the cause for final hearing at the next stated term of the court, which commences on the fourth Tuesday of September. It is possible that additional evidence, or a fuller verification of the allegations of the answer, may so modify the facts of the case presented for consideration as to lead to a change of views on the question of infringement, or of excuse therefor. At all events, it will be more satisfactory not to render judgment in the case until the defendant has been fully heard, and when it would have a right of immediate appeal. Should the defendant not be ready for a hearing at the time indicated, the present motion may be renewed without additional argument, or the complainant may take such other course as it shall be advised.

At the September term no further evidence was offered, and an order for injunction was granted without opposition.

THE MARIEL.

GRIFFIN and others *v.* THE MARIEL and others.

(*District Court, N. D. Illinois.* July 5, 1887.)

COLLISION—TUG AND TOW—IMPRUDENT INCREASE OF SPEED.

A steam-tug with two tows, one behind the other, entered the south branch of the Chicago river abreast of a steam-barge, going in the same direction at the rate of about four miles an hour. Within half a mile the tug so increased her speed that the stern of her rear tow came abreast of the wheel of the barge, which maintained her speed of four miles. The suction of the wheel caused the tow to sheer, so that she came into collision with a passing steamer. *Held*, that the tug was responsible for the collision, having, by increasing her speed so as to bring her tow abreast of the barge's wheel at a time when another steamer was passing, caused a dangerous situation, which she was able and ought to have anticipated.

Wm. H. Condon, for libelant.
Schuyler & Kremer, for the Mariel.
Wm. L. Mitchell, for the Butters.

BLODGETT, J. This is a libel by the owner of the canal-boat Iceland against the steam-tug Mariel, the steam-barge Butters, the tug Welcome, and the canal-boat Messenger, for damages to the Iceland occasioned by a collision between the Iceland and Messenger, near Stilson's slip in the Chicago river, about a half mile below where the Illinois & Michigan canal joins the South branch of the river.

There is less conflicting and contradictory testimony than is usual in collision cases; and it appears without dispute that on the evening of June 24, 1886, the Mariel entered the South branch of the Chicago river, from the Illinois & Michigan canal, with the canal-boat Servia and the canal-boat Iceland in tow; the Servia being towed by a line of about 175 feet astern of the Mariel, and the Iceland by a line of about the same length, or perhaps longer, astern of the Servia. Just as the Mariel entered the river, the steam-barge Butters came down the river from the stock-yards, so that the tug and the barge were about abreast of each other when the Mariel drew into the river. Some of the witnesses say they were just abreast, and others say the barge was 40 or 50 feet ahead of the Mariel. Signals were exchanged between the tug and barge, by which it was agreed that the barge should keep upon the starboard or east side of the river. All of the testimony concurs in showing that the Butters was proceeding at the rate of about four or four and a half miles per hour, and that the Mariel, after having entered the river, increased her speed to such an extent that when they reached a point opposite Stilson's slip, which is not to exceed a half mile from the junction of the canal with the river, the Mariel and the Servia had gone clear past the Butters, and the stern of the Iceland was abreast of the Butters' wheel. When the stern of the Iceland came abreast, or nearly so, of the Butters' wheel, the suction of the wheel drew the stern to the starboard towards

the Butters, and caused the bow of the Iceland to sheer to port, so that she was brought in collision with the canal-boat Messenger, which was proceeding up the river in tow of the tug Welcome, causing the injury complained of.

All the testimony seems to agree that the sheer of the Iceland was caused by her stern being drawn towards the Butters by the action of the Butters' wheel, and that she became unmanageable by her crew in consequence of this sheer; and the only question, it seems to me, in the case, is, who was blamable for the predicament into which the Iceland was thrown? The Welcome was proceeding up the South branch on the west side; and there was ample room for her and her tow, the Messenger, to pass clear of the Mariel and her tows, and the Butters; the Butters being upon the east or starboard side of the river as she was going down, and lying pretty close to the shore, so as to give the Mariel and her tows ample room to pass her. There is no evidence in the case that the Welcome was running too fast, or was in an improper place on the river, or that there was any bad seamanship in her own management, or that of her tow the Messenger. She was proceeding in her own place, at a proper rate of speed, and handling her tow in the usual manner that tugs handle canal-boats upon the waters of the Chicago river. There is no proof that the Butters increased her speed from the time the Mariel came abreast of her, nor that her speed was unusual or unsafe, but she seems to have proceeded at the same rate of speed at which she was proceeding before she reached the mouth of the canal; and it seems to me there can be no doubt but what the injury to the Iceland was occasioned solely by the act of the Mariel in attempting to tow the Iceland so closely alongside of the Butters. I do not think that the Butters was obliged to stop her wheel, or slow up, so long as she was not proceeding, any part of the time, at an unusual or dangerous rate of speed. The increase of speed was solely on the part of the Mariel, which increased, of course, the speed of her tows, and perhaps rendered the Iceland more susceptible to the suction of the Butters' wheel; and the Mariel seems to me solely responsible for having brought the Iceland into dangerous proximity with the Butters. All the evidence concurs that the Welcome was coming up the river in plain sight, with her tow, the Messenger, giving the usual signals, upon the west side, or near the west bank of the river. Those in charge of the Mariel must have been able to see the Welcome approaching, and must have been able to calculate that, at the speed they were running, they would bring the Iceland abreast of the Butters at about the time the Iceland would be abreast of the Welcome or the Messenger; and hence the danger of the Iceland being caused to sheer, or lose her steerage, by the motion of the Butters' wheel, ought to have been anticipated by those in command of the Mariel. Seemingly, with entire disregard of the danger of attempting, in the narrow channel of the Chicago river, at the point where this collision occurred, to effect a safe passage for a tow along-side of the working wheel of a propeller, 9 feet in diameter, the master and pilot took their tow into the peril, and it seems to me that his negligence, and his alone, is responsible for the

consequences. There will be a finding, therefore, that the injury to the Iceland was caused by the fault or negligence of those in command of the Mariel, and that the damages should be paid by the Mariel.

The libelant in this case seems to have proceeded upon the assumption that he would make everybody that was in the vicinity of this collision parties respondent, whether he had any proof of their negligence or fault or not; and inasmuch as the proof has wholly failed of making the Welcome or the Messenger in any degree blameworthy, the libel must be dismissed, at the cost of libelant, as against the Welcome, Messenger, and Butters, and a decree entered in favor of the libelant against the Mariel alone for the damages and costs, and a reference to the commissioner to take proof in regard to the damages.

THE CITY OF MEXICO.

UNITED STATES *v.* THE CITY OF MEXICO.

(*District Court, S. D. Florida.* June 14, 1887.)

1. SHIPS AND SHIPPING—FORFEITURE UNDER NEUTRALITY LAWS—WHO ARE INFORMERS.

   Where the testimony showed that the entire crew of a vessel, which was afterwards seized and forfeited, met the consular agent upon his leaving the ship, and demanded an audience, and made a statement of their suspicions, and the facts on which they were based, and protested against proceeding on the voyage, at which meeting the chief mate took a prominent part, but no steps were taken by the consular agent looking to the seizure of the vessel, but an arrangement was made to proceed on the voyage; that, after the departure of the consular agent, the crew held another meeting, and drew up a formal written protest, setting up the facts before stated, and refusing to proceed on the voyage under any circumstances, which protest was not in the handwriting of the mate, and was signed by all the crew; that, upon the receipt of this protest, the consul began the first official interference in anticipation of seizure, took the crew ashore, and took the sworn testimony of each of the crew upon the charges preferred by them against the officers and passengers of the vessel, at which hearing other members of the crew took as prominent part as did the mate; that, after this investigation, a man-of-war was sent for, and the seizure made: *held*, that the entire crew, and not the mate, were the informers, so as to entitle them to the informer's moiety.

2. SAME—INFORMATION NOT ACTED ON.

   Neither a consular officer who furnishes the government authorities with a statement of the facts regarding the sailing and the objects and intentions of a vessel, and does all in his power to thwart or prevent her voyage, and after her seizure furnishes assistance of much value in obtaining evidence, nor a detective employed by such consular officer to obtain accurate information, and upon whose information such officer acts, are informers so as to entitle them to the informer's moiety, where such acts and information do not result in the seizure of the vessel, and it does not appear that any party active in the seizure had any information from such consular officer or detective, or orders or instructions from those they had informed.

3. SAME—NAVAL AND CONSULAR OFFICERS.

   United States naval officers, and a consular agent who conveyed information received by them, leading to the seizure of a vessel, to other official authorities, but gave no information except what had been received in the regular discharge of their duty, are not informers.

4. SAME—PROCEDURE—NECESSITY OF PETITION.
In a proceeding to enforce the forfeiture of a vessel for violation of the neutrality laws, the fact that, after a decree of forfeiture, the case was allowed to remain open for further hearing on the question of who were entitled to a moiety of the proceeds as informers, and that only one person filed a petition making a claim, does not deprive others appearing on the original evidence to be entitled to share as informers.

In Admiralty. Forfeiture. In the matter of informer's moiety.
Proctors for petitioners, viz.:
James Parker and *G. Brown Patterson*, for Admiral Jouett and others.
Phillip J. Joachemsen, for Consul Gen. Baiz.
John R. Abney, for Green.
John A. Osborne, for Mehan.
Louis Z. Kinstler and *Jefferson B. Browne*, for McLaughlin.

LOCKE, J. This cause having been heard, and a decree of forfeiture pronounced under the law for the prevention of the violation of neutrality, (Rev. St. § 5283; 28 Fed. Rep. 148,) it remained to designate the informer to whose use the one-half of the proceeds should go.

The hearing of the original case, and the evidence presented at it, pointed out who might with good reason be considered the informer; but the question whether there might not be some one else who, upon a fuller hearing of the origin of the case, might have some rights, suggested itself, and the matter was held under advisement, and an opportunity offered for any one to make and support a claim to the informer's share who considered himself entitled. Under this notice Jacob Baiz, consul general of Honduras, at New York; Rear Admiral James E. Jouett, commanding the N. A. squadron; Robert Boyd, fleet captain; Colby M. Chester, commanding the Galena, the capturing vessel; Brooks Carnes, consular agent at St. Andrews, where the seizure was made; John G. Mehan, who was at one time in the employ of Baiz as a detective in this matter; James H. Green, chief mate of the steam-ship; and James McLaughlin, one of the crew,—have filed petitions.

Although there has been found no decision touching the question of an informer under this statute, there can be no doubt but what any ruling upon the same subject, under customs or internal revenue laws, or any class of forfeitures, will apply with full force wherever any question of doubt arises. An "informer," in the legal as well as the ordinary sense of the term, whether the information he gives applies to customs, internal revenue, criminal matters, or forfeitures for any other reason, is he who gives the information which leads directly to the seizure and condemnation, regardless of the questions of evidence furnished, or interest taken in the prosecution. *Westcot* v. *Bradford*, 4 Wash. C. C. 492; *Sawyer* v. *Steele*, 3 Wash. C. C. 464; *U. S.* v. *Simons*, 7 Fed. Rep. 709; *One Hundred Barrels Whiskey*, 2 Ben. 14; *U. S.* v. *Isla de Cuba*, 2 Cliff. 458.

"If the officer seize upon the information, that act invests an inchoate right in the informer, *who has given the information upon which the seizure was made*, which is consummated by a condemnation." *Westcot* v. *Bradford*,

supra; Jones v. *Shore's Ex'r*, 1 Wheat. 462. It must be the information upon which the seizure was made. *Van Ness* v. *Buel*, 4 Wheat. 74.

Mehan, a professional detective, having learned of the purchase of this steam-ship by Hollander, informed Consul General Baiz, in whose employ he had been in other matters, of this fact, and of such circumstances connected with the purchase as he considered of importance; who, feeling from his official position particular interest in such information, at once took Mehan into his employ to watch the vessel, and obtain more definite knowledge. Baiz also transmitted a history of the case to the secretary of state at Washington, had several interviews with the collector of customs at New York, regarding her sailing, and the objects and intentions of the voyage, and succeeded in preventing the shipping of the arms and ammunition. He also visited Washington, and had interviews with the secretary of state and attorney general, and had correspondence with the district attorney of New York, regarding both this vessel and the steam-ship Framm, which finally carried the arms and ammunition. There is no doubt but what he did everything in his power to prevent or thwart her voyage, and to influence the authorities at New York and Washington to interfere, but all to no purpose. The principal recognition his information appears to have received was a letter from the attorney of the United States at New York, inquiring what evidence he had, and promises from the departments at Washington that the matter should be attended to. Surely it did not result in a seizure of the vessel; and although, after the capture, his assistance in obtaining evidence for use in the trial was of much value, it does not appear that any party who was active in the seizure had any information from him, or orders or instructions from those whom he had informed.

The petitioner Mehan, who first obtained information of the sale to Hollander, and reported it to Baiz, acted after that entirely under him, and conveyed his information through him. He suggested the visit to Washington, and accompanied him to the collector's office; but his information accomplished no more than did that of Baiz, as they were merged before they reached any official. His information had no weight in the seizure, as it became that of Baiz, and amounted to no more.

The history of the case shows that although Consul Baiz did all he could to interest the officers of the government in his behalf, and satisfy them that enough was being attempted to justify or demand their action, he failed in doing so, and the steam-ship cleared with a legal clearance, and all effect of his information was left behind. There is nothing to show that either the consul at St. Andrews, or the naval authorities who finally made the seizure, had instructions from any one growing out of the information of Baiz, given at Washington or New York; but everything shows that nothing was done by any one in authority to interfere with her movements until after the positive stand taken by the crew.

Green, the first mate, has by his own testimony in this hearing made a very strong case in his own behalf; and were this a cause by itself, and the only testimony to be considered that taken and presented with the petitions for the informer's share, there could be no doubt but what he

has put himself in a position where his claim could not be questioned; but this is but a part of a case,—a supplementary hearing of one already heard in part, and in which the judgment to be given is but one of equal importance, and as necessarily following from the whole trial of the case as the judgment of forfeiture already pronounced. The entire vessel is in no respect forfeited to the United States, to whom the informer can look for his share, but it is forfeited to his use; and, had the general hearing been fully satisfactory upon that question, the informer should have been declared in the same judgment with the forfeiture.

The entire testimony in the main case is before the court in the question now pending, and is considered as assisting in determining it. That testimony shows that while questions, suspicions, and surmises had existed among the crew, and applications to consular officers had been made by different members of it at the different ports, nothing had been done which looked towards a seizure until they were about to clear for Kingston, Jamaica, from St. Andrews. The testimony of disinterested witnesses shows at this time the circumstances to have been about these: The consular agent at St. Andrews, being on board in the cabin with Capt. Kelly a short time before the contemplated leaving of the vessel, upon coming out of the cabin, being about to leave the ship, found the entire crew assembled in the starboard gangway, demanding audience. This being granted, statements of their suspicions, of the facts they knew, and their protests against proceeding, were made. Ayres, the chief cook, says he was the spokesman who addressed the consul. Greene says: "They told him they did not wish to proceed any further in the vessel." He says in his testimony upon this question that he brought the consul down to the crew after he had told him his story, but this does not appear to have been the case, when the testimony of Capt. Kelly is considered. But yet no step was taken looking to a seizure, and the consul's suggestion that he should go to Kingston with them was accepted, and arrangements made for them to proceed on the voyage. After his leaving that night, the crew had another meeting, and further considered the case, and upon his return in the morning presented a formal written protest, setting up what they had before stated, and refusing to proceed under any circumstances. This the consul declared looked serious, necessitating some action by him, and he began the first official interference in anticipation of seizure. This written protest was not in Greene's handwriting, and was signed by all the members of the crew. The consul took all the crew ashore, and took the testimony of each upon the charges preferred by them against the steam-ship, master, and passengers. At this hearing, as shown by the records of the consular investigation, several members of the crew took a more prominent and active part than did Greene. It was only after this thorough investigation and examination under oath that a schooner was chartered, and sent for a man-of-war, and the consul general, upon the arrival of whom the investigation was continued and the seizure made.

Without doubt Greene joined with the rest of the crew in giving information and protesting against proceeding, but that he should have the

entire credit as informer I cannot for a moment accept. Having been before the court as witness in the case several times, I feel compelled to say that, weighed in the light of his former testimony, his later *ex parte* statements in his own behalf should be taken with great allowance. He had had ample opportunity in open court, and in the presence of other actors in the same transaction, to state his entire connection with the giving of information, and bringing about the seizure; but the case he made then was materially different from what he makes now.

Without doubt, certain members of the crew were more active and influential in bringing about the final result; but it was "the crew" who demanded to see the consular agent in the gangway, and who on the next morning, protested in writing. The Galena was dispatched to St. Andrews upon application from them, through the consulate, and not by orders from Washington; and the consular agent was moved to action by their protest, and not by advices from the state department. Without their action, the City of Mexico would undoubtedly have awaited the arrival of the Framm, which reached the port a few days later with the arms and ammunition,—with what results it is difficult to surmise.

Greene and McLaughlin are the only members of the crew who have appeared as petitioners, and it is claimed that Greene, being at the head of the crew and representing them, should be treated as informer, both for that reason and because no one else has made claim and presented evidence as such informer. Neither of these reasons do I consider sufficient to exclude others who may, from an examination of the principal case, appear to have any rights. This is not a new case, nor did it require a petition to give an informer standing in court as such. The decree to the informer could as well have followed or been embodied in the general decree of forfeiture without an opportunity for a petition as after one had been filed, had the court been satisfied that the entire testimony touching the question of informer had been heard; and, certainly, holding the case open to give others an opportunity to be heard cannot defeat those already shown to be entitled.

In *Sawyer* v. *Steele*, 3 Wash. C. C. 464, the officers of the revenue cutter sued for an informer's share; and although, the suit being at common law, the question was raised whether they should sue jointly or severally, there was no question but what they might share as joint and common informers. In this case I am satisfied that the crew were the informers, both technically and actually; and, although some were more prominent than others, it is impossible to discriminate in their favor. I think every name was signed to the written protest, and all are entitled to share.

The naval officers and consular agent in whose behalf a petition has been filed did their duty as officers in conveying the information received to other official authority, but no information was given by any one of them but what had been received in the regular discharge of his duty. It was in the performance of duty touching this subject-matter, and under special orders to investigate, that their knowledge was acquired, and reporting the same cannot certainly give rights as informers. It is there-

fore ordered that, after the payment from the fund now in the registry of the court of the proper costs in this hearing, the balance be paid those who were the crew of the steam-ship City of Mexico, as appears from the pay-roll as filed herein, in the petition for seamen's wages, and the same be divided between them in proportion to the several rates of monthly wages therein stated.

THE HARRIET S. JACKSON.[1]

VIRDEN *v.* THE HARRIET S. JACKSON.

(*District Court, E. D. Pennsylvania.* June 28, 1887.)

PILOTS—COMPULSORY PILOTAGE—EVIDENCE.

Where the evidence fails to show a refusal by the master of a vessel to accept the services of a pilot, whom, under the law, he was bound to employ, a libel filed by such pilot to recover the value of services, which were never rendered, will be dismissed.

In Admiralty.

Henry Flanders, for respondent.

Henry Edmunds, for libelant.

BUTLER, J. The evidence does not sustain the libel. It does not show that the master refused to take the libelant as pilot. On the contrary, it tends to show that he did not. The conversation between the parties (relied upon by the libelant) seems to have been half jocular. It leaves the impression that Mr. Virden was simply teasing the master respecting the question of pilotage, and that the master answered in the same vein, saying, "I will take you," while he knew that Mr. Virden, personally, would not go.

The libel must be dismissed, with costs.

[1]Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

LEWIS and others *v.* SIXTY-FIVE PACKAGES OF MERCHANDISE.

MERRITT *v.* ONE CASE OF WOOL, etc.

(*Circuit Court, E. D. New York.* July 8, 1887.)

1. SALVAGE—DUTIES ON SALVED PROPERTY.
Where property is salved on the high seas, and brought by the salvors within the limits of the United States, the salvage claims are entitled to priority over the claims of the government for duties.
2. SAME—IMPORTED GOODS—CUSTOMS LAWS.
Goods so brought into the United States are not imported goods, in the sense of the customs laws, so as to necessarily attach the right to duties.
3. SAME—SALE OF SALVED PROPERTY.
But where the goods so brought within the United States, subsequently, by virtue of a sale, pass into consumption within the United States, an equitable right on the part of the government to be paid duties arises; not taking precedence, however, of the salvage claims.

Whitehead, Parker & Dexter, for William Lewis.
Geo. A. Black, for Israel J. Merritt.
Mark D. Wilber, U. S. Atty., for the United States.

The decree of the district court in the above case (30 Fed. Rep. 195) affirmed, without opinion.

THE WISCONSIN.

BEEBE *v.* THE WISCONSIN.

(*Circuit Court, E. D. New York.* July 9, 1887.)

1. SALVAGE—PILOT AS SALVOR—AWARD.
Libelant, a pilot, was on board the steam-ship W., but had not taken charge, when the vessel ran ashore. Thereafter he rendered assistance by suggestions as to getting her off, and by taking charge of her when she was floated in a rudderless condition. He incurred no risk, and was not called upon for any extraordinary exertion. *Held*, that he should recover $1,000 salvage.
2. SAME—WHEN PILOT MAY BE SALVOR.
A pilot may be a salvor, although aboard the vessel, if he has not yet assumed the relation of pilot to her.
3. SAME—EXTRAORDINARY PILOTAGE SERVICES.
The statute of New Jersey (section 16 of the issue of 1846) relates to extraordinary pilotage services. A case of pilotage services necessarily presupposes the vessel capable of being navigated. So a pilot, rendering aid to an unnavigable vessel, is not bound by the above statute, and his services may be not those of a pilot, but of a salvor.

Whitehead, Parker & Dexter, for appellee.
Nash & Kingsford, for appellants.

The decree of the district court in the above case (30 Fed. Rep. 846) affirmed, without opinion.

THE CAROLINA.

MCKENNA *v.* THE CAROLINA.

(*Circuit Court, E. D. New York.* July 9, 1887.)

1. MARITIME LIENS—MACHINERY FOR DISCHARGE OF CARGO—DAMAGES.
A lien arises against a vessel for damages occasioned by failure to provide safe machinery for the discharge of her cargo.
2. SAME—PERSONAL INJURIES.
As a hogshead was being hoisted from the hold of the steam-ship Carolina, a guy-rope, belonging to the ship, and used for the hoisting, parted, and the fall of the hogshead injured libelant. The officers of the ship knew of the insufficiency of the rope. No fault could be attributed to libelant. *Held*, that he was entitled to damages against the ship.

Anson Beebe Stewart, for appellee.
Wheeler & Cortis, for appellant.

The decree of the district court in the above case (30 Fed. Rep. 199) affirmed, without opinion.

THE CEPHALONIA.

FOOTE *v.* THE CEPHALONIA.

FELTY *v.* CUNARD S. S. CO., Limited.

GREENE, Adm'r, etc., *v.* CUNARD S. S. CO., Limited.

(*Circuit Court, E. D. New York.* July 15, 1887.)

COLLISION—STEAMER AND TUG—OVERTAKING VESSEL.
The tug Glen Island, while proceeding down the bay of New York, was overtaken and run down by the steam-ship Cephalonia, of the Cunard Line. The tug was sunk, and several lives were lost. Prior to the collision the tug did not alter her course. On suit brought against the steam-ship to recover for the loss of life and property, *held*, that the Cephalonia, as the overtaking vessel, was bound to have avoided the tug; that the fact that she blew whistles in time to enable the tug to get out of her way was no excuse for the collision; and that she was solely responsible for the collision.

Butler, Stillman & Hubbard and *Hyland & Zabriskie*, for libelants.
Carpenter & Mosher, for Oliver Greene.
Owen & Gray, for Cunard S. S. Co., Limited.

The decree of the district court in the above cases (29 Fed. Rep. 332) affirmed; but entry of the decree in the case of *Greene* v. *Cunard S. S. Co.* suspended, to await the decision of an appeal taken by the respondent in the suit of *Felty* v. *Cunard S. S. Co.*, provided such appeal be taken and perfected within 30 days after the entry of a decree in this court in said suit.

SHERWOOD *v.* ROUNDTREE.

(*Circuit Court, S. D. Georgia, W. D.* August, 1887.)

1. USURY—WHAT IS—COMMISSIONS.
R., having applied to D. & M., agents of the C. B. Co., for a loan of $2,000, was made to sign an application for a loan of $2,500. The application also contained a statement expressly constituting D. & M. agents of R. in the transaction, and authorizing them to retain $500 as "commission." Subsequently, R. gave a note for $2,500 at 8 per cent., payable to S. at the office of the C. B. Co. R. only received $2,000; the other $500 being divided between D. & M. and the C. B. Co. *Held*, in a suit by S., that the retention of the $500 as commission was clearly usurious, under Code Ga. § 2057, forbidding any one to "reserve, charge, or take for any loan or advance of money * * * any rate of interest greater than eight per cent. per annum, either directly or indirectly, by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever."[1]

2. SAME—AGENCY.
The evidence showing that D. & M. were the regular agents of the C. B. Co., and that the latter received a portion of the usurious commission, the court will not suffer the statutes to be evaded by the fact that R. authorized D. & M. to act as her agents in the transaction.

3. SAME.
While authority to make a usurious loan will not be presumed where the agency is special, and limited to a single transaction, it will be presumed where the agency is general. *A fortiori* will it be presumed where it constitutes a great and comprehensive business, and where the courts have rendered decisions making manifest and public the nature of the business.

4. SAME—NOTICE.
The fact that S. was accustomed to lend money habitually through the agency of the C. B. Co. was sufficient to charge him with notice of the character of the contracts made by that firm or its agents.

5. SAME.
Where there is a regular business of lending money, with an elaborate system, one who lends money by such system will be chargeable with knowledge of all the facts which he could have learned by inquiry. The case of *Call* v. *Palmer*, 116 U. S. 98, 6 Sup. Ct. Rep. 301, distinguished.

6. SAME—COURT AND JURY.
When the commission retained for services in negotiating a loan is so large as to be usurious on its face, it is the duty of the court, in the absence of explanatory proof, to say so. It is not, in the federal courts, a question for the jury.

Suit on Promissory Note. Plea of usury. Motion for new trial.

William E. Simmons and *Duncan & Miller*, for plaintiff.

A. C. Riley and *Davis & Hardeman*, for defendant.

SPEER, J. The plaintiff brought suit to recover the face value of the following promissory note:

$2,500. FORT VALLEY, GA., December 28, 1883.

On the first day of December, 1888, I promise to pay to J. K. O. Sherwood, or order, at the office of the Corbin Banking Company, New York city, twenty-five hundred dollars, with interest from this date at the rate of 8 per cent. per annum, payable annually, as per five interest notes hereto attached, value

[1] Upon the question as to when a commission charged by an agent for negotiating a loan, in addition to the legal rate of interest, is usury, see Halderman v. Insurance Co., (Ill.) 11 N. E. Rep. 526; Mackey v. Winkler, (Minn.) 29 N. W. Rep. 337, and note.

received; and I hereby waive and renounce my right to the benefit of the exemption provided for by the constitution and laws of Georgia in all property I now have or may hereafter acquire, as against the payment of this note, and the interest notes hereto attached. Should any of said interest not be paid when due, it shall bear interest at the rate of eight per cent. per annum from maturity, as stipulated in said interest notes, and, upon failure to pay any of said interest within thirty days after due, said principal sum may, at the option of the holder of this note, be declared due without notice, and may thereupon be collected at once, time being of the essence of this contract; and, in case this note be collected by suit, I agree to pay all the costs of collection, including ten per cent. of the principal and interest as attorney's fees.

No. 34,342. REBECCA A. ROUNDTREE.

Also the face value of the five coupons, as follows:

$208.33. FORT VALLEY, GA., December 28, 1883.

For value received, I promise to pay J. K. O. Sherwood, or order, at the office of the Corbin Banking Co., New York city, two hundred and eight dollars and thirty-three cents, on December 28, 1888, being interest to that date on my note given to said payee with interest from maturity at eight per cent. per annum. REBECCA A. ROUNDTREE.

No. 34,342.

The remaining coupons are in the same form as that here printed, but are for different amounts, and are of different dates. Among other pleas, the defendant presents the plea of usury. She avers that Duncan & Miller, attorneys at law, were the agents of the plaintiff, and they withheld the sum of $500 at the time the loan was negotiated, this being 20 per cent. of the face value of the note; and while she executed the note for $2,500, in truth, her husband, for whom the money was borrowed, did not receive this amount, but the balance, after deducting 20 per cent., as above stated, was appropriated to pay her husband's debts, and she herself did not receive a dollar of the fund. The case was tried before a jury, and a verdict was rendered for the plaintiff, with 10 per cent. attorney's fees; the jury deducting from the plaintiff's demand all the excess of the interest over and above 8 per cent., which is the regular interest rate in Georgia. The plaintiff is dissatisfied with the verdict, and has made a motion for a new trial, and insists that certain instructions to the jury relative to the plea of usury were erroneous. There are other grounds of the motion, but as to them the court has no doubt or difficulty, and they are overruled.

On account of the great importance of the main question here involved, I embody in full that portion of the charge which relates to the plea of usury:

Now, what was the law of Georgia at the time of this contract? Code of Georgia, § 2050: "The legal rate of interest shall remain seven per cent. per annum, where the rate per cent. is not named in the contract, and any higher rate must be specified in writing, but in no event to exceed eight per cent. per annum." It, therefore, is illegal to charge more than eight per cent. per annum in this state where this contract was made. It has been, and is the policy of this state to render void usurious contracts, to the extent of the usury, it being thought by the law-making power of the state that such contracts are injurious to the best interests of the people. The law of the state

upon this subject is exceedingly stringent. Section 2057 of the Code of Georgia provides that "it shall not be lawful for any person, company, or corporation to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per cent. per annum, either directly or indirectly, by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever. (*b*) Any person, company, or corporation violating the provisions of the foregoing sections shall forfeit the excess of interest so charged or taken, or contracted to be reserved, charged, or taken. (*c*) The amount of forfeit as aforesaid may be pleaded as a set-off in any action for the recovery of the principal sum loaned or advanced by the defendant in said action. (*d*) No contrivance or arrangement between the parties to any such unlawful transactions, or their privies, shall have the effect to discharge such forfeiture, except it be an actual and full payment of the amount so forfeited. (*e*) All titles to property made as a part of a usurious contract, or to evade the laws against usury, are void."

You now understand the law, gentlemen, and I call your attention to the evidence of the witnesses, both for plaintiff and defendant, relating to this subject. Mr. Roundtree, the husband of the defendant, testified that Duncan & Miller, who were the agents with whom the contract of loan was made, retained $500 as commission, and that this was 20 per cent. of the amount borrowed. Mr. Duncan, one of the attorneys for the plaintiff, testifies that he, with his partner, were the agents of the Corbin Banking Company, from whom the money was directly received; that he don't know the plaintiff, Sherwood, at all. That Sherwood, he didn't think, had made more than ten or twelve loans of this character in Houston county. That most of the loans he and his firm had made went to the American Freehold Mortgage Company. He did not know how many, but thought the loans went to eight or ten different parties. He was questioned further, and I will read his evidence as reported by the stenographer: "*Question.* You represent the Corbin Banking Company as their agents? *Answer.* We represent the borrower. *Q.* Don't you also represent the Corbin Banking Company? *A.* They never paid us anything. *Q.* Didn't you say at the last court that you were the agents of the Corbin Banking Company? *A.* I said, in that way we send to them and negotiate. *Q.* The Corbin Banking Company are the agents of Sherwood? *A.* I don't know; my understanding is that they simply put these loans on the market. *Q.* Didn't I understand you, last court, to say that you were the agents, and that they were the agents for Sherwood? *A.* I don't know anything about that. I only know that we represent the borrowers, and we receive applications and send them on, but don't know where they go. *Q.* You didn't get the $500 commission for yourself? *A.* No, sir; we got only 5 per cent. *Q.* What became of the balance? *A.* I don't know. *Q.* You retain a commission of 20 per cent., and only 5 per cent. comes to you? *A.* Yes, sir; that is all. *Q.* And the other 15 per cent. is retained and sent to the Corbin Banking Company and to Sherwood? *A.* I don't know who it is retained by. *Q.* In addition to your services in making out the application and receiving the money, don't you always collect the interest and send it forward as it falls due? *A.* No, sir; sometimes a man comes in and gives us the interest, and we send it forward, but it is not our business, and we do it very seldom. *Q.* Ain't it your business to keep watch over the property, and see that it is not sold for taxes? *A.* No, sir; we don't watch anything. *Q.* You are under no such obligation as that to the Corbin Banking Company? *A.* No, sir. *Q.* You don't have to inform them when the property goes for taxes? *A.* No, sir; but they generally send out a list with a request that we mark all the taxes paid and those unpaid. They send a request each year, and we write a statement. We do that. *Q.* For that sort of work, do you get no

compensation from the lender? *A.* We are under no obligations to do it. *Q.* They call on you for that sort of services? *A.* Yes, sir; the Corbin Banking Company does. *Q.* Who do they represent? *A.* I don't know who they represent. *By the Court. Q.* Whom did you represent when you told Mrs. Roundtree that she could not get this money unless these executions were paid? *A.* We represented her. *Q.* In whose interest was it that you told her that she could not get this money, unless these executions were paid? *A.* It was in the interest of the Corbin Banking Company. *Q.* To that extent, then, you were the agents of the Corbin Banking Company? *A.* Yes, sir; to that extent, to see that the title was all right. We are required to send on an abstract showing the title. *Q.* You have a regular correspondence with the Corbin Banking Company? *A.* Yes, sir. *Q.* Receive instructions from them as to the matters you attended to for them? *A.* Yes, sir. *Q* And while you claim to be the agents of the borrower, and the contract recites that you are the agent of the borrower, nevertheless, if it were not for the power the Corbin Banking Company puts in your hands there would be no money for the borrower? *A.* We might send the application to other companies. *Q.* In point of fact you are really the agents of the lenders of the money, looking after their interest, and examining the titles of the borrowers to see if they are all right. Don't you know, as a lawyer, that you do render the services of an agent to this Corbin Banking Company? *A.* Certainly, to the extent of seeing that the titles are perfect and in due form. *Q.* Would not you feel, in making transactions of this sort, that you must protect the interest of the Corbin Banking Company? *A.* I would feel that we must send in a correct statement. As a matter of course we ought not to do anything to injure them, and we ought to protect them. *Q.* And you do not feel, therefore, that you were simply their agents as an attorney is for a client? *A.* No, sir. *Q.* You insist, then, that you are the agent of both parties? *A.* I just state the facts as to what we do; we have no authority except to do what I have stated. They would not be bound by anything we should do. We simply send forward the papers, and sometimes they reject them, sometimes they reduce the amount, and sometimes they allow the loan."

Mr. Miller, another member of the firm of Duncan & Miller, and an attorney for the plaintiff, testifies on this subject: "*Question.* In representing these loans it is your usual rule to charge 20 per cent. and you retain only 5 per cent. for your services? *Answer.* The rule has varied somewhat about that. The rate of commission has varied; it has steadily fallen off. At the time this loan was made I think it was 20 per cent. *Q.* You had a good many of these transactions, and that was the invariable rule up to that time, and since that time it has been the invariable rule to take out considerable sums, of which you get a portion? *A.* At one time Nelson & Barker had the general business, and we were subagents, and the portion that reached us was small; and afterwards, when Robinson was the agent, dealing with the banking company, until we established a direct agency between us and the Corbin Banking Company,—then they got 15 per cent. and we got 5 per cent. *Q.* The Corbin Banking Company gets part of this commission? *A.* We do not know anybody but the Corbin Banking Company in this transaction. *Q.* You don't get all this commission? *A.* No, sir; so far as I know, the Corbin Banking Company divides the commission; and, taking the commission at 20 per cent. the Corbin Banking Company gets 15 per cent., and we get 5 per cent. And at a commission of 15 per cent., which is the rate now, the Corbin Banking Company gets 10 per cent., and we get 5 per cent. *Q.* The Corbin Banking Company represents Sherwood in making a good many loans in Houston county? *A.* I don't know what the connection is between the Corbin Banking Company and Sherwood, but occasionally Sherwood's name appears as the lender, and sometimes the American Mortgage Company, and sometimes oth-

ers. *Q.* Sherwood, a good many times made the loan to the Corbin Banking Company; there were a number before this loan was made, and a number since? *A.* Yes, sir; unquestionably."

From this evidence it is apparent, gentlemen, that a sum largely in excess of the legal rate of interest was held back by the lender or his agent from the borrower. Now, where the agent who is authorized by his principal to lend money for the lawful rate of interest, exacts for his own benefit more than the lawful rate of interest, and does so without the authority of the principal lender, or without his knowledge, the loan is not thereby rendered usurious. Where, however, the agent is authorized to loan the money for usurious interest, or where the lender, that is the principal, had knowledge that the loan was usurious, then the contract is in violation of law, and, in a suit on an instrument like this, the plaintiff can only recover the legal rate of interest. This loan would unquestionably have been usurious if made by the principal lender. It is usurious if made by his agent with his consent, knowledge, or acquiescence. I charge you, further, that if the circumstances are such, either from the number of the transactions, the importance of the amounts involved, or the continuous nature of the business carried on through the same agency, that, from one or all of these reasons, it is reasonably inferable that the principal lender knew the character of the contracts his agents were making, he will be chargeable with knowledge of the usurious interest and the usurious character of the contract, the law presuming that he would not carry on a business of a continuous and important character without understanding the nature of the contracts made by his agents in its conduct. To summarize what I have said upon this subject: If these usurious commissions were retained by the agents for their own benefit, without the knowledge, consent, or acquiescence of the principal, the principal lender would not be affected by the usurious nature of the transaction, and he would be entitled to recover without deduction on account of usury. If, on the other hand, these contracts were made and these commissions were withheld with his consent, knowledge, or acquiescence, he would be chargeable with the usurious character of the transaction, and he could not recover any sum in excess of the legal rate of interest, which, in this state, is eight per cent. And furthermore, if from the nature of the business, its extent, the importance of the amounts involved, the continuous character of the transactions, it would be reasonably inferable that a man of business of ordinary intelligence, carrying on such a business, would understand the nature of the contracts that his agents were making, he would be presumed to understand the nature of the contracts, and, therefore, the presumption that he is chargeable with the usurious interest, and with its consequences, in lessening the amount of his demands, would obtain; and in the absence of proof on his part to rebut such knowledge, acquiescence, or consent, the jury would be obliged by their verdict to deduct all sums of the plaintiff's demand over and above the amount actually paid to the defendant, with the legal rate of interest calculated thereon.

From the evidence contained in this portion of the charge of the court, it is plain that there is an extensive business carried on in the state of Georgia, to which the plaintiff was party, by which it is the unvarying custom to charge inordinate and extravagant rates of interest. In this case the note sued on bore 8 per cent. per annum, the highest legal interest permissible. The plaintiff's agents withheld 20 per cent. in the outset. Thus, 28 per cent. is imposed on the necessities of the borrower; in addition, 10 per cent. attorney's fees are charged. It is superfluous to say that no business, howsoever prosperous, can survive the exactions of these fearful and unconscionable interest charges. To correctly ap-

preciate the enormous extent of these transactions, we have but to turn to the docket of this court alone, where we find that there are pending and have been disposed of in one division of this district 51 cases upon contracts of this precise character, involving $211,062.13, and mortgaging and conveying 66,911 acres of land. The plaintiff in this case, J. K. O. Sherwood, according to the testimony of Mr. Duncan, made 10 or 12 loans of this character in one county, the county where Mrs. Roundtree lived. The *modus operandi* by which the loan was negotiated is as follows: The necessitous learn that the subagency has money to lend upon farms. Application is made, and the first thing done is to present to the borrower a printed form, with which the subagents are supplied, requiring the applicant to constitute the subagents his or her agents. The form of agreement in the record has printed on it, "South Form No. 2." It stipulates:

"I hereby constitute you my agent, and request and authorize you as such to negotiate for me a loan of $2,500 on five years' time, with interest at 8 per cent. per annum, payable annually at such place as you may name. Said loan to be evidenced by my note of the form used by you, and said note and loan to be secured by mortgage on, or an absolute deed (consented to by my wife) to my farm consisting of 607¼ acres situated about six miles of the town of Perry, in Houston county, Georgia."

Among other stipulations, the agreement contains this:

"I further agree to pay you for negotiating said loan a commission of $500, to be paid at the time of closing the loan, and, if I decline to accept the loan for any reason, I agree to pay said commission at once. I also authorize you to pay off all liens, including taxes due against said property, and I hereby certify that the total amount of indebtedness against the said property does not exceed ——— dollars. I hereby authorize you to insure said property for ——— dollars for ——— years, in such company as you may select, to pay the premium out of the loan," etc.

The application is also written on a printed blank, viz., on "South Form No. 1." This is also careful to state that the agent is agent of the applicant, Mrs. Roundtree. This agent, who is designated on form No. 1 by the Corbin Banking Company as their "correspondent," forwards the application. If the loan is accepted, a draft is sent by the Corbin Banking Company. The agent withdraws 20 per cent., 5 per cent. he retains for himself, and the 15 per cent. he remits to the Corbin Banking Company. The borrower executes a note for the full amount of the loan, but one-fifth of the amount in this case was never paid to him. Now, it will be observed from the agreement quoted above that Mrs. Roundtree promises to pay the subagent, who in this case was one John W. Robinson, the predecessor of Duncan & Miller, $500 for his services in negotiating the loan. Nothing was said in the agreement to notify her that 15 per cent. or $375 would go to the Corbin Banking Company, and yet this was true, and Duncan & Miller testify that it is invariably true. To use Miller's language, "the Corbin Banking Co. gets 15 per cent.; we get 5 per cent.; and at a commission of 15 per cent., which is the rate now, the Corbin Banking Co. gets 10 per cent., and we get 5 per cent." This witness is asked this question: "The Corbin Banking Co. represents

Sherwood in making a good many loans in Houston county?" He answered: "I don't know what the connection is between the Corbin Banking Co. and Sherwood, but occasionally Sherwood's name appears as the lender, and sometimes the American Freehold Mortgage Co., sometimes others." "*Question.* Sherwood, a good many times, made the loan,—a number before and a number since? *Answer.* Yes, sir; unquestionably." Now, it will be perfectly manifest to the intelligent mind that this gigantic business, carried on in the manner pointed out, has for its largest profits the exorbitant charges of 15 and 20 per cent., so-called commissions, which are exacted from the necessities of the borrower in plain violation of the law, but with the artful and specious device whereby the borrower is had to sign a paper stating that the person who negotiates the loan is his agent, when it is perfectly evident that he is the agent of the money lender. The relation of principal and agent arises whenever one person, expressly or by implication, authorizes another to act for him, or subsequently ratifies the acts of another in his behalf. Code Ga. § 2178; *Cheney* v. *Woodruff*, 6 Neb. 151; *Cheney* v. *Eberhardt*, 8 Neb. 423, 1 N. W. Rep. 197; *Security Co.* v. *Addison*, 15 Neb. 336, 18 N. W. Rep. 76,—a case precisely in point; *Matteson* v. *Blackmer*, 46 Mich. 393, 9 N. W. Rep. 445; *Wilcox* v. *Chicago, etc., Railroad Co.*, 24 Minn. 269; *Milligan* v. *Davis*, 49 Iowa, 126; *Reynolds* v. *Collins*, 78 Ala. 94; *Fouch* v. *Wilson*, 59 Ind. 93; *Payne* v. *Newcomb*, 100 Ill. 611.

Duncan & Miller, no doubt, had heard the application of the borrower, but their business in this connection was that of loan agents, and for a particular company, and for certain individuals; and they represent the lenders in placing the loan, examining the titles, releasing the property from liens, insuring the property, and paying the taxes. It was their regular business to invest safely the money of the lender, and thereafter protect the investment. They are now seeking to collect the money, and it appears that all their actions in the premises have been ratified by the lender. They were the agents of the plaintiff; and this is manifest notwithstanding the sedulous attempt to make it appear that they were the agents of the defendant. The fact is, this attempt is strongly indicative of the illegal character of this business. The *quo animo* of the parties is of the first importance. Is it not perfectly evident that this entire scheme is a device or shift to dodge the usury laws of the state of Georgia? If not, why so careful to state that the subagent and correspondent of the Corbin Banking Company is the agent of the borrower? Look at the testimony of Duncan, one of the subagents, who is likewise the attorney of the plaintiff: "*Question.* Who represent the Corbin Banking Company as their agents? *Answer.* We represent the *borrower*. *Q.* Don't you also represent the Corbin Banking Company? *A.* They never paid us anything. *Q.* Didn't you say at the last court that you were the agents of the Corbin Banking Company? *A.* I said, in that way we send to them and negotiate." Again: "You didn't get the $500 commission for yourself? *Answer.* No, sir; we got only 5 per cent. *Question.* What became of the balance? *A.* I don't know." Again: "You have a regular correspondence with the Corbin Banking Company? *An-*

swer. Yes, sir. *Question.* Receive instructions from them as to the matters you attend to for them? *A.* Yes, sir."

It is true that there must be an intention knowingly to contract for or to take usurious interest, for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract upon its very face imports usury, *res ipsa loquitur*, the thing speaks for itself. This distinction was laid down as early as the case of *Button* v. *Downham*, 2 Cro. Eliz. 643; *Bedingfield* v. *Ashley*, Id. 741; *Roberts* v. *Trenayne*, 3 Cro. Jac. 507. The same doctrine has been acted upon in modern times, as in *Murray* v. *Harding*, 2 W. Bl. 859, where GOULD, J., said that the ground and foundation of all usurious contracts is the corrupt agreement. *Floyer* v. *Edwards*, Cowp. 112; *Hammet* v. *Yea*, 1 Bos. & P. 144; *Doe* v. *Gooch*, 3 Barn. & Ald. 664; and *Solarte* v. *Melville*, 7 Barn. & C. 431. *Vide* opinion of Mr. Justice STORY in *Bank* v. *Waggener*, 9 Pet. 399.

Now, the agreement by which Mrs. Roundtree promised to pay 20 per cent., in addition to the 8 per cent. per annum interest, to pay all premiums of insurance, all taxes, and to pay off all liens, is part of the plaintiff's case; it is an essential part of the contract, and was put in evidence by the plaintiff. Unquestionably it is the rankest usury. It is not disputed that one who negotiates a loan may be allowed reasonable compensation for his expenses and trouble, in addition to interest. But where there is no expense, and no trouble, there cannot properly be charged any such remuneration. Tyler, Usury, 335. And no decision can be found where a court of justice has sustained a charge of 20 per cent., where any knowledge of such charge was traceable to the money lender. But here is 20 per cent. in addition to 8 per cent. per annum. Indeed, Lord TENTERDEN, in *Meagoe* v. *Simmons*, 1 Moody & M. 125, held that, where the lender stipulates with the borrower that the latter shall pay a commission to the lender's agent, it is usurious, although the lender himself retains nothing but the legal discount. This, Mr. Tyler says, is a well-considered case. The truth is, the enormous commissions charged are merely intended as a mask thrown over the transaction. The statute of Georgia quoted above is intended to defeat schemes of this character, and a fraud upon a statute is a violation of the statute. *Bank of U. S.* v. *Owens*, 2 Pet. 527. The services rendered in the negotiation of this loan, had they been rendered the defendant, when in fact they were not, would not have been worth at the most more than a tenth of the sum charged. Nor is this, under the circumstances, a question for the jury. It is usurious on its face; and, in the absence of explanatory proof, it was the duty of the court to say so. *Steele* v. *Whipple*, 21 Wend. 103. This is especially true, as a matter of practice, in a court of the United States. *Hathaway* v. *East Tennessee, V. & G. R. R.*, 29 Fed. Rep. 489.

The plaintiff relies with great apparent confidence upon the case of *Call* v. *Palmer*, 116 U. S. 98, 6 Sup. Ct. Rep. 301. There Burnham had $10,000 belonging to a relation, Mrs. Davidson. Call applied in writing for a loan; and Burnham, thinking Call's proposition a favorable one, decided to accept it for Mrs. Davidson, and afterwards sent

the money to Emmettsburgh, to a firm of bankers, of which he was a member, for Call. The bankers, Burnham, Ormsby & Co., took Call's note for $10,000, with 10 per cent. interest, which Call secured by mortgage. They paid him only $8,000, retaining $2,000 as compensation for their services in negotiating the loan. No part of this sum was paid to Mrs. Davidson. She did not know that it had been deducted; and she never authorized Burnham, or Burnham, Ormsby & Co., to loan her money at greater rate of interest than 10 per cent., or to retain any commission or bonus out of the sum lent. In short, she received no benefit, nor had any knowledge of the usurious charge. This appeared from the proof, and it was manifestly to be held, and was held, not usurious as to her or her assignees. In rendering the decision, Mr. Justice WOODS uses language which is quite significative of the rights of the parties here, had this not been true.

It will be observed that in the case of *Call* v. *Palmer* there was but a single transaction. Here there is a continuous and settled business, with an elaborate system, with printed forms, classified with reference to the different sections of the country, correspondents, and subcorrespondents, and printed instructions to correspondents, with usually a charge of 20 and always a minimum charge of 15 per cent. above the rate of interest allowed by the laws of the land. Under such circumstances, one who lends money by this system will be chargeable with knowledge of all the facts which he could have ascertained by inquiry. It appears from the evidence that Sherwood made many loans within the confines of one county, and certainly it is presumable that he knew the terms upon which, under these circumstances, his money was loaned. This has been expressly held by the supreme court of Connecticut, a tribunal whose judgments are entitled to high consideration, in the case of *Rogers* v. *Buckingham*, 33 Conn. 81. The doctrine is there announced in these words: "Authority to make a usurious loan will not be presumed where the agency is special, and limited to a single transaction. It may be presumed where the agency is general, and embraces the business of making, managing, and collecting the loans of a moneyed man." *A fortiori* will it be presumed where it constitutes a great and comprehensive business, covering entire states, and especially where the courts have rendered decisions making public and evident the nature of the business carried on by the Corbin Banking Company through which all the loans are placed? *Vide New England Mortgage Security Co.* v. *Addison*, 15 Neb. 336; 18 N. W. Rep. 76. The action of this loan agency, in withholding 20 and 15 per cent. commissions, is a matter of public notoriety. It will be presumed that they had authority to do as they did. It will be inferred from the general manner in which they have been allowed to proceed for a period sufficiently long to establish a settled course of business. *Martin* v. *Webb*, 110 U. S. 14, 3 Sup. Ct. Rep. 428; *Merchants' Bank* v. *State Bank*, 10 Wall. 604. If it were not true, however, that the plaintiff was engaged in the business of a usurer, certainly the circumstances were such as would put a man of ordinary business intelligence, lending his money by this system, on inquiry. Let us suppose that the first loan was legitimate so far as

Sherwood, the plaintiff, was concerned. The Corbin Banking Company continues to take his money to lend in a remote state. Presumably he expects the return of his principal with 8 per cent. interest. He lends to many persons through the same agency. Ought he not to inquire the terms of the contracts upon which his money is loaned? A man of ordinary business intelligence is presumed to know the character of the contracts made with his money. He should have inquired what was the compensation of the Corbin Banking Company. Lending money as a business, he should have known the amount of the commissions that his agents charged. He cannot shut his eyes and ears to the nature of these transactions, and thus empower others to carry on a stupendous business, in violation of law, with his money, without sharing the responsibility for their conduct. This being true, he is chargeable with notice of all that he would have found out on inquiry; and, certainly, there would be no want of witnesses to satisfy him that the agents were violating the law. In *Call* v. *Palmer*, *supra*, it was clear that the principal lender knew nothing about the usury. And so in *Boardman* v. *Taylor*, 66 Ga. 648. In the last case, Chief Justice JACKSON used this language: "The payment of the money to Plant and Son to negotiate the loan, which money Taylor never got, and of which he knew nothing, cannot convict him of usury, or taint the loan he made with the leprosy of usurious interest."

In the presence of the presumption which arises from the settled character of this business, and the facts which should put the plaintiff on inquiry, having shown the usury, the defendant may rest his case; and the plaintiff is then called upon to show that he did not know, or authorize, or consent to these usurious charges; otherwise the defendant is entitled to a deduction therefor. *Maine Bank* v. *Butts*, 9 Mass. 55; *Roberts* v. *Trenayne*, 3 Cro. Jac. 508; *Childers* v. *Deane*, 4 Rand. (Va.) 406; *New York Fireman's Ins. Co.* v. *Sturges*, 2 Cow. 676. The evidence of the plaintiff is strangely silent upon this damaging accusation. Certainly, if he is not connected with the usurious transactions, it is competent for him to show it. The effect of the evidence of the plaintiff was to withhold from the court and jury the identity of the person or persons by whom the 15 per cent. was appropriated, after Duncan & Miller were paid 5 per cent. This does not commend the plaintiff's case to the court. I repeat this is clearly a device to avoid the law of Georgia. In *Bank* v. *Owens*, 2 Pet. 527, Mr. Justice JOHNSON, upon a question of this character, said: "Courts of justice cannot be made the handmaids of iniquity. Courts are instituted to carry into effect the laws of the country. How can they, then, become auxiliary to the consummation of violations of the law?" The usury laws are made for the protection of the needy; and, in the language of Mr. Justice FIELD, in *Cromwell* v. *Sac Co.*, 96 U. S. 60, "courts will look with disfavor upon the devouring character of the interest stipulated." In that case it was far smaller than that stipulated in this case. Chief Justice TANEY, in *Brewster* v. *Wakefield*, 22 How. 118, declares: "Where the party desires to exact from the necessities of the borrower more than three times as much as the legislature deems reasonable and just, he must take care that the con-

tract is so written in plain and unambiguous terms, for with such a claim he must stand upon his bond." Chief Justice BEST, in the house of lords, declared that the policy of all usury laws in modern times is to protect necessity against avarice, and to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and national wealth. 3 Bing. 193.

It would be difficult to devise contracts which, in their operation and effect, would more completely defeat the object of the usury laws than the contract now before the court. In its inception 20 per cent. of the entire capital is withdrawn. In addition to this, he must pay 8 per cent. on a sum he never received, as regular interest. No amount of industry in ordinary and legitimate business can compensate the borrower for so great a deduction. This is especially true of those engaged in the pursuits of agriculture. The courts, ordinarily, have nothing to do with the results of the contracts which people make; but the direful effects of such contracts, as that upon which the plaintiff has brought his action, well illustrates the wisdom of the laws of Georgia upon this subject. Many families, who otherwise would have enjoyed all the comforts of home and adequate support, have been turned out homeless and landless. The head of the family has been induced by the hope of speculative gain to enter into contracts to pay these exorbitant and extravagant rates of interest for the use of money. Not only does he find that the product of his farm is insufficient to pay the principal, but he cannot support his family and pay the interest coupons as they fall due. It is then optional with the creditor to foreclose his mortgage, or to sue his notes for the entire amount. The judgment of foreclosure is obtained; the sheriff or the marshal brings the land of the debtor to the block; and a family, with all its productive capacity to the state, and all of its contentment and happiness within its own circle, is destroyed and scattered. The money lender is compelled to purchase the farm which he obtains for a mere moiety of its value. Unacquainted with the conditions of our climate, the character of our soil, and the methods of our agriculture, he is unable to cultivate his acquisition in a manner profitable to himself, or beneficial to the state. Persisted in, this monstrous system would reduce the agricultural population of the state to the condition of a landless tenantry, with all of the degradation of manhood, and all the wretchedness and pauperism, this is known to entail.

In every possible view, therefore, the system is absolutely ruinous, and well has the experience of those who have observed the effect of this business justified the declaration of Mr. Justice JOHNSON, in *De Wolf* v. *Johnson*, 10 Wheat. 385, where he declares that "usury is a moral taint wherever it exists." He continues: "No subterfuge shall be permitted to conceal it from the eye of the law." This is the substance of all the cases, and they only vary as they follow the *detours* through which they had to pursue the money lender.

Nor is this experience confined to our own state, or our own times. In an important case in the court of errors of the state of New York, involving the question of usury, the illustrious Chancellor KENT has given

to us certain facts of history with relation to usury laws in general. "If we look back upon history," said he, "we shall find that there is scarcely any people, ancient or modern, that have not had usury laws. The Romans through the greatest part of their history had the deepest abhorrence of usury. It will be deemed a little singular that the same voice against usury should have been raised in the laws of China, in the Hindu institutes of Menu, in the Koran of Mahomet, and perhaps, we may say, in the laws of all nations that we know of, whether Greek or barbarian." "In England, usury was an object of hatred and legal animadversion, at least as early as the time of Alfred." The statute of 37 Hen. VIII., *c.* 9, not only made usury illegal, declared that the usurer should forfeit for every offense the total value of the money or thing forborne, but that he should suffer imprisonment, and that one moiety of the forfeiture should go to the king, and the other to the prosecutor. And while the British people at this time have free trade in money, as in everything else, the American states have, almost without exception, adopted laws prohibiting an unreasonable rate of interest. Here, at least, the utterances of Lord REDESDALE are applicable, when he said: "The statute of usury is interposing its warning voice between the creditor and the debtor, even in their most secret and dangerous negotiations, and teaches a lesson of moderation to the one, and offers its protecting arm to the other."

In this case the plaintiff must be content, so far as the action of this court is concerned, with his principal actually paid to the defendant and 8 per cent. interest thereon, with attorney's fees. The verdict by which he has been deprived of the 20 per cent. so-called commissions, included in the face of the note, but never received by defendant, is sustained, and the motion for a new trial is overruled.

MARSHALL *v.* TURNBULL and others.[1]

(*Circuit Court, E. D. New York.* August 10, 1887.)

1. INJUNCTION—AFFIDAVITS—CONFLICT OF TESTIMONY
   Complainant, a holder of bonds which a certain tract of land in the delta of the Orinoco was mortgaged to secure, applied for a preliminary injunction restraining defendants from committing any injury to said land. Nothing appeared in the moving papers to show that defendants were in any way interfering with the land in question except by claiming title to it, and the affidavits disclosed a conflict of testimony which could be passed upon safely only on the trial of the action. *Held*, that the determination of the rights of the parties should be postponed until the trial, and the motion for a preliminary injunction be denied.
2. SAME—PREVENTION OF WASTE—FOREIGN LAND—POWER TO ENJOIN.
   A defendant, properly served, may be enjoined from committing waste upon, or otherwise impairing the value of, property in which the complainant is interested, even though the property is situated abroad, provided a case for the interposition of a court of equity is made out.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

In Equity.
W. M. Safford, for complainant.
Silas M. Stilwell, for defendant.

LACOMBE, J. This is an application for a preliminary injunction to restrain defendants George Turnbull and the Pedernales Company, their agents, associates, servants, etc., from committing any injury upon a certain tract of land in the delta of the Orinoco, or doing any other act to the prejudice of the complainant, who is the holder of certain bonds which said tract of land is mortgaged to secure.

The defendant Turnbull raises a preliminary objection, viz.: That the court has no jurisdiction of the action, the bill being for the foreclosure of a mortgage on lands situated in a foreign country. The question of jurisdiction need be considered at this stage of the proceedings so far only as it is germane to the matter now before the court. The particular relief prayed for in the bill, and which the court is now asked to extend to the complainant, is concededly within the power of this court. A defendant, properly served, may be enjoined from committing waste upon, or otherwise impairing the value of, property in which the complainant is interested, even though the property is located abroad, provided a case for the interposition of a court of equity is made out.

The affidavits admitted upon the motion disclose a complicated condition of affairs, with an unusual display of personal bitterness. Upon questions of fact so simple as apparently to preclude the possibility of an honest mistake in their statement, the respective affiants flatly contradict each other, and it is hard to escape the conviction that there has been an abundance of false swearing.

It appears that in 1883 the government of Venezuela granted to one Fitzgerald a concession, for 99 years, of several hundred thousand acres of land (including the island of Pedernales) situated in the delta of the Orinoco, upon certain terms and conditions. This concession Fitzgerald transferred to the Manoa Company. The latter company leased to Henry F. Stone that part of the concession known as the island of Pedernales. Stone and his associates created the International Asphalt Company, and subsequently the Pedernales Asphalt Company, to operate under such lease; the island being supposed to be valuable by reason of an asphalt lake therein situated. Subsequently, and early in 1886, the defendant George Turnbull received from Guzman Blanco, at that time minister and envoy from Venezuela to London and Paris, a concession, or rather a contract to give a concession, including all the territory originally conceded to Fitzgerald. On September 10, 1886, this contract was approved by the president and federal council of Venezuela; the same authorities having, on September 9, 1886, declared the Fitzgerald contract void and forfeited. The complainant urges that the new contract is either wholly void as to the Manoa Company, by reason of the circumstances under which it was made, or that it inures to the benefit of the Manoa Company, (complainant's mortgagor,) by reason of the trust relation which it is claimed George Turnbull bore to that company.

The claim that the new contract is wholly void is based on the assertion that was obtained from Blanco by bribery and corruption. The only fact sworn to in support of this assertion is that on several occasions Turnbull has stated either that Blanco was his partner in the concession, or that he was to give Blanco "forty-eight per cent. of the fruit of the contract." Whether or not the laws of Venezuela allow her foreign ministers and other government officials to become interested with foreigners in schemes for developing the resources of the country, nowhere appears, although it seems that Blanco was also interested in the Manoa Company, holding one-fourth of its capital stock, and that Gen. Crespo, while president of the republic, was also a stockholder in said company. The defendant Turnbull flatly denies that Blanco is interested with him, or that he ever so stated; and as to one interview referred to in complainant's affidavits he is corroborated by the evidence of another witness. This is not a question to be determined on *ex parte* affidavits. The vehement and bitter charges and counter-charges with which the affidavits are filled, indicate a state of affairs which can only be safely passed upon at the trial, where the several witnesses may be cross-examined.

The claim that the new concession inures to the benefit of the Manoa Company by reason of the trust relation which it is claimed George Turnbull bore to that company is based upon two assertions. In the first place, it is contended that Turnbull was the real party in interest in the Stone contract, by which the island of Pedernales was leased from the Manoa Company. In the second place, it appears that he was elected treasurer of the International Asphalt Company, which was formed to work that lease, and in which the Manoa Company was a large stockholder. Turnbull denies that he is the real party in interest in the Stone contract, and says that, though elected treasurer of the company, he never acted as such. Without discussing the conflict of testimony thus presented, it is sufficient to say that there is nothing in the affidavits to show that Turnbull or the Pedernales Company are, either of them, in any way interfering with the island of Pedernales, except by claiming title thereto. The specific acts charged against these defendants are the mining of ore from some other part of the original concession. Of course, the duty, if any, which Turnbull owed, as holder of a trust relation to the Manoa Company, was limited to the subject-matter of the Stone contract, and of the International Asphalt Company. The subject-matter is the island of Pedernales, and the asphalt lake therein. There is nothing shown in the moving papers which calls for the summary granting of a preliminary injunction to restrain defendants' action as to the island and lake, and therefore, in view of the conflict of testimony presented by the affidavits, the determination of the parties' rights should be postponed till the trial. Motion denied.

MILLS v. HURD and others. (No. 532, and Three Other Cases.)

(*Circuit Court, D. Connecticut.* September 19, 1887.)

1. EQUITY—PLEADING—MULTIFARIOUSNESS—PRAYER FOR ACCOUNTING AND INJUNCTION.
   Complainant, a stockholder, trustee, and creditor of an unincorporated association, brought a bill against his co-trustees for the winding up of the affairs of the company on account of gross mismanagement, for an accounting, and the appointment of a receiver; also praying for an injunction against a proposed fraudulent sale by the trustees of a large portion of the property of the association. *Held*, that such a prayer did not make the bill multifarious.
2. SAME—ENJOINING SALE—VENDEE PROPER PARTY.
   In a bill for an accounting by a member of an unincorporated association, and praying an injunction against a proposed fraudulent sale, it is proper to make the proposed vendee a party to the suit, although he may have no interest in the accounting.

Goodwin Stoddard and *H. C. Robinson*, for Consolidated Rolling Stock Co. and others, defendants.

Wm. C. Case and *T. M. Maltbie*, for John Hurd.

Wm. A. Underwood and *A. Howells*, for plaintiff.

SHIPMAN, J. This is a demurrer to a bill in equity on the ground of multifariousness in improperly joining distinct and independent matters in one bill. The facts in the case, as they appeared upon the plaintiff's motion for a preliminary injunction, are stated in *Mills* v. *Hurd*, 29 Fed. Rep. 410.

The bill in No. 532 alleges, in substance, as follows: The plaintiff and the defendant Hurd were the originators of the unincorporated association or partnership *sub modo* formed for the purpose of owning and leasing railroad freight cars, known as the Bridgeport Rolling-Stock Association, were the original trustees thereof, and are still trustees. Hurd was and is its president and treasurer. All the stock of said company was issued to him. He furnished to it freight cars which he claimed were furnished in exchange for said stock. These shares he afterwards sold to sundry persons. He has had the entire management of the moneys and property of said association. The plaintiff is a stockholder in, and creditor of, said association. Subsequently the defendants Ritchie, Trubee, and Cogswell became trustees. The bill then sets out at length the particulars in which Hurd has mismanaged and misappropriated the property and funds of said association, has failed to render proper and accurate accounts, and has been guilty of a breach of his obligation, as a trustee and manager. It alleges that he has a large amount of its funds in his hands which he refuses to pay or account for properly, that there is no hope of his coming to an honest account with said association, or voluntarily or honestly distributing its assets, and that said Ritchie, Trubee, and Cogswell are supine, and either will not or cannot afford any assistance to the stockholders in this regard. The bill further alleges that the four trustees, other than himself, have made an

agreement with the Consolidated Rolling-Stock Company, also a defendant, and claiming to be a Connecticut corporation, whereby all the cars belonging to the Bridgeport Company, and some of its funds, and all the cars of three other companies, are to be conveyed to said Consolidated Company; that said conveyance is to be without consideration, except an issue, in the future, to the stockholders in said four associations, of the shares of stock of the Consolidated Company, in exchange for their respective shares in said associations, leaving shareholders, who were unwilling to make said exchange, subject to such terms as said corporation may offer, or else to a resort to legal remedies; that this scheme is promoted by said defendant trustees without the consent or request of the majority of the stockholders, and, if carried out, would be a fraud upon their rights; that said transfer is intended by said four trustees and those having control of said Consolidated Company to be fraudulent and for the purpose of putting and leaving the shareholders in the position which has been described, and that said conveyance, notwithstanding the protest of the plaintiff, is about to be made. The prayer is for an account by said Hurd, and by the other trustees, of all his and their financial dealings with said company; that all the defendant trustees may be enjoined against selling or disposing of any of the assets of said company to the new corporation, or to any other person, and from collecting any dues belonging to said companies; that the Consolidated Company may also be enjoined against purchasing the cars or other assets of said association; that the affairs of said company may be wound up, its property sold, and the proceeds distributed among the shareholders, and that this may be done by the aid of a receiver, who shall take possession of its property.

The three other bills make the same allegations and the same prayers, *mutatis mutandis*, in regard to the three other companies.

The bill is by a stockholder, trustee, and creditor of an unincorporated association against his co-trustees, in which a number of the Connecticut stockholders are also made defendants, praying for a winding up of the affairs of the association, on account of the gross mismanagement and fraud of its manager, and the supineness of its co-trustees, and for an accounting by them all in regard to the property and funds of said association, and for an injunction against a proposed fraudulent sale of a large portion of its property, in which intended fraud the defendant trustees and the proposed vendee participate. The bill makes no different or additional allegations on account of the different characters in which the plaintiff presents himself.

It must be observed, and this I conceive to be the important point upon this demurrer, that all the allegations in regard to the sale relate to a proposed sale only. It is not alleged that such sale has been consummated, nor is there any prayer for its cancellation, or for a return of the property in the hands of the Consolidated Company to the receiver. The prayers in regard to a delivery of property relate only to the trustees. If the bill had counted upon an executed sale, and had prayed, not only for the winding up and settlement of the business of the company or

partnership, but for a rescission of a fraudulent sale made by a majority of its managers to a third person, and a return to the receiver of the property so attempted to be sold, a question would have arisen upon which the authorities differ, and which is, in my opinion, to be determined by the allegations and facts in each particular case. The cases of *Sawyer* v. *Noble*, 55 Me. 227, cited with approbation in *Walker* v. *Powers*, 104 U. S. 245, and *Salvidge* v. *Hyde*, Jacob, 151, are examples of the views which courts have taken against the union of such matters upon the ground that they are independent. The cases of *Hayes* v. *Heyer*, 4 Sandf. Ch. 485, and of *Attorney General* v. *Cradock*, 3 Mylne & C. 85, are examples of a different view, which was based, in the latter case, upon a state of facts peculiar to itself.

The bill is, then, in substance, for the winding up of the affairs of the Bridgeport Company, and an accounting by its trustees and manager, and also asks for an injunction against a proposed sale upon the ground that, if consummated, it would be the execution of an intended fraud, and would still further waste the assets of the company. Such a prayer does not make a bill multifarious, for it would be a technicality, without foundation, if a partner could not, in addition to his remedies against the already consummated frauds of his copartners, ask, in the same bill, for a preventive remedy against a fraud not already consummated, which is being planned, and which, if completed, would result in the scattering of his property. It is proper in such a bill for an accounting by one partner, if an injunction is asked against a proposed fraudulent sale, to make the proposed vendee a party to the suit, although he may have no interest in the accounting. 2 Lindl. Partn. 880; *Bevan* v. *Lewis*, 1 Sim. 378. So far as the defendant trustees are concerned, the bill does not join distinct causes of action. Its object is to show the necessity of a winding up by judicial action. The weight of the allegations is upon Mr. Hurd, but the necessity of a winding up by the interposition of a court is enforced by the averment that the other trustees are too negligent and inattentive to do the work themselves.

I have intentionally refrained from a discussion of the general principles in regard to multifariousness, mindful that the attempt to state abstract propositions in regard to the subject is not fruitful of benefit. "Every case must be governed by its own circumstances." *Gaines* v. *Chew*, 2 How. 619.

The demurrer is not allowed.

WITTERS, Receiver, etc., *v.* SOWLES, Ex'r, and others.

(*Circuit Court, D. Vermont.* August 13, 1887.)

1. EXECUTORS—PAYMENT OF LEGACIES—INSUFFICIENCY OF ASSETS—TRANSFER OF BANK STOCK TO RESIDUARY LEGATEE.
   An executor representing that he had sufficient assets to pay all legacies, but filing no inventory, obtained a decree that he pay the legacies, and that the residue be paid to the residuary legatee, and afterwards transferred to the residuary legatee, with her assent, certain shares of bank stock belonging to the estate, the dividends on which were afterwards paid to the executor, who was the husband of the residuary legatee. The remaining assets were insufficient to satisfy the legacies. In an action brought to charge the estate with an assessment on the stock, *held*, that the transfer was valid, and passed the title to the residuary legatee.
2. SAME—CONVEYANCE BY EXECUTOR—RESIDUARY LEGATEE.
   A conveyance by an executor to the residuary legatee, who is his wife, is good at common law.
3. NATIONAL BANKS—LIABILITY OF SHAREHOLDERS—ESTATE OF SHAREHOLDER—LIABILITY OF LEGATEES AND DEVISEES.
   Under Rev. St. U. S. § 5151, rendering shareholders individually responsible for the liabilities of a national bank to the extent of the value of their stock; and section 5152, providing that the estate of a shareholder in the hands of the executor shall be liable in like manner and to the same extent that the testator would be if living,—assets which have been transferred to devisees or legatees cannot be subjected to liabilities of the bank accruing after the transfer.
4. SAME—ASSESSMENT ON STOCK—LIABILITY OF LEGATEE.
   On the representations of the executor that he had more than sufficient assets in his hands to satisfy all debts and legacies, he was decreed to pay defendant S. S. her legacy, but neglected to do so until after the failure of the national bank in which the testator was a stockholder, when he delivered property to her trustee in satisfaction of the legacy. *Held*, that under the statutes above quoted, the legatee and her trustee were chargeable with an assessment upon testator's stock to meet the liabilities of the bank accruing before actual delivery to the legatee.
5. SAME—SALE OF STOCK FOR TAXES—TRANSFER ON BOOKS OF BANK.
   In 1865, a tax collector assumed to sell 50 shares of testator's bank stock for delinquent taxes, and they were bid in by defendant E. S., but they were never transferred on the books of the bank. E. S. received the dividends until the validity of the tax was adjudged, and afterwards they were received by testator. *Held* that, under the laws of Vermont then in force relating to the enforcement of taxes, no title passed, and that there was no such acquiescence on the part of testator as to make the sale good.
6. SAME—TRANSFER OF STOCK—CONSIDERATION—TITLE.
   Where an executor, without consideration, transfers bank stock in trust for his own benefit, and to enable the transferee to become a director of the bank, the title, for the purposes of assessment, remains with the executor.
7. SAME—INSOLVENCY—ASSESSMENT—SET-OFF.
   In an action by a receiver of an insolvent bank to charge the estate of a shareholder with an assessment on his shares, the executor claimed, by way of set-off, that property belonging to the estate had been delivered to the bank, upon the understanding that it should be applied on the assessment if the bank should fail. *Held* not a proper subject of set-off, even though the bank examiner assented to the agreement.
8. TAXABLE PROPERTY—SWORN INVENTORIES—DISCLOSURE OF CONTENTS—EVIDENCE.
   Under Laws Vt. 1882, No. 2, §§ 26-28, providing for sworn inventories by tax-payers of taxable property, the listers of the town, in an action between a receiver and stockholders of an insolvent national bank, will not be allowed to disclose the contents of such sworn inventory; nor will the town clerk,

having it in custody, be allowed to produce it; but a witness who assisted the tax-payer in making the inventory, and saw its contents, with her permission, before it was taken by the lister, may be examined as to its contents.

9. SAME—RULE IN VERMONT—ENFORCEMENT IN UNITED STATES COURT.
The rule of the Vermont statutes, prohibiting the disclosure by listers, or the production by the town clerks, of the sworn inventories of tax-payers, will be enforced in an action in the United States circuit court for the district of Vermont.

10. NATIONAL BANKS—ASSESSMENT—SUIT TO CHARGE ESTATE—PLEADING.
In a suit in equity, brought by the receiver of a national bank, to charge the assets of the estate of a testator, in the hands of the executor and devisees and legatees, with an assessment on certain shares of the capital stock of the bank, the bill was framed so as to charge defendant M. with the assets in her hands as legatee, with the payment of the assessment on the testator's stock. *Held*, that she could not be charged in this action as owner of the stock.

11. EQUITY—DECREE—CORRECTION BEFORE SIGNATURE OR ENTRY.
Before the decree is entered or signed, the court, at the suggestion of either party, or on its own motion, will correct any error or oversight that may appear in the decision or decretal order.

In Equity.

Chester W. Witters and *Guy C. Noble*, for orator.

Edward A. Sowles and *Kittredge Haskins*, for Edward A. Sowles and Margaret B. Sowles.

Edward A. Sowles, for Susan B. Sowles.

W. D. Wilson, for Town of Fairfax.

Albert P. Cross, for Town of St. Albans and defendants Atwood.

WHEELER, J. This bill is brought to charge the assets of the estate of Hiram Bellows, in the hands of the defendant Sowles, as executor, and of the other defendants, as devisees and legatees, with an assessment on 430 shares of the capital stock of the First National Bank of St. Albans, of the par value of $100 each, made by the comptroller of the currency equal to that amount. At the time of the organization of the bank, in 1864, the testator took 450 of its 1,000 shares, and they were placed to his name on the books of the bank. In 1865 he refused to pay his taxes, and the collector advertised and assumed to sell 50 shares of this stock, which were bid off by the defendant Sowles and paid for by money of the bank, for which he gave his note. The collector made no transfer of the stock on the books of the bank, and it stood there the same afterwards as before. The validity of the tax was in suit between the testator and collector, and was finally decided against the testator in 1869. *Bellows* v. *Weeks*, 41 Vt. 590. To about that time Sowles received the dividends; afterwards the testator did. After the death of the testator, Sowles paid his note given for the stock to the bank. It is claimed now that Sowles became the real owner of these 50 shares, and that the estate of the testator is not liable for the assessment upon them. The laws of the state for the distraint, keeping, and sale of property for taxes did not, at that time, apply to property of this nature, and the attempted sale by the collector had no effect whatever upon the title. *Barnes* v. *Hall*, 55 Vt. 420. It is urged, however, that the acquiescence of the testator, shown by permitting Sowles to receive the dividends,

made the sale good. However this might have been if Sowles had continued to receive the dividends after the contest was over, his yielding the right to them, from that time, to the testator, shows with plainness that they both understood that the stock belonged to the testator, and that the receipt of dividends and payment for the stock were to be adjusted on that basis. Sowles has, since the death of the testator, undertaken to transfer more shares as executor than would remain to the testator, without these, which shows the same thing. The real title to these shares appears, therefore, to have been in the testator, as the record title on the books of the bank was, at the time of his death. He died October 18, 1876. At that time he was still the owner of the 450 shares, and they all stood in his name on the books of the bank. He left a will providing for various devises and bequests to the defendants other than Sowles, the executor, and made his wife, Susan B. Bellows, residuary legatee, and appointed the defendant Sowles executor, without requiring additional surety on his bond. Letters testamentary were granted accordingly, with additional surety for the payment of debts, as required by the laws of Vermont in such cases. Rev. Laws, § 2067. Proceedings were taken for ascertaining the debts due from the estate, and the executor satisfied some of the legacies wholly, and others in part, out of the assets of the estate. Ten shares of the stock were transferred by the executor to Oscar A. Burton, and 10 to George W. Foster, in a manner about which no question is now made.

In 1880, Susan B. Bellows died, leaving a will making, so far as is material, the same devises and bequests as were made by the will of Hiram Bellows, except that their adopted daughter, Margaret B. Sowles, wife of Edward A. Sowles, executor of his will, was made residuary legatee in her will; and Edward A. Sowles was appointed executor of her will, with the same provision that additional surety should not be required on his bond, and that he should not be required to file any inventory of her estate. Letters testamentary were granted to him upon her estate accordingly, with additional surety upon his bond for the payment of debts, of which, however, there appears to have been none.

Prior to or on March 11, 1881, Sowles, as executor of each of the wills, appears to have applied to the probate court having jurisdiction for an order for the settlement of his accounts, and for decrees of distribution under each will, whereupon notice was ordered to be given for that purpose, as required by law for such settlement and decrees, on the twenty-sixth of the same month, and notice having been given the hearing was continued to the thirtieth. On that day Margaret B. Sowles made an application in writing to that court, signed by her as residuary legatee, wherein she requested the court to "decree the amount of real and personal estate named in Hiram Bellows' will to E. A. Sowles, executor therein named, according to the terms of said will, without finding any definite amount in said executor's hands," and "to decree to the undersigned all the residuary portion of real and personal property named in Susan B. Bellows' will, or owned by her, without finding any definite amount in E. A. Sowles', executor's, hands, without any inven-

tory or specification of items, or articles or estate," and added, "and I accept the same without further specification, and exonerate said E. A. Sowles, as executor, named in said wills, from further duty or liability in the premises." And the court made decree in the case of Hiram Bellows' estate, reciting the notice and continuance, and the appearance of Sowles, executor, and representation by him that he had paid, and had in his hands sufficient funds and estate to pay, all the legacies, leaving to be decreed to the residuary legatee both real and personal estate, and that after paying the bequests, naming them particularly, the residue was devised and bequeathed to Susan B. Bellows, who had deceased, and of whose will Edward A. Sowles was executor, and that Sowles, as executor of her will, had requested the court to decree the residue to him, as such, without an inventory or specific amount found; and that the court found from the evidence that the testator, Hiram Bellows, died seized of estate sufficient to pay all the debts and legacies, and leave a large amount of real and personal estate to be decreed to the residuary legatee; that he pay to each of the legatees named in the will the sum bequeathed in the manner specified, and that the real and personal estate therein devised to each was thereby decreed and assigned to each as in the will provided; and that the remainder, after paying the legacies, was thereby decreed to the estate of Susan B. Bellows, residuary legatee, of whose will Sowles was executor. And after similar recitals respecting the estate of Susan B. Bellows, naming the bequests, and reciting the application, in substance, of Margaret B. Sowles, the court decreed that the executor pay all the legacies, and decreed the residue to her. No appeal was taken from these decrees, and on the next day after they were passed, Edward A. Sowles, as executor of the will of Hiram Bellows, transferred to Margaret B. Sowles, on the books of the bank, in accordance with the by-laws of the bank, 400 shares of this stock, and that number of shares was credited to her on the stock ledger of the bank, and charged to the stock account of Hiram Bellows. These 400 shares stood in her name on the books of the bank until its failure April 7, 1884.

The bill alleges, as to these 400 shares, referring to this transfer previously therein set out, that such pretended transfer was made before the conditions of the decree had been complied with, by paying the legatees the several sums bequeathed to them, of which sums the amount of about $40,000 remained unpaid, with less than $30,000 of property in the hands of the executor, aside from this bank stock, from which to pay this balance; that she had no knowledge of the transfer until a long time after it was attempted to be made, and after the bank became insolvent; that she never accepted or assented to the transfer, nor received any certificate of the stock, or dividends thereon.

The answers of the executor, and of Margaret B. Sowles, who is made a defendant on account of the receipt of assets, admit these allegations, and she affirms their truth. The answers of the other defendants deny them. That the executor had not assets in his hands, aside from this bank stock, sufficient to pay the balance of the legacies, at the time of

the transfer, sufficiently appears. On the question whether Margaret B. Sowles knew of the transfer of the stock to her, and accepted it or assented to it, the other defendants, or some of them, took the testimony of the listers of the town, to whom tax-payers are required to return a sworn inventory of their taxable property, as to the contents of her inventories, with reference to whether this stock was therein set down by her as her taxable property after the transfer, and called upon the town clerk having custody of some of these inventories to produce them. Motion was made to suppress this testimony, and the offer to have the town clerk required to produce the inventories was objected to. The laws of the state provide that these inventories, after they are made by the tax-payers, shall be taken up by the listers, and on or before a certain day be lodged in the town clerk's office, and there kept three years; that the town clerk shall allow certain prosecuting officers, the listers and selectmen, and the tax-payers their own, and no others, to examine them; that they shall be produced in court, by the town clerk, on subpœna; and that their contents shall not be disclosed by any person having access to them, except as set forth, and in the event of prosecution for breach of the provisions of that act. Laws 1882, No. 2, §§ 26–28.

By section 858, Rev. St. U. S., the laws of the state are made the rules of decision in the courts of the United States as to the competency of witnesses, except in some respects not material. This provision requires this court to enforce that part of the statute of the state prohibiting disclosure. *Insurance Co.* v. *Trust Co.*, 112 U. S. 250, 5 Sup. Ct. Rep. 119. The provision of that statute, as to production of the inventories in court on subpœna, applies to production on prosecutions under that act, as all other disclosure is prohibited. The listers should not be required or allowed to testify to their contents, nor the town clerk be required to produce them, except in such prosecutions. The motion to suppress is therefore granted, and that testimony not read, and the offer of production excluded.

The testimony of a witness who assisted her in making one of the inventories, and saw its contents by her permission before it was taken up by the listers, was examined as to what they were. Motion was made to suppress this. The state law imposes the obligation of secrecy only after the inventories are taken up by the listers, and has no application to exhibitions of them by the tax-payers before. This testimony is in the nature of proof of declarations and written statements by her, bearing upon her testimony when she testifies that she did not know that the stock was transferred to her. The motion to suppress is denied as to this, and the testimony read and considered. It shows that this stock was put into her inventory as made by her. The grand lists, on which taxes are made out, are open and public, and are in evidence. They show that this stock ceased to be set to the executor at the time of the transfer, and was set to her afterwards, and taxes assessed upon it were paid by or for her. Hiram Bellows was president of the bank, while he lived, after it was organized; she was the only child and resided in the same village. She must have known of the stock, and have known that

a large part of the estate, which included that, was coming to her. She did not receive any certificate of the stock, and the dividends were paid to her husband by being credited to him in his bank account. This latter circumstance is not very strong as showing that she knew of the transfer, for they would probably have been credited in the same manner if the transfer had not been made. Taking all the circumstances together, it does not seem reasonable to suppose that she did not expect that this stock, which was then worth considerably more than its par value, would come to her with the residue that she asked for. She did not repudiate it; her husband was, by the common law, which had not been changed in this state, entitled to the dividends, and had them. The conclusion that there was no want of knowledge and assent on her part, necessary to the validity of the transfer, is irresistible.

The orator insists, however, that the decrees were so unlawful and irregular as to furnish no foundation for the transfer; and that the transfer, without them, and without consideration, was inoperative to divest the executor of the stock. There is no question here between legatees and devisees about this stock, nor between any such and the creditors of the estate. Hiram Bellows had been dead several years, about seven, before the debts of the bank, for the payment of which this assessment is wanted, were contracted. These assets are therefore only liable for this assessment by virtue of section 5152, which provides that executors shall not be personally holden, but the estates and funds in their hands shall be liable in like manner as the testator would be if living. The question is whether this stock was in the hands of the executor, within the meaning of this statute, at the time of the failure. The legatees had no title or right to the property, except under the will. By the terms of the will, and the law of the state, they had only the responsibility of the executor for security. The creditors could not be defeated in their rights, but they were provided for, as the laws of the state required, by a bond with such sureties, and to such an amount, as the probate court should require. Rev. Laws, § 2067. The highest court of the state, whose construction of these proceedings is binding, has held in respect to this very decree that, in an action by one of the unpaid legatees for the legacy, the question whether debts and expenses had been paid was not a proper subject of inquiry, but was *res adjudicata*, and that the decree laid a foundation for the recovery of the legacy. *Weeks* v. *Sowles*, 58 Vt. 696, 6 Atl. Rep. 603. The executor took the risk of having assets sufficient for all when he represented and showed to the court that he had them. This showing gave the court jurisdiction to decide that he had them. He elected to treat this stock as a part of the residuum; whether it was or not, is not now open. It is suggested that no inventory had been filed, as directed by the statute, and that there was no property before the court for the decree to operate upon. An inventory does not appear to be necessary to bring the assets of a deceased person within the jurisdiction of the probate court for administration. If none is filed, the court may proceed to ascertain and decree the assets on proof, as was done, on notice to all, and proof to the satisfaction of the court furnished by the executor.

Holmes v. *Bridgman*, 37 Vt. 28; *Weeks* v. *Sowles*, 58 Vt. 696, 6 Atl. Rep. 603. The decree did not separate this stock from the rest of the assets, but it settled conclusively the rights of all others to the estate, as between them and the executor, and left him with control of the whole, without liability to further account, or otherwise than on his bond. His election to treat this stock as a part of the residue therefore made it such, when carried out.

The relation of husband and wife between the executor and residuary legatee is put forward as preventing the validity of the transfer, to change this stock from his hands to hers. They are one person in law, as by the common law, in this state, for most purposes, and a sale by him to her of his own property would be of no validity, both on that account and by reason of her disability to make contracts. But this was not a sale of the stock to her, and involved the making of no contract. He did not own the stock, and did not transfer it as his own, but as of the testator, by virtue of the authority given by the will to him as executor. As early as A. D. 1495, it was adjudged that a *feme covert* executrix could make sale of lands to her husband, and it was a good bargain. Year Book 10 Hen. VII. 20; Brooke, Abr. "Executors," 175. And in Coke upon Littleton it is laid down that, if a *cestui que use* had devised that his wife should sell his land, and made her executrix, and died, and she took another husband, she might sell the land to her husband, for she did it *en autre droit*, and her husband should be in by the devisor. 112*a*, Hargrove's Notes, 143; *Newis* v. *Lark*, 2 Plow. 414. This appears to be good law now. *Gridley* v. *Wynant*, 23 How. 500; *Gridley* v. *Westbrook*, Id. 503. The reasons are equally strong why a conveyance by a husband executor to his wife should be good. The executor separated this stock from the rest of the estate in his hands, and made it a part of the residue by the transfer, which was a mere delivery, and it became hers by title from the testator. From that time it appears to have ceased to be in his hands as executor, and was in hers as legatee.

On the fifth day of September, 1882, the executor transferred 10 shares of the stock to Bennett C. Hall. The bill alleges that this transfer was without consideration, and in mere trust for the benefit of the executor, and for the purpose of enabling Hall to become a director. The answer of the executor, in substance, admits this, and there is in reality no question made but that the allegations are true. These 10 shares, upon these facts, remained in the hands of the executor, for the purposes of this assessment. *Bank* v. *Case*, 99 U. S. 628; *Witters* v. *Sowles*, 25 Fed. Rep. 168. These considerations leave 30 shares in the hands of the executor subject to the assessment, and for which the "estates and funds," in his hands are liable. Rev. St. § 5152. The assessment amounts to $3,000, with interest from September 10, 1884, the time at which it became due.

The receiver claims that the assets of the estate which have been paid, delivered, or otherwise have gone to the devisees or legatees, in satisfaction of their legacies and devises, are still liable for this assessment, and that they are chargeable for the amount received up to the amount of

the assessment. The devisees and legatees who have received the assets insist that only those which were left in the hands of the executor are liable. The shareholders are liable only by force of the statute, which declares that they shall be held individually responsible for all contracts, debts, and engagements of the bank, to the extent of the par value of their stock. Rev. St. § 5151. The liability of the shareholder attaches when the contracts are made, debts are created, or engagements are entered into, by the bank, and it is an original liability, made by the law a part of them. *Hobart* v. *Johnson*, 19 Blatchf. 359, 8 Fed. Rep. 493; *Richmond* v. *Irons*, 121 U. S. 27, 7 Sup. Ct. Rep. 788. The testator did not become liable on account of the stock, except for such debts, contracts, and engagements as the bank became liable for during his life-time. The ownership of the stock would not of itself create any, not even a contingent, liability; but ownership of the stock, and creation of a liability by the bank, together, would create a liability of the shareholder contingent upon the discharge by the bank of its liability. Both are necessary to the creation of a contingent claim against a shareholder or his estate. If such a claim had arisen against the estate, it could be enforced against the legatees and devisees to the extent to which they have received assets; not by bringing the assets back into the hands of the executor, but by proceeding directly against those who have received them. Rev. Laws, §§ 2209, 2211, 2214. None of the liabilities of the bank to meet which this assessment is made, are shown or claimed to have been incurred during the life of the testator. Therefore this is not a contingent claim for which the assets can be pursued under the laws of the state relating to such claims. The statute of the United States provides that an executor shall not be personally subject to any liability as a stockholder, but that the estate and funds in his hands shall be liable in like manner, and to the same extent, that the testator would be if living. Rev. St. § 5152. So far as appears or is claimed, all the assets of the estate in the hands of those sought to be charged for them were received before any of the liabilities of the bank now in question were created, and most of them several years before. If the testator had lived, and had disposed of his property as it had been disposed of under his will, he would have been personally liable to this assessment, but none of this property could have been reached to satisfy it. The meaning of this statute seems to be that such estates and funds as an executor or administrator has in his hands, at the time when the liability attaches, are liable in like manner as the testator would be if living at that time, and having in his hands the stock and other property, as the executor had it in his hands; and not that they are holden as the testator would have been if the liability had attached in his life-time. This case is very different in this respect from *Davis* v. *Weed*, 44 Conn. 369. There the liability attached before letters testamentary were granted, if not before the death of the testator, and therefore it was impressed upon all the assets, and would follow them into the hands of the devisees and legatees everywhere. And it is understood that there the executor or administrator can recall property from heirs, devisees, or legatees, if necessary to meet a

liability of the estate arising or appearing after distribution. Therefore the assets were followed and reached, in that case, through the administrator. But that does not show that these assets can be reached through the executor, and are therefore in any sense in his hands so as to be liable to the assessment. The statute appears to contemplate the stockholders as they are at the time of the incurring of the liability, and to hold them responsible equally and ratably, and not one for another, as they stood then. Rev. St. § 5151; *U. S.* v. *Knox*, 102 U. S. 422. Each stands by himself as he is at that time, solvent or insolvent; and, if he is an executor or administrator, the estate then in his hands, adequate or inadequate, and that only, is holden. When these devisees and legatees received their shares of the estate of the testator, the bank was apparently, and, in fact, so far as is shown or claimed, amply solvent, and there was nothing in that direction then to prevent them from taking a clear title, and the law does not appear to be such as to make what happened afterwards, in which they had no part, disturb their title. The orator has therefore no claim for relief against these devisees and legatees, and the bill must be dismissed as to them.

The executor appears to have delivered to the bank, while its failure was impending, stocks and securities belonging to the estate, to an amount much larger than the amount of these shares, which were disposed of by the bank in payment and security of claims against it. He sets up in his answer that this was done upon an understanding that the property should be restored by the bank, if it survived, and applied on an assessment, if it failed, and one should be made. And he now claims that so much of this property or its proceeds as is necessary should be applied upon this assessment, and bar further recovery. He claims, upon the evidence, that this understanding was had, with the bank examiner as well as with the officers of the bank. This assessment is for the purpose of paying those who were creditors of the bank at the time of its failure. That property went to pay others not creditors at the time of the failure, so far as it did pay them. The delivery of the property may have created a liability of the bank; if so, the assessment upon this and the rest of the stock would go ratably upon that and the other liabilities if proved and established. A set-off cannot be made without depriving others of their ratable proportion. Besides this, the claims are not in any sense mutual. The claim of the executor, if he has any, is against the bank. The assessment never was due to the bank, and does not belong to it. The assessment belongs to the creditors of the bank, and is recoverable by the receiver, only for the purpose of ratable distribution among them. *Delano* v. *Butler*, 118 U. S. 634, 7 Sup. Ct. Rep. 39. This claim is therefore no answer to the claim for the assessment, whether this understanding was had or not, or with the bank examiner or only with others. There was no receiver, and the examiner did not, and probably did not assume to, represent the creditors.

The bill is not framed to charge Margaret B. Sowles with the assessment as owner of the stock, but only to charge the assets in her hands as legatee; and it is said by Mr. Justice SWAYNE, in *Kennedy* v. *Gibson*,

8 Wall. 498, in the opinion of the court respecting such assessments: "Where the whole amount is to be recovered, the remedy must be at law." The bill must be dismissed as to her, but without prejudice to the right to recover against her as holder of the stock. As she has not been joined in her defense by next friend, but only with her husband, who is held chargeable in another capacity, the dismissal must be without costs to her.

Let there be a decree for the orator against the defendant Edward A. Sowles, that he pay to the orator, out of the assets of the estate of Hiram Bellows in his hands, the sum of $3,000, with interest from September 10, 1884, to the time of entering the decree, together with the costs of this suit, within 10 days from the entry of the decree; and that in default of such payment execution against such assets issue; and dismissing the bill as to Margaret B. Sowles, without costs and without prejudice, and as to the other defendants, with costs.

(August 24, 1887.)

On rehearing the following opinion was delivered:

WHEELER, J. Since the filing of the decision and decretal order in this cause, and before entry or signature of any decree pursuant thereto, on motion of the orator, further hearing has been had as to charging the assets of the estate of Hiram Bellows, which have passed to Margaret B. Sowles, trustee of Susan B. Sowles, with the assessment upon 30 shares of stock of the national bank, of which the orator is receiver, still held by the executor. At this stage of the case correction of any oversight or error can be made on suggestion of any party, or by the court of its own motion. Such correction is not the alteration of a decree, for as yet there is no decree; but is a mere change of the directions for a decree, if necessary, which may always be done until the directions, as finally settled, are carried into the decree itself and the decree is entered.

On re-examination of the case on this point, which was not made on the argument in chief, it fully appears that, at the time of the creation of the debts of the bank, on account of which this assessment is made necessary, there were estates and funds in the hands of the executor, which were of the testator, to an amount several times greater than this assessment upon this stock. It is said in argument that the title to these assets had before that time vested in the legatees under the decrees of distribution. None of these assets were specifically bequeathed or distributed to the legatee. A legacy of $25,000 was bequeathed to her by the testator. The decrees were made on representations by the executor that he had more than sufficient assets in his hands to satisfy all debts, legacies, and charges. Thereupon he was decreed to pay this legacy. He had not done so at the time of the failure of the bank, which, of course, was after the accruing of these liabilities of the bank. He has since assumed to pay it out of these assets by delivering them to the trustee at agreed prices, in satisfaction of the legacy. The statutes of

the United States provide that the estates and funds in the hands of an executor shall be holden as the testator would have been holden. This statute fixed the lien upon these assets, and it would follow them, wherever they should go, in any subsequent division or distribution of them. The delivery of them by the executor subsequent to this did not remove them away from the lien, but left them in the hands of the trustee of the legatee, or in the hands of the legatee, if they had reached her, subject to the lien as before. The statutes of the state make heirs, devisees, and legatees, who have received assets of an estate, liable for debts,—chargeable for the debts,—to the extent of the assets received. Rev. Laws Vt. § 2209. This is not a debt of the testator, but is a liability of the estates, and funds in the hands of the executor, which attaches to them in the same manner that a debt of the testator would if contracted when he had the same assets. They may be followed, therefore, in the same manner. It is said that some of these assets are real estate, and that such estate goes to the residuary, and not to the pecuniary, legatee, or the executor. But the statutes of the state leave real estate in the hands of the executor, if needed to pay debts or legacies, (Rev. Laws, § 2137;) and the statutes of the United States make no distinction in the kinds of estates and funds which are left in his hands, but make all that are left liable. Rev. St. U. S. § 5152. If this was not so, a large part of the assets so delivered by the executor were strictly personalty, and a still larger part redeemable leases reserving annual rent, which are in the nature of mortgages, and go to the executor, and not to the heir. It is not disputable, and conceded, that the amount of the latter is greater than this liability. The legatee and trustee are chargeable, therefore, with the amount of this assessment.

So much of the decretal order heretofore entered herein as directs that the bill be dismissed as to Susan B. Sowles, and Margaret B. Sowles, trustee for her, is hereby vacated. And there is added thereto that the decree provide that in default of payment by the defendant Edward A. Sowles, executor, payment be made by the defendant, Susan B. Sowles, or Margaret B. Sowles, her trustee, within 10 days thereafter; and, in default of such payment, that execution issue against the assets of the estate of Hiram Bellows, in the hands of Edward A. Sowles, executor; and for want thereof against such assets in the hands of Margaret B. Sowles, trustee of Susan B. Sowles; and for want thereof against the goods, chattels, and estate of Susan B. Sowles, in her own hands, or in the hands of Margaret B. Sowles, trustee.

In re HEARN.

(*District Court, N. D. Ohio, E. D.* February Term, 1887.)

MINORS—ENLISTMENT IN UNITED STATES ARMY—CONSENT OF PARENTS.

Rev. St. U. S. §§ 1116, 1117, authorizes the enlistment in the army of the United States of men above the age of 16 years, and provides that no person under the age of 21 years shall be mustered into military service without the written consent of his parents or guardians. *Held*, that a contract of enlistment entered into by a minor, over 16 years of age, without the consent or knowledge of his parents, could not be avoided by the minor himself, but could only be avoided by the parents, who might claim the right to his custody before majority.

Habeas Corpus.

Jay L. Athey, for complainant.

Gen. Ed. S. Meyer, for respondent.

WELKER, J. The said M. Seward Hearn was born on the twenty-fourth day of September, 1862, and became 21 years old on the twenty-fourth day of September, 1883. On the first day of August, 1882, he enlisted in the service of the United States as a private soldier, then being over 19 years of age. He remained in the service until the summer of 1883, when he left the service without discharge, then lacking a few months of being 21 years of age. He is now in custody of the military officers for desertion from the army. At the time he enlisted he had a father and mother living, who were entitled to his services during minority, and who did not consent to his enlistment, either in writing or otherwise, and had no knowledge of said enlistment until after he had left the recruiting station for service. No efforts were made by the parents to procure his release on the ground of minority during such minority, his father stating at the hearing he thought it best for him, after he learned of the enlistment, to allow him to remain in the army. The relator is now over 24 years of age, and makes this application for discharge for himself.

Section 1116 of the Revised Statutes of the United States provides that "recruits enlisting in the army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years at the time of enlisting." Section 1117 provides that "no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: provided, that such minor has such parents or guardians entitled to his custody and control." Section 1118 provides that "no minor under the age of sixteen years * * * shall be enlisted or mustered into the military service."

The relator claims that under the provisions of the statute his enlistment, without the consent of his parents, was voidable by him, and having left the service before he arrived at the age of 21, he thereby elected to avoid the enlistment, and cannot now be held to service. This claim

raises the question as to the construction of these provisions of the statutes. Usually, a contract made by a minor may be avoided at his election, provided it is done before ratifying it after he arrived at age. This, even at common law, he could not do when the contract was for his benefit.

These sections are to be construed together. It is clear that congress provided by these sections that a minor under 16 years of age cannot be enlisted, and, if done, it would be absolutely void, and he could not be held to service; but it is also clear that if he be 16 years old he can legally enlist. Congress, having so authorized, makes such enlistment legal, and thereby confers capacity on such minor to make the contract of enlistment. If the relator was by the law made competent to enter into this contract when over 16 years of age, he cannot for himself avoid it. Section 1117, requiring the written consent of parents or guardians, when under 21 years of age, was for the benefit of such parents, who might assert their right to his custody before majority, and does not affect the capacity of the minor to bind himself. It can hardly be maintained that congress intended to authorize a minor 16 years of age to enlist in the military service, and, after having so enlisted, to desert the service at any time before arriving of age, at his will and pleasure. Under section 1117, he could only be taken from the service on the application of the parents or guardian entitled to his custody, to either the secretary of war or through the instrumentality of the courts. In this construction of the statute I am borne out by several decisions of the courts. *In re Davison*, 21 Fed. Rep. 618; *U. S.* v. *Gibbon*, 24 Fed. Rep. 135. The only case to the contrary cited is *U. S.* v. *Hanchett*, 18 Fed. Rep. 26, where the judge did discharge the relator under his own application before he became 21 years of age.

The prayer of the petition is therefore denied, and he is remanded to the custody of the respondent.

UNITED STATES *v.* REICHERT and others.

UNITED STATES *v.* GLOVER and others.

(*Circuit Court, D. California.* September 5, 1887.)

1. CONSPIRACY — AGAINST UNITED STATES — WHAT CONSTITUTES — FRAUDULENT CLAIMS.

Section 5438, Rev. St., so far as it declares that every person who enters into any agreement, combination, or conspiracy to defraud the government of the United States, or any department or officer thereof, by obtaining, or aiding to obtain, the payment or allowance of any false or fraudulent claim, shall be punished without requiring any act in furtherance of the conspiracy, is modified by section 5440, Rev. St., as amended by the act of March 17, 1878, which declares that 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 parties do any act to effect the

object of the conspiracy, all the parties to such conspiracy shall be liable to the penalty specified; so that a mere conspiracy, without some overt act in execution of it, is not an indictable offense.

2. SAME—INDICTMENT.
An indictment alleging a conspiracy, without alleging the execution of any act to carry it into effect, is therefore fatally defective.

3. SAME—FRAUDULENT CLAIMS—PRESENTMENT TO SURVEYOR GENERAL.
Where an indictment alleges as part of the conspiracy that a false, fictitious, and fraudulent claim was to be presented to the United States surveyor general for allowance and payment, it should also allege that such officer was authorized to allow and approve the claim, and for the omission of this allegation the indictment is defective.

4. SAME—ABBREVIATIONS OF WORDS IN INDICTMENT—TERMS OF SCIENCE OR ART.
In an indictment charging a conspiracy to procure the allowance of a false and fraudulent claim for compensation for a survey of land claimed to have been made by defendant, a description of the property alleged to have been surveyed, and for which the fraudulent claim is charged to have been presented, should be made in ordinary language. Abbreviations of words employed by men of science or in the arts will not answer, without full explanation of their meaning in ordinary language.

After the demurrer to the plea in abatement in the case of *United States* v. *Benson*, 31 Fed. Rep. 896, and several other similar cases, including the above, was sustained, and the defendants ordered to plead to the indictments, the defendants filed a demurrer to the indictments, and the demurrer to the indictment in the above case was argued. The indictments in the other cases (14 in all) are substantially alike, with the exception of the fourth count, hereafter mentioned. Each indictment has four counts. The first count alleges that Theodore Reichert and the other defendants who are named, "heretofore, to-wit, on the seventh day of Novemher, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, state and district of California, within the jurisdiction of this honorable court, did unlawfully, corruptly, and wickedly conspire, combine, and agree together, and with divers other persons to the said grand jurors unknown, *to commit an offense against the United States*, by knowingly making and causing to be made a false, fictitious, and fraudulent claim upon and against the United States, knowing the same to be false, fictitious, and fraudulent, for the payment to them, and to divers other persons to the said grand jurors unknown, of a large sum of money, to-wit, the sum of one thousand and seventy-two dollars, more or less, which said false, fictitious, and fraudulent claim consisted and was to consist of a certain false, fictitious, and fraudulent survey of certain public lands of the United States, to-wit, the surveying, marking, and establishing the exterior lines of Tps. 4 N., Rs. 21, 22, 23 E.; and Tps. 5 N., Rs. 22 and 23 East M. D. M.,—and in false, fictitious, and fraudulent field-notes of such false, fictitious, and fraudulent survey of said public lands of the United States; and which said false, fictitious, and fraudulent claim upon and against the United States, based upon such false, fictitious, and fraudulent survey and field-notes thereof, was designed and intended to be presented to the United States surveyor general for California, for his allowance and approval, contrary to the form of the statutes of the United States in such

case made and provided, and against the peace and dignity of the United States." The second count is similar to the first, except that it alleges that the conspiracy was to commit an offense against the United States by presenting and causing to be presented a false, fictitious, and fraudulent claim upon and against the United States, etc. The third count alleges a conspiracy *to defraud the United States*, but in other respects is similar to the first count. The fourth count alleges an act committed "in execution and in furtherance and pursuance of said unlawful and corrupt conspiracy," but does not allege what said "unlawful and corrupt conspiracy" was.

The law on which the indictments purport to be founded is in section 5438 and section 5440, as amended, of the Revised Statutes. Section 5438 provides that—

"Every person who enters into any agreement, combination, or conspiracy to defraud the government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand or more than five thousand dollars."

Section 5440, as amended by the act of May 17, 1879, provides:

"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 parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court." Volume 21, St. p. 4.

John T. Casey, U. S. Dist. Atty., for the United States.
McAllister, Van Duser & Barnes, for defendants.

On the twenty-ninth of August the court gave its decision on the demurrer, per Mr. Justice FIELD, orally, as follows:

We have had under consideration the demurrers to the several indictments against Reichert *et al.*, for a conspiracy to defraud the United States, or to commit some other offense against the United States, and we have come to the conclusion that all the indictments are fatally defective. The first and second counts in the indictment in the above case allege a conspiracy *to commit an offense against the United States*, but do not allege the performance of any act in furtherance of the conspiracy, or, in the language of the statute, "any act to effect the object of the conspiracy;" nor do they allege that the surveyor general of the United States for California, to whom the alleged fraudulent and fictitious claims were to be presented, was authorized to allow and approve them. The third count in the indictment alleges a conspiracy *to defraud the United States*, but, like the other counts, fails to aver the performance of any act in

furtherance of the conspiracy, or that the United States surveyor general for California was authorized to allow and approve the claim which was to be presented to him. The fourth count alleges the performance of acts in furtherance of the "said unlawful and corrupt conspiracy," but does not set forth what the said conspiracy was. No such direct reference to any one of the preceding counts is made as to bring the conspiracy averred in one of them within the meaning of those terms. *State* v. *Longley*, 10 Ind. 484.

The circuit judge is of opinion that the count is defective only in the last particular stated, namely, that it does not aver authority in the surveyor general to allow and approve the claim which was to be presented to him; and that where the charge is of a conspiracy *to defraud the United States*, by obtaining or aiding to obtain the payment or allowance of a false, fictitious, and fraudulent claim, it is not necessary to aver the performance of any act in furtherance of the conspiracy. In this respect I am unable to agree with him. I am of opinion that section 5440 Rev. St., amended by the act of May 17, 1879, (21 St. 4,) qualifies the provisions of section 5438; and that a conspiracy to defraud the United States, or to commit any other offense against the United States, is not, of itself, an indictable offense, unless the conspiracy be followed by some act in furtherance of it,—that is, to effect its object. Section 5440 applies to conspiracies to defraud the United States *in any manner or for any purpose*, and of course embraces the particular conspiracy mentioned in section 5438,—to defraud the government of the United States by "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." As, under section 5440, the conspiracy to defraud must be followed by some act to effect that object, to constitute a public offense, it would seem that, to the extent in which the section differs in that particular from the offense of defrauding the United States mentioned in the preceding section, (5438,) it must be held to qualify and amend that section. Were this not so, we should have a general provision that in case of a conspiracy to defraud the United States *in any manner, or for any purpose*, it would be necessary to show the doing of some act to effect its object by one or more of the conspirators, to constitute the offense, with a previous provision that, in case of a conspiracy to defraud the United States *in a specified way*, there would be no necessity of showing any act to carry the conspiracy into effect. Consistency is given to the statute by treating the latter section as qualifying the preceding one. But I agree with the circuit judge that the absence of any averment of authority in the surveyor general to allow and approve the claim which was to be presented to him is, of itself, a fatal defect.

The counts in all the indictments for conspiracies similar to those alleged in the indictment against Reichert are defective in one or more of the grounds stated. The demurrers to all the indictments are therefore sustained.

The Court. As the defects in which the indictments are sustained may be avoided upon new indictments, does the district attorney desire the parties to be held for further proceedings?

The District Attorney. I ask for an order that the defendants be held to answer to the next grand jury of the circuit.

The Court. An order will be entered that they be thus held.

Subsequently, on the fifth of September, the United States district attorney moved for a rehearing in three of the cases, on the alleged ground that the fourth count in the indictment in those cases was not covered by the decision rendered. The fourth count in the indictment against Glover and others (and the fourth count in the other three cases is similar to it) avers:

"That said Glover and the other defendants named heretofore, to-wit, on the nineteenth day of November, in the year of our Lord one thousand eight hundred and eighty-four, at the city and county of San Francisco, state and district of California, and within the jurisdiction of this honorable court, did unlawfully, corruptly, and wickedly conspire, combine, and agree together, and with divers other persons to the said grand jurors unknown, *to defraud the United States*, by presenting and causing to be presented a false, fictitious, and fraudulent claim upon and against the United States, in order to secure the allowance and payment to the said James R. Glover, and to divers other persons to the said grand jurors unknown, of a large sum of money, to-wit, the sum of one hundred dollars, more or less; which said false, fictitious, and fraudulent claim consisted and was to consist of a certain false, fictitious, and fraudulent survey of certain public lands of the United States, to-wit, the survey, marking, and establishing the exterior boundary lines of Tp. 1 S., R. 1 W.; Tp. 1 S., R. 16 W.; Tp. 1 S., R. 17 W.; Tp. 1 N., R. 16 W.; Tp. 1 N., R. 17 W.; Tp. 2 N., R. 16 W.; Tp. 2 N., R. 17 W., S. B. M.,—and in certain false, fictitious, and fraudulent field-notes of such false, fictitious, and fraudulent surveys of the aforesaid public lands of the United States; and which said false, fictitious, and fraudulent claim upon and against the United States was designed and intended to be presented to the United States surveyor general for the state of California, for approval and allowance. And the grand jurors aforesaid, on their oath aforesaid, do further say that the said James R. Glover, in execution and in furtherance and pursuance of the said unlawful, corrupt, and wicked conspiracy, agreement, and combination, as aforesaid, afterwards, to-wit, on the thirteenth day of July, in the year A. D. 1885, did at the state and district of California, before M. F. Reilly, a commissioner of the U. S. circuit court, Ninth circuit, district of California, make, sign, and execute a certain false and corrupt oath, affidavit, and certificate, wherein he, the said James R. Glover, then and there falsely, corruptly, and fraudulently did depose, declare, and certify in substance and effect that he had, in his own proper person, made an actual survey of certain public lands of the United States, to-wit, all those parts or portions of the south, east, and west boundary lines of Tp. 1 S., R. 1 W., of the San Bernardino base and meridian, state of California, and that the field-notes accompanying and to accompany the said false and corrupt oath, affidavit, and certificate were true and correct field-notes of such survey, and that he had marked and established the corner monuments of such survey as required by law, the surveying manual, and surveying instructions. Whereas, in truth and in fact, no such survey had been made, and the said pretended field-notes did not represent a *bona fide* survey, and no such corner monuments had been marked and established, which said false and fraudulent oath, affidavit, and certificate, and which said false, fictitious, and fraudulent field-notes of such pretended survey, were designed and intended to be presented to, and were thereafter presented to, the United States surveyor general for California, for the purpose

of securing the approval, allowance, and payment to the said James R. Glover, and to divers other persons to the said grand jurors unknown, of the aforesaid sum of money, more or less, all in furtherance and execution of the said conspiracy aforesaid. Contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the United States."

ON MOTION FOR A REHEARING IN SOME OF THE CASES.

After argument, the court denied the motion; FIELD, J., observing that the count was subject to the objection stated when the decision was made,—namely, that it fails to aver that the surveyor general of the United States for California, to whom the alleged false, fictitious, and fraudulent claim was to be presented, was authorized to allow and approve of it. The court also held that the count was defective in not describing the property in relation to which the alleged false, fictitious, and fraudulent survey was made in intelligible language. An indictment is to be read to the accused unless the reading is waived. The language should therefore be so plain that one of ordinary intelligence can understand its meaning. For that purpose, common words are to be used as descriptive of the matter. Abbreviations of words employed by men of science or in the arts will not answer, without full explanation of their meaning in ordinary language. The use of the initials A. D. to indicate the year of our Lord is an exception because of its universality. Arabic figures and Roman letters have also become indicative of numbers as fully as words written out could be. They are of such general use as to be known of all men. They therefore may be employed in indictments. But the initials here have reference to the public lands as marked on the public surveys; they are signs used in a particular department of public business, and are not matters of general and univeral knowledge by all speakers of the English language. The same objection applies to the initials S. B. M., supposed to denote San Bernardino meridian. There is no averment except in this way that the land alleged to have been surveyed lies in the state of California.

The indictment is also defective in not stating that the accused knew that the claim was false, fictitious, and fraudulent.

UNITED STATES v. MORRISSEY.

(*Circuit Court, E. D. Missouri, E. D.* April 21, 1887.)

1. ELECTIONS—VIOLATION OF UNITED STATES LAWS—CONSTRUCTION OF STATUTE.
In Rev. St. U. S. § 5514, enacting that where, by the laws of a state, the name of a candidate for representative or delegate in congress, and the names of candidates for state offices, are required to be on the same ballot, "it shall be deemed sufficient *prima facie* evidence to convict any person voting or offering to vote unlawfully, under the provisions of this chapter, to prove that the person so charged cast, or offered to cast, such ticket or ballot wherein the name of such representative or delegate in congress might by

law be printed, written, or contained, or that the person so charged committed any of the offenses denounced in this chapter with reference to such ticket or ballot," the last clause should be read as if the word "so" were omitted, and the section is therefore not limited to the offense of voting or offering to vote unlawfully, but embraces all offenses named in the chapter.

2. INDICTMENT—STATE ELECTION—CANDIDATE FOR CONGRESS.
Although the indictment, for an offense against the United States election laws, was for receiving illegal ballots in a state where the names of all candidates voted for, including candidates for congressmen, are required to be on the same ballot, the defect in the indictment in not charging that the illegal ballot contained the name of a candidate for congress is not aided by Rev. St. U. S. § 5514, above quoted.

3. SAME—ARREST OF JUDGMENT.
Defendant was convicted under the fourth and sixth counts of an indictment for the violation of the United States election laws, the fourth count charging that, "at a lawful election so held under the laws of the said state of Missouri, for representative in the fiftieth congress, * * * defendant being then and there a judge of election appointed and acting under authority of the laws of said state, * * * did then and there, as judge aforesaid, with intent to affect said election, and the result thereof, willfully and knowingly receive and place in the ballot-box * * * a certain ballot then and there offered to him. * * *" The sixth count charged that "a lawful election was held," not stating what for, nor that a congressman was voted for. On motion in arrest of judgment, *held*, that the fourth and sixth counts charged no offense cognizable by the federal courts, and that the motion should be sustained.

4. SAME.
An indictment for an offense against the United States election laws, to be cognizable by the United States courts, must contain an affirmative and distinct charge of an act which does or may affect the election of a representative or delegate in congress.

5. SAME—STATUTE OF JEOFAILS.
An indictment for an offense against the United States election laws, which is defective in not charging an offense cognizable by the United States courts, is not aided by the statute of jeofails, (Rev St. U. S. § 1025,) especially where it cannot be said that the defect has not operated to defendant's prejudice.

6. UNITED STATES COURTS—JURISDICTION OF OFFENSES AGAINST ELECTION LAWS.
The United States courts have no jurisdiction of an offense against election laws which does not and cannot affect the election of a representative or delegate in congress.

7. SAME—JUDICIAL NOTICE OF STATE LAW.
On the trial of an indictment for an offense against the United States election laws, the federal courts will take judicial notice that, at the election at which the offense was charged to have been committed, state officers were to be elected, and that, by the laws of the state in which the election was held, the names of all candidates voted for, both for state and national offices, were required to be on one ballot.

8. SAME—AVERMENT OF JURISDICTION.
In a prosecution in the federal courts under the United States election laws, where the offense charged is on the border line of federal jurisdiction, it is the imperative duty of the court to require a clear and distinct averment of every fact essential to give the court jurisdiction.

Motion in Arrest.

Defendant was indicted under section 5515, Rev. St. U. S., for knowingly doing an act unauthorized by law, with intent to affect the result of a congressional election, while serving as judge of an election whereat a candidate for congress as well as certain candidates for state and county offices were voted for. The indictment charged, in substance, that he received certain ballots from persons whom he knew were not entitled to vote, and whose votes were for that reason known to him to be fraudulent.

A conviction was had on the fourth and sixth counts, and as to the residue of the counts there was a verdict of acquittal. The fourth and sixth counts failed to state that the fraudulent ballots alleged to have been received were cast for a candidate for congress. On this ground there was a motion in arrest of judgment. The laws of the state of Missouri, where the election was held, require the names of all candidates voted for to be printed or written on a single ticket.

Thomas P. Bashaw, Dist. Atty., and *D. P. Dyer*, for the United States.

Napton & Frost, for defendant.

BREWER, J., (*orally.*) In this case two questions are presented, one challenging the ruling of the court in construing section 5514, which declares that where by the laws of the state all candidates are to be voted for on a single ballot, proof of the existence of the ballot shall be *prima facie* evidence sufficient to justify conviction of the fact that a congressman was voted for on that ballot. It is insisted that, reading that section critically, it is evident that congress intended only that that rule should apply to the party voting or offering to vote. The section is as follows:

"Whenever the laws of any state or territory require that the name of the candidate or person to be voted for as representative or delegate in congress shall be printed, written, or contained, on any ticket or ballot with the names of other candidates or persons to be voted for at the same election as state, territorial, municipal, or local officers, it shall be deemed sufficient *prima facie* evidence to convict any person charged with voting, or offering to vote, unlawfully, under the provisions of this chapter, to prove that the person so charged, cast or offered to cast such ticket or ballot whereon the name of such representative or delegate in congress might by law be printed, written, or contained."

That is the forepart of the section referring specifically to the person charged with voting or offering to vote. Then follows this clause:

"Or that the person so charged committed any of the offenses denounced in this chapter with reference to such ticket or ballot."

As it is claimed, the use of the word "so" carries this clause back to the forepart of the section, and makes it applicable only to persons voting or offering to vote. It is a familiar rule that that which is within the letter of a statute, and not within its spirit, is not within the statute; and also that that which is within the spirit, though not within the letter, may sometimes be declared to be within the statute, even in criminal cases. Reading that as it is expressed, "so charged," it makes that clause superfluous, meaningless, and worse than that, because a person "so charged" could not be convicted of any offense but that of which he is charged, and could not be convicted of any of the other offenses named in this chapter. Obviously, that was not the intent of congress. Through carelessness in the drafting or compilation of this section that word "so" was interpolated improperly, and the only fair construction of that section is to treat it as though that word was not there. So read, it gives force and validity to this clause which otherwise it would

not have. So read, it gives meaning to the whole section, and carries out the obvious intent of congress that, where there is a single ballot at any election at which under the law of the state all names must appear on the same ballot, the production of the ballot is *prima facie* evidence sufficient to convict, etc., in the trial of any of the offenses named in this chapter. I think that objection, therefore, is not well taken.

The other question runs to the sufficiency of the indictment. There were six counts in this indictment. The defendant was found guilty upon the fourth and sixth, and it is claimed that neither of these counts charge an offense of which the federal courts can take cognizance, or which are included within the statute; in this, that neither count charges that the ballot which was charged to have been wrongfully received contained the name of any candidate for congress. It goes without saying, in our dual system of government, that the federal government cannot take charge of a mere state election, or an election merely for state officers, and no matter what wrongs may be perpetrated in such election, they are beyond the cognizance of the federal courts. The states, and the states alone, can punish offenses which are merely offenses against the state laws. It has been settled by the decision of the supreme court in *Ex parte Siebold*, 100 U. S. 371, that where at the same election federal and state officers are to be elected, the general government can, for the purpose of protecting the election of federal officers, take cognizance of that election and punish offenses which do or may affect the election of such officers. It is clear from the language of the opinion of the court in that case that it was not the intent of this act, if it was within the power of congress, to attempt to reach beyond and punish any act, however wrongful, in or about that election which affects solely the election of state officers. I quote what the court say:

"In what we have said it must be remembered that we are dealing only with the subject of the election of representatives to congress. If, for its own convenience, a state sees fit to elect state and county officers at the same time, and in conjunction with that election of representatives to congress, congress will not be thereby deprived of the right to make regulations in reference to the matter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they will be amenable to federal jurisdiction. Nor do we understand that the enactments of congress now under consideration have any application to such acts."

Therefore, it must be apparent that the act charged is one which does or may affect the election of a congressman. Of course, anything affecting the registration prior to the election is an act which may affect the election for congressman, and is within the cognizance of the federal courts. Anything that transpires after the election in counting the votes for governor or state officers, or in preparing certificates therefor, is something which affects only the state election, and cannot be considered here. Anything transpiring on the election day which does or may affect the election of a congressman is within federal cognizance. Upon the other hand, if it is something which does not and cannot affect the election of a congressman, it is something beyond our jurisdiction. Bear-

ing that in mind, obviously, there must be an affirmative and distinct charge in the indictment of an act which either does or may affect the election of a congressman. It is a familiar rule of criminal practice and pleading that nothing is taken by intendment. The fact must be charged, and charged distinctly. We cannot by inference fill out an incomplete charge.

Now, the first two counts of this indictment charge that "the defendant, being a judge at that election, with intent to affect said election and the result thereof, did knowingly receive and place in the ballot-box, then being used at the polling place at said precinct, a certain ballot for a representative in said congress from said congressional district." There it charges him with an act which affected the election of a congressman —"receiving a certain ballot for a representative in congress." When we come to the fourth count, part of that clause is omitted. It is charged that "at a lawful election so held under the laws of the said state of Missouri for representative in the fiftieth congress," etc., * * * "Peter R. Morrissey, being then and there a judge of election appointed and acting under authority of the laws of said state at and for said precinct, did then and there, as judge aforesaid, with intent to affect said election and the result thereof, willfully and knowingly receive and place in the ballot-box then being used at said polling place a certain ballot then and there offered to him, the said Peter R. Morrissey, as judge aforesaid, and by a person to the jurors aforesaid unknown." It does not charge that he received a ballot for representative in congress, but that he received a ballot. It is true, that count charges that there was a lawful election then being held for a representative in congress. We turn to the sixth count, and we find that even this is omitted. It simply charges in that count that "a lawful election was held." What for, is not stated. It does not say that a congressman was voted for.

Now, the district attorney very plausibly and ingeniously argued that as this count names only an election for a representative in congress, we are to limit this allegation to the express words of the pleader; that no reference was made to the fact that other officers were to be elected, and we are therefore to construe it as though, having charged that at an election being held for representative a ballot was received by him, it must necessarily be presumed to have been a ballot for congressman. Well, that is eking out an omission of the indictment with an inference, because we are bound to take judicial notice that at that election, under the laws of the state, a vast number of state officers were to be elected, and that that ballot or any ballot offered had to contain all the names of all the candidates, state or national, for whom the person tendering the vote desired to vote. It is true that section 5514, when it comes to the matter of proof, says the production of the ballot is *prima facie* evidence that a congressman's name was on it, but a mere rule of evidence is not sufficient to enlarge the allegations of a pleading. Let me make this illustration, which I think will make my idea a little clearer. By the laws of the state of Maine, when one is shown to be in possession of a United States liquor license, that license is *prima facie* evidence of the posses-

sion of liquors for sale, unlawfully under the state statute; so when you charge a man under the state laws with selling liquor unlawfully, you make out a *prima facie* case by producing the federal license for him to sell. But would it for a moment be claimed that an indictment under that law was good which charged the defendant with selling liquor under a United States license, without also charging him that he was selling liquor without the state license? One is a mere rule of evidence which does not eke out a defect or omission in the language of the indictment. There should be, as there was in the first two counts, a distinct, direct, and affirmative allegation that the defendant did receive a ballot on which was the name of a congressman. That being charged, then the section determines the matter of proof.

In cases of this kind, where the act comes to the border line of federal jurisdiction, it seems to us an imperative duty upon the court to hold the pleader to a distinct and clear averment of every fact which is essential to give federal courts jurisdiction, and that we ought not by inference and presumption to open the door so as to include matters which may or may not be an offense against the United States. It is charged that this defendant knowingly received a ballot at that election. Who can say from that that it was a ballot for congressman? We know judicially that that ballot was to contain the names of all the candidates, or might contain the names of all the candidates, but when he is charged with knowingly receiving a ballot, is he charged, or can it by any fair inference be assumed that he is charged, with receiving a ballot for congressman?

We think, under the clear rule of criminal pleading, that that count in the indictment does not charge an offense against the defendant, and the motion in arrest will be sustained.

THAYER, J. I fully concur in the order sustaining the motion in arrest of judgment as to the fourth and sixth counts. According to the authorities cited on the argument it is clear that the act charged in the indictment is no offense against the laws of the United States, *unless the fraudulent ballot alleged to have been received by the defendant was a ballot for a candidate for congress.* *U. S.* v. *Cahill*, 3 McCrary, 200, 9 Fed. Rep. 80; *U. S.* v. *Seaman*, 23 Fed. Rep. 882. In the absence of any adjudication on the subject, I should have no doubt that such was the law of the case. In the nature of things, congress has no authority to impose penalties on a judge of election for receiving a fraudulent ballot, unless the ballot is cast for a candidate for some federal office. It is the single fact that the ballot alleged to have been received by the defendant affected the result of a congressional election that gives this court jurisdiction over the offense. Such being the law, it goes without saying that the indictment should show the character of the alleged fraudulent ballot, not by inference merely, but by plain and direct averment.

Now, in neither of the counts upon which a conviction was had is there any direct averment that the ballot in question was cast for a representative in congress. In the fourth count of the indictment it does

appear that the election at which the ballot in question was received was an election at which a representative in congress was voted for, but we must take judicial notice that it was also a general state election for the election of numerous state and county officers, so that it by no means follows as a necessary inference from anything stated in the count that the fraudulent ballot was cast for a candidate for a federal office. It would be consistent with all the averments of the count to assume that it was cast for a candidate for a state office only. The sixth count is even more defective, in that it is not averred in express terms that at the election in question a representative in congress was voted for. In my opinion, it would be violative of all rules of correct pleading to hold that the fourth and sixth counts of this indictment show that an offense has been committed against the laws of the United States. They can only be sustained by indulging in inferences favorable to the pleader that would hardly be tolerated in a civil proceeding, even after the rendition of verdict, and this is open to violation of the rule that an indictment should charge an offense with the highest degree of certainty.

In answer to the suggestion made on the argument of the motion that the defect in the indictment is cured by the statute of jeofails, section 1025, Rev. St. U. S., it is sufficient to say that the statute in question will not remedy a defect in an indictment of such a radical nature as a failure to charge an offense; and, even if the statute should be held to have such curative properties, it would be impossible to say, from a consideration of the indictment and the charge to the jury, that the defect in the indictment had not operated to prejudice the defendant. I may further add that section 5514, Rev. St. U. S., does not aid the indictment, as that section prescribes a rule of evidence only, whereas the indictment is faulty in failing to state an offense within federal cognizance. There is no escape from the conclusion that the judgment should be arrested.

EVANS and another *v.* VON LAER.

(*Circuit Court, D. Massachusetts.* September 8, 1887.)

1. TRADE-MARK—"MONTSERRAT LIME-FRUIT JUICE"—IMITATION OF BOTTLES.
   In a suit to restrain the infringement of a trade-mark, the only resemblance between the defendant's and complainants' packages was in the color of the labels, the use of the words "Montserrat Lime-Fruit Juice," and the form of the bottles, but the evidence disclosed that most lime-juice bottles were quite similar in size and design. *Held* no deception.
2. SAME—GEOGRAPHICAL NAME.
   Montserrat being the name of an island from which both parties import lime juice, the complainants, in the absence of fraud, are not entitled to the exclusive use of the word "Montserrat" as a designation for lime juice, although their article may have acquired a high reputation for purity and strength, while that of defendant may be of an inferior quality.
3. SAME—USE OF BOTTLES STAMPED WITH COMPLAINANTS' NAME.
   Where both parties are dealers in lime juice, the defendant has no right to sell lime juice in bottles stamped with complainants' name.

In Equity.
Rowland Cox and *Warren & Brandeis*, for complainants.
Gray & Swift and *Austin G. Fox*, for defendant.

COLT, J. The complainants by their bill claim, as against the defendant, the exclusive use of the word "Montserrat," as a designation for lime juice. Montserrat is the name of a small island in the West Indies, and the complainants, who reside in Liverpool, are the consignees of the Montserrat Company, Limited, a corporation having large plantations on the island. The defendant lives in Boston, and is a dealer in lemon and lime-fruit juice. Formerly he did business as Von Laer & Co., or as the Von Laer Fruit-Juice Co. It appears that on labels bearing the name Von Laer & Co., the lime juice was designated as imported from Montserrat. It is not shown that this lime juice was not in fact imported from Montserrat. On the contrary, the evidence is that the defendant, or Von Laer & Co., bought lime juice on the island, and had it shipped to this country. The fact that the Montserrat Company may have acquired a high reputation for the purity and strength of their article, and that the importation of Von Laer & Co. may have been inferior in quality, can make no difference, unless the defendant, by improper means and devices, has sought to make the public believe that he was selling the article made by the Montserrat Company. In the absence of fraud the complainants cannot enjoin the defendant from the use of a geographical name. This was settled in the case of *Canal Co.* v. *Clark*, 13 Wall. 311, where the court refused to enjoin the defendant against calling their coal "Lackawanna Coal," and where it was held that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation. The fact that such use by another person may cause the public to make a mistake as to the origin or ownership of the product can make no difference, if it is true in its application to the goods of one as to the other. Purchasers may be mistaken, but they are not deceived by false representation, and equity will not enjoin against telling the truth. It is manifest, then, that to entitle the complainants to any of the relief sought by this bill, some fraud must be proved.

The complainants charge the defendant with fraud in two respects: (1) Imitation of their package as a whole; (2) the use of bottles having their names moulded in them. A comparison of the labels will, I think, show that the public could not be misled into mistaking the defendant's article for the complainants'. Aside from a resemblance in color, and from the use of the words "Montserrat Lime-Fruit Juice," which the defendant had a right to use, there is nothing on defendant's label which resembles that of the Montserrat Company. Stress is laid upon the fact that the bottles are alike, but, bearing in mind that the evidence discloses that most lime-juice bottles are quite similar in size and design, I do not deem this very important. There is one thing, how-

ever, which it seems to me the defendant has no right to do. The evidence is that some bottles used by the defendant have the complainants' name blown into them. I am aware that the name is on the bottom of the bottle, and that it is not very prominent; but while the defendant may buy in the market these bottles, and sell them again filled with anything but lime juice, I do not think he should be permitted to put his own lime juice into a bottle stamped with the complainants' name, and sell it. This may be said to be calculated to lead the public to believe they are buying the complainants' lime juice, when, in point of fact, they are buying some other person's. *Rose* v. *Loftus*, 38 L. T. R. (N. S.) 49; *Richards* v. *Williamson*, 30 L. T. R. (N. S.) 746. To this extent I think the complainants are entitled to a decree; and it is so ordered.

Decree for complainants.

McNAB and another *v.* NATHAN MANUF'G CO.

(*Circuit Court, S. D. New York.* August 15, 1887.)

PATENTS FOR INVENTIONS—NOVELTY—SELF-FEEDING LUBRICATORS.

The claim of letters patent No. 106,150, granted August 9, 1870, for an improvement in self-feeding lubricators, is wanting in patentable novelty by reason of prior inventions of substantially the same form and character.

Arthur v. Briesen and *Antonio Knauth*, for plaintiff.
Edmund Wetmore, for defendant.

SHIPMAN, J. This is a bill in equity to restrain the defendant from the alleged infringement of letters patent No. 106,150, granted August 9, 1870 to William Gee, as inventor, for an improved self-feeding lubricator. The patentee's description, in his specification, of the nature and character of the invention, is as follows:

"The want of some means of observing the operation of self-feeding lubricators has long been recognized. With a view to provide for this want, and to facilitate the proper adjustment of the feed-regulating device, the reservoirs have been made of glass, or with glass sides, through which the quantity of oil contained therein might be seen; but the facility thus afforded for ascertaining whether the lubricator was feeding properly was very imperfect, as the action could only be determined by watching the gradual diminution of the level of the oil in the reservoir, which was necessarily tedious. The object of this invention is to provide for the better observation of the operation; and, to this end, it consists in the provision below the reservoir and the feed-regulating device, and the contracted orifice through which the oil escapes from the reservoir, of a chamber of such capacity that the oil or other lubricating material drips through the said chamber, instead of trickling down over the surface of the passage leading from the reservoir and feed-regulating device to the bearing or other device to be lubricated; such chamber having openings in its sides, or being partly constructed of glass, and thereby enabling the dripping of the oil within or through it to be distinctly

seen. In order to insure the dripping instead of the trickling of the oil or lubricating material from the reservoir through the said chamber, one feature of this invention consists in providing a teat around the orifice, through which the oil or lubricating material passes into the said chamber. Figure 1 in the drawing is a central vertical section of a lubricator with my improvement. Figure 2 is an elevation of the drip-chamber, detached from the reservoir and feed-regulating device. Similar letters of reference indicate corresponding parts in both figures. A is the reservoir; B the feed-tube; and C, the adjusting valve or plug for regulating the feed.

These are represented of a well-known construction, serving as well as any other to illustrate the application of my invention; but the reservoir and feed-regulating device may be of any other known or suitable construction, whereby a contracted orifice is provided at the bottom of the reservoir for the escape of the oil or other lubricating material. F, H, I, is the drip-chamber, arranged below the reservoir and feed-regulating device, and between the said device and the hollow stem, G, which is inserted into the support for the

Fig. 2.

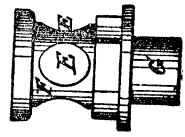
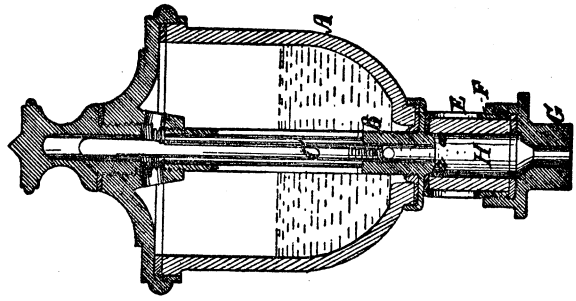


Fig. 1.



lubricator. This chamber is formed, in part, of a hollow cylindrical shell of metal, F, which is made in the same piece with or attached to the bottom of the feed-tube, B, and in part by a socket, I, provided on the stem, G, the shell, F, screwing into this socket. To render the interior of the said chamber visible, holes, E, E, of suitable size, are provided in the sides of the cylindrical shell, F; and to prevent the entrance of dust, while still permitting the interior to be seen, the said shell is lined with a glass tube, H, or small plates of glass may be fitted to the holes, E, E, for the same purpose. At the top of the said chamber, surrounding the lower orifice of the feed-tube, is the teat, *a*, on which the oil or lubricating material collects to form the drip. The operation is as follows: The oil or other lubricating material, passing the feed-regulating valve or plug, C, collects in the lower part of the feed-regulating tube, until there is a sufficient accumulation at the lower orifice of the said tube to form a drip, which drips through the chamber, F, H, I, to the bottom thereof, whence it passes through the hollow stem, G, to the place to be lubricated. The dripping, taking place frequently, can be observed through the openings, E, E, of the chamber, and the quantity supplied can

be so easily determined as to enable the feed-regulating device to be properly adjusted. The delivery of the oil in drips is better insured by the teat, *a*, formed around the lower orifice of the feed-tube, or, by what would be equivalent, by the making of the interior of the upper part of the chamber of convex form. This invention differs from all other lubricators, not in allowing the oil to be seen, but in feeding with a visible drip, the frequency or cessation of which can be at once ascertained."

The claims are as follows:

"(1) The open or transparent drip-chamber, arranged below the reservoir and feed-regulating device, and in combination with the contracted opening through which the oil or lubricating material escapes from the reservoir, substantially as herein described, to provide for the dripping of the said material, and the view of the drip. (2) In combination with the drip-chamber and reservoir, the teat, *a*, substantially as and for the purpose specified."

From the patent it appears that the invention consisted of an open or transparent standard or chamber, below the oil reservoir and the contracted lower orifice of the feed-regulating device, of such capacity that the oil visibly drops through, and does not trickle down the sides of the chamber. The reservoir and feed-tube are old, unless the teat, *a*, surrounds the lower orifice of the feed-tube. The standard is an open or transparent stem in these lubricators which have stems by which they are attached to the bearings.

The question at the foundation of the case is whether, in view of the state of the art at the date of the invention, the improvement was patentable. It is clearly proved that in 1863, upon the steamer Merrimac, a vessel in the service of the United States government, and in 1867 upon the United States steamer Ontario, drip feed lubricators, made by Richard Lavery, were used, which, operated solely by gravity, were regulated by an ordinary spindle, and were elevated above the bearing which received the dripping oil so that the drip and the frequency of the drip were visible, but without any chamber surrounding the feed. In like manner, in 1850, William Burnett, formerly supervising inspector general of steam-vessels, used oil-cups which were raised or elevated above the shaft-bearings of steam-engines, and from which the oil dropped in separate drops upon the bearing, so that the number of drops could be ascertained by the eye, and the quantity could be regulated by the cock which controlled the discharge of the oil from the cup. These cups had no chamber below the bottom of the cup. In the provisional English specification of William Brookes, dated May 22, 1867, his lubricator is described as follows:

"The object of this invention is to obtain a more certain and continuous supply of lubricating matter to those parts of machinery which are subject to friction. To attain this object the reservoir containing the oil or lubricating matter is formed of glass or other transparent material, and at the base thereof it is attached to glass (or other transparent) pipe, in which is placed a supply cock for the purpose of regulating the supply, and having a nut at one extremity for the purpose of permanently adjusting it when properly fixed. Below this regulating supply cock is placed another similar cock for the purpose of cutting off the supply when needed, and thus dispensing with the necessity of closing and readjusting the first-mentioned cock. The second

one might be dispensed with if required. By making the reservoir of glass or other transparent material, the workman can at all times see when it requires replenishing, and the glass (or other transparent) pipe permits also of his observing any interruption in the continuousness of the supply to the machinery."

This description does not state that the lubricant dripped from the reservoir through the transparent pipe; it might have trickled down the sides of the pipe. I shall therefore assume that there was no drip-pipe which delivered the oil in separate drops into the transparent stem or chamber. I intentionally omit a discussion of the question whether John Absterdam used oil-cups, substantially like the patented invention, at No. 5 Haverhill street, and at the factory of J. J. Walworth & Co., in Boston, in 1853 and 1854, because upon this question there is the conflict of testimony which frequently arises in regard to the use of an inconspicuous object in a factory 20 or 30 years before the testimony was given, and I think that the case does not require a decision in regard to the correctness of Absterdam's recollection.

There were, then, prior to the date of Gee's invention, gravity lubricators which were elevated above the bearings to be oiled, and from which the oil dripped in separate drops upon the bearings, so that the quantity and frequency of the drip could be ascertained by inspection, but which had no chamber into or through which the oil dripped. The Brookes specification described a gravity lubricator which had a reservoir, and at its base a transparent chamber in which was a supply cock for the purpose of regulating the supply. The oil flowed into the transparent pipe, and was delivered to the journal or bearing to be lubricated; the chamber being for the purpose of enabling the engineer to observe and watch the flow of the oil. In my opinion there was no invention in making the Brookes supply cock discharge the oil through an orifice which should deliver a drip, and in thus producing the Gee lubricator. Neither would it require much if any more inventive genius to prevent the entrance of dirt into or the effect of wind upon the Lavery and Burnett lubricators by attaching to the bottom of each cup a transparent standard. After Lavery and Burnett had in a rough way shown the principle of a sight-feed oiler, it would not seem that invention was required to embody the principle in the neater form in which Gee presented it.

I place the decision especially upon the Brookes specification, and hold that, if it did not anticipate the Gee patent, it was so nearly like it that no invention was needed to make the simple alteration or addition which is said to distinguish the Gee device. The bill is dismissed.

BARNES v. RUTHENBURG.

(*Circuit Court, S. D. Ohio.* June 4, 1887.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—NEW COMBINATION OF OLD DEVICES—FIRE-EXTINGUISHING APPARATUS.
   Letters patent No. 216,821 were granted June 24, 1879, to Charles Barnes for an apparatus for extinguishing fires, and letters patent No. 233,393 were also granted to him October 19, 1880, for an "automatic fire extinguisher." The patents describe a system of distributing pipes passing through the various rooms of a building at their ceilings, and fitted with a number of downward projecting sprinkling nozzles. A reservoir is placed in the lower story, above the supply pipe, leading to the street, filled with a fire-extinguishing liquid, which will be discharged upon the fire by force of water from the street main. A supply-valve has an actuating lever which is held up to keep the valve closed by a wire passing up to and united in each room by a fusible joint. The sprinkler consists of a perforated rose-head, with a cap soldered upon its neck with fusible metal, and certain other attachments. In case of fire the said fusible joints and caps are melted, the water rushes through the supply-valve, forcing and following the fire-extinguishing liquid. Until the occasion of fire the pipes are kept free from fluid. The details of combination in the two patents differ in some respects. The proof showed that the constituent parts were old, but that the combinations were new. *Held*, that the devices were patentable inventions.
2. SAME—INFRINGEMENT.
   The defendant manufactured and sold a device for extinguishing fires under letters patent No. 318,508, dated May 26, 1885. A reservoir was used in it charged with a fire-extinguishing liquid, which generates a gas, thus producing pressure, and the distributing pipes being thus at all times filled with liquid. A pipe connected the reservoir with the street main, cut off by a check-valve kept closed by the pressure from the reservoir. In case of fire, the pressure was relieved by the flow through the distributing pipes, and the valve opened, letting in the water. *Held*, that this device was not sufficiently similar to those above mentioned to constitute an infringement.
3. SAME—DOCTRINE OF EQUIVALENTS.
   The sprinkler or distributer, manufactured by said defendant under said patent No. 318,508, is, by the doctrine of equivalents, an infringement upon the fourth, fifth, and sixth claims of the above-mentioned patent No. 233,393, but does not infringe the first claim of said patent No. 216,821.

In Equity.

Follett, Hyman & Kelley and *George F. Murray*, for complainants.

James Moore, for respondent.

SAGE, J. The complainants sue for infringement of letters patent No. 216,821, granted June 24, 1879, to Charles Barnes, for apparatus for extinguishing fires, and letters patent No. 233,393, granted October 19, 1880, for automatic fire extinguisher, alleging infringement of the two claims of No. 216,821 and of the third, fourth, fifth, and sixth claims of No. 233,393. The drawings in No. 216,821 show a system of distributing pipes passing through the various rooms of a building at their ceilings, and fitted with a number of downward projecting sprinkling nozzles. In the lower story, and just above the supply-valve of a pipe leading from the street main up to and connecting with the distributing pipes, is a reservoir to be filled with some non-freezing and fire-extinguishing liquid, which will be discharged upon the fire by the force

of water from the street main when used in connection with water-works, or by the weight of water from a reservoir on top of the building in localities where there are no water-works. The supply valve has an actuating lever, which is held up to keep the valve closed by a wire passing up to and united in each room by a fusible joint formed by cutting the wire, and inserting the cut ends into the opposite ends of a metal tube, and making solder joints between the ends of the tube and the wire with fusible metal. The sprinkler consists of a screw-threaded shank or seat-piece, adapted to be screwed into the union of the distributing pipes, a perforated rose-head, secured to the shank and a valve within the rose-head, adapted to be adjusted and held against its seat by a screw-threaded stem tapped through a cap soldered with fusible metal upon the neck of the rose-head. This cap, it is stated in the specification, has, preferably, up-turned flanges which cap over the neck, to which the cap is secured by fusible solder run upon the top edge of the flange, and around and against the neck. The neck has a space between its shell and the valve stem, and perforations which allow the heated air, in case of fire, to enter and fuse the solder joint, and let the valve drop down and open the passage for the fire-extinguishing liquid and water into the rose-head. At the same time the heat fuses the soldered joint of the wire which holds up the actuating lever, and the water rushes through the supply-valve, forcing and following the fire-extinguishing liquid into the distributing pipes and rose-heads, the caps of which, the solder holding them in place, having been fused, are forced off, and a shower of water thrown upon the fire. There is also an arrangement for ringing an alarm bell, but, as it is not mentioned in the claims, it is not necessary to describe it.

The claims, both of which it is claimed are infringed, are as follows:

(1) A nozzle for automatic fire extinguishers, constructed substantially as before set forth, namely, of a rose-head inclosing a valve controlling the water passage thereto, the stem of the valve projecting through a neck of said rose-head, and being screwed to a cap secured to said neck by fusible metal. (2) The combination, substantially as before set forth, of the water-pipes, the automatic valve, and the fire-extinguishing liquid-containing reservoir, connected with the water-pipes as described, so that its contents will be discharged with and by the flow of the water.

The object of patent No. 233,393, as set forth in the specifications, is fivefold, as follows:

(1) To provide a supply-valve more easily and securely forced and held to its seat, and more readily released therefrom; (2) to relieve the valve-sustaining devices from the strain consequent upon the expansion and contraction of the valve closing and releasing wires under varying temperatures; (3) to relieve the fusible solder joints from strain, so that they may be made more sensitive to heat, without liability to parting, excepting in case of fire; (4) to prevent the possibility of the discharge orifices becoming clogged by sediment, or by scales from the pipes; (5) to provide means to hold the valve seat within the distributer securely to its seat, without liability of fracturing the solder joint by which it is held, by expansion and contraction of the metal.

The drawings show the general system of distributing and supply pipes, supply-valve, and reservoir, as in No. 216,821. The case of the sup-

ply-valve is cast in two sections, which are bolted together through outwardly projecting flanges, to receive the journal bearings of a shaft. The valve has a yoke cast with it, upon the under side, through which the shaft passes. An eccentric upon the shaft, and within the yoke, opens the valve when turned in one direction, and closes it when turned in the opposite direction. The valve is guided by rods which pass through transverse bars in the upper and lower parts of the case. The lower rod has a groove to receive a pin from one of the bars to prevent the valve and yoke from rotating, and the shaft, where it enters the valve case, is suitably packed to prevent leakage. Any desired number of flanges or disks may be secured upon the shaft, either separately or upon a common hub. The form of the shaft outside the case illustrated in the drawings is square, to enter corresponding perforations in the flange or disk hubs, but, the specifications state, any other mode of securing them rigidly to the shaft may be adopted. To each of the disks a lever is pivoted, with a weight suspended from outside the periphery of the disks. The free ends of the lever are held up by wires or cords which pass through the different stories of the building, and are united at different points of their length by a coupling device which is a joint of fusible solder. When in position or coupled, the wires or cords, by sustaining the lever, hold the supply-valve closed; and, as the valve opens against the pressure of water from the main, that pressure assists to hold it securely to its seat.

The patentee's intention was to have independent wires or cords from the different stories or divisions of the building, and as many independent levers. Thereby the contraction and expansion of the wires would be distributed between all the levers, and the friction caused by the pulleys or bell cranks required to change the direction of one wire throughout the entire building avoided. Whenever any lever is released by its retaining wire, the weight upon the lever brings it down upon its fulcrum pin, secured in the face of the disk, partially rotating the shaft, and, by the action of the eccentric, opening the valve, and turning a supply of water into the system of pipes. The coupling device consists of a metal lever through the eye of which one of the cut ends of the wire cord is passed and looped. A loop is made upon the end of the adjoining section of the wire. The bar of the lever is passed through this loop, and turned back parallel with the wire, which passes through the eye of the lever. A slide is passed over the end of the lever, and over the cord holding the lever in position parallel with the cord. The other wire, or part of the wire, is held by its loop around the enlarged portion of the lever containing the eye, and extends in the opposite direction. The slide is jointed together with fusible solder, and, as the strain is slight, the solder may be made very sensitive to heat, without liability to part, excepting in case of fire. When it does part the lever is released, and flies back, the loop of the other part of the wire instantly slips off the lever, the part of the wire over which the slide passed is released, the lever of the supply-valve drops, the supply-valve is thrown open, the water is turned on, and the fire extinguished.

These features of the patented improvements are covered by the first, second, and third claims of the patent, which are as follows:

(1) In an automatic valve for fire extinguishers, the combination of case, A, valve, C, and cam-shaft, B, with flange, D, weighted lever, E, and a fusibly jointed releasing wire, as G, for the purpose specified. (2) In an automatic fire extinguisher of the character described, the combination of a system of pipes, a supply-valve for said system, with two or more independent valve-actuating devices; each of which is held by an independent wire passing to a different part of the building, either one of which actuating devices will throw the valve open when its holding wire is parted. (3) A valve-releasing device for automatic fire extinguishers, consisting of wires, G, lever, H, and *fusibly jointed slides*, I, combined to operate substantially as set forth.

Of these the third only is involved in this cause.

The next feature of the complainant's improvement relates to a perforated rose-head distributer or sprinkler, into the lower end of which is screwed a cap, and between two lugs secured or cast upon the under side of this cap, about the distance of half a radius from its center, a lever is pivoted. The opposite end of the lever has a swinging lug-plate, which, when the distributer is adjusted for use, is secured by a fusible solder joint to a projection extending from the periphery of the cap, as shown in the drawings. The preferred form of distributer has at its outer end, instead of the lug-plate, a hooked lever which reaches up and hooks over a projection of the shell of the rose-head, and has its flat edge jointed by fusible solder to the projection upon the shell and a corresponding projection upon the cup. The pivot pin of the lever is in a vertical plane outside the solder joint, so that, when the solder is fused, the lever is thrown from its bearing, the lower part of the projection upon the cap serving as a fulcrum for this purpose. The valve of the distributer, which shuts off the flow of water from the distributing pipes, has a stem, in two sections, projecting downward through a central opening in the cap. The lower end of the upper section is bored out for some distance, and a rubber plug inserted. The lower section is turned off to enter the cavity in the upper portion, and rest upon the rubber plug, which serves as a cushion. The valve is tightened and held to its seat by a screw, which is tapped through the arm of the lever above described. The valve is thus, when the lever is in position, held closed, and, when the solder of the lever joint is fused, the elastic force of the rubber plug in the valve assists to throw the lever down, and, while the lever is in position, the same force prevents the fracture of the joint, and also leakage from the valve in the event of the distributing pipe being filled with water.

The specifications also describe, and the drawings illustrate, the mode of applying the elastic stem of the valve to the form of sprinklers theretofore used. For such use the elastic joint is made at the upper end of the valve-stem, and the lower end is screw-threaded through a plug of fusible metal in the lower end of a guide-cap, which has a projection extending up into the shell of the distributer, and a flange or shed extending around it below the shell. The lower part of the shell is per-

forated so that, in case of leakage, the water would be discharged from the distributer upon the inclined top of the flange, and be carried off without reaching the neck of the cap to impede the fusing of the joint in case of fire.

These features of the complainant's improvements are covered by claims 4, 5, and 6, as follows:

(4) In an automatic fire extinguisher, the combination, substantially as set forth, of a perforated distributer, a valve located within said distributer, and having a stem which projects through the shell of the distributer, and a lever, as K, to hold the valve to its seat within the distributer until its fusible joint, k^3, is released by heat.

(5) In an automatic fire extinguisher, the combination, substantially as specified, of a perforated distributer provided with a valve, the stem of which projects through the distributer shell, with a jointed lever, K^1, and latch, K^2; said latch resting upon a projection on the shell of the distributer, and secured thereto by fusible solder to hold the valve to its seat.

(6) In an automatic fire extinguisher, the combination of a perforated distributer, and a valve to control the supply of water to said distributer, said valve provided with a two-part stem, and an elastic cushion between the parts, to hold the valve to its seat with elastic pressure by fusible solder, substantially as specified.

There is also a provision against the clogging of the distributer by sediment or scales. This is prevented by a perforated screen within the distributer, which is covered by claim 7 of the patent, but, as that claim is not involved in the litigation, no further reference to it is necessary. The defendant admits the manufacture and sale of the device, which, it is claimed, is an infringement of the complainants' patents. The complainants' system is what is known technically as the "dry-pipe system," —that is, the distributing pipes are kept free from fluid until the occasion of a fire; but if his reservoir be filled, as he suggests in the specification of his patent of June 24, 1879, "with some non-freezing and fire-extinguishing liquid," the pressure of the gas evolved in the reservoir would fill the distributing pipes with the liquid, and his system would be a "wet-pipe system," in which the pipes are at all times filled with fluid. In practice the complainant has not charged his reservoir as suggested, but has placed in it dry chemicals, with which the water, upon the opening of the supply-valve, comes in contact, and the fire-extinguishing fluid thus provided, passes into the distributing pipes, and is thrown through the sprinklers upon the fire. In many cases even the chemicals are omitted, the sole dependence being upon the supply of water coming through the supply-valve, so that, in practice, the complainant's system is a dry-pipe system.

The defendant's is a wet-pipe system. He has a reservoir charged with a fire-extinguishing fluid, which generates a gas, producing a pressure of about 100 pounds to the square inch. It results that the distributing pipes are at all times filled with fluid. He has also a pipe connection with the street main or other source of supply, which is cut off by a check-valve placed without the reservoir, and opening inwardly towards the reservoir. When the pressure from the reservoir is greater

than that from the main, which is ordinarily about 40 pounds, the check-valve is kept closed; but it opens whenever, as occurs upon the breaking out of a fire in the building, the pressure from without is greater than that from within. The defendant has also distributing pipes like the complainant's, and sprinklers, the openings to which are closed by valves under control of devices whose action is suspended whenever the temperature of the surrounding air becomes sufficient to melt a retaining instrumentality of some fusible metal.

The first defense is anticipation by various devices in public use before the date of complainant's invention. Armitage's patent No. 15,721, of July 8, 1856, shows a vertical supply-pipe, leading from a ground connection with the water supply to the different stories of a building where it connects with jet-pipes secured to the ceiling. A valve located in the supply-pipe is normally closed, preventing the passage of water to the jet-pipes. This valve is provided with a weighted lever, which, falling downward, opens the valve, but the lever is prevented from falling by a combustible cord which sustains it, and extends to and along the ceilings where the jet-pipes are located. The burning of the cord which occurs upon the breaking out of a fire releases the lever, the valve opens, and the water is discharged through the jet-pipes upon the fire. This was a dry-pipe system. The jets were always open.

Newton's patent No. 171,305, December 21, 1873, provided for a valve or stop-cock in each branch or distributing pipe, and operated by the melting of an easily fusing solder, and each sprinkler is provided with a suitable check-valve kept closed, except in case of fire, by a fusible solder. Reservoirs or tanks charged with chemical compounds for extinguishing fires were known before the date of complainant's invention. They are shown in the Manning patent of October 17, 1871; the Maxim patent of July 22, 1873, in which the reservoir connects directly with the jet-pipe system in the building. They are also shown in other forms of apparatus of dates prior to the complainant's invention, for extinguishing fires; but as the complainant makes no claim to the reservoir, but only to the combination of the valve and attachment with a fusibly jointed releasing wire, they need not be considered. The combination claimed is not anticipated.

In automatic fire extinguishers, an essential requisite is prompt action at the incipiency of the fire, when alone they are effective; and it is highly important also to confine the discharge of the extinguishing fluid to the locality of the fire, and thus limit damage by water. In testing the validity of the complainant's patents, we must keep these points in view. The best automatic fire extinguisher prior to complainant's was Parmalee's, known as the Parmalee water-joint automatic distributer. It consisted of a perforated nozzle or distributer, over which an unperforated cap was soldered by a fusible metal. This was a wet-pipe system, and the soldered joint was in contact with the water in the pipes, which retarded the melting of the fusible metal. The complainant Barnes then made his first invention for which letters patent No. 212,346 were granted him February 18, 1879. The device for sustaining the lever controlling

the supply-valve differed from that patented June 24, 1879, No. 216,-821, which is the first of the two patents on which this suit is brought, in that the fusible connection of the sustaining wire was made by passing the ends of the wire through holes in a connecting piece of fusible metal, and making a loop, or by soldering them with fusible metal, the connection to be made in either case at a point removed from the rose-heads, and where the action of the heat upon the fusible metal would not be retarded. The stem of the valve of the rose-head sprinkler is screw-threaded, and tapped through a cap secured to flanges upon the neck of the rose-head by fusible solder. The neck has a space between its shell and the valve-stem, and perforations which allow the heated air to enter so as to rapidly fuse the solder joint and release the valves. At the same time the heated air fuses a joint of the wire, and the discharge of water upon the fire takes place in less than half the time required to set any previous automatic fire extinguisher in operation. The complainant's improvement was properly recognized as a patentable invention, as were the improvements subsequently patented and in suit. It is true that most if not all of the constituent parts were old, but the combinations claimed are new, and they are precisely the combinations requisite to greatest sensitiveness to heat, and the speediest operation of the apparatus at a time when every moment's delay involves damage and possible danger.

The next inquiry is, does the defendant infringe? And, first, as to the supply-valve in the reservoir or tank of his apparatus. His valve, as has been stated, is an ordinary check-valve, opening inward, or towards the reservoir. It has no lever with wire attached, as has the complainant's. It is acted upon solely by pressure from within or from without. If the excess of pressure be from within, as is the case when his reservoir is charged, and the sprinklers of his distributing pipes are closed, the valve is closed, and remains closed until the pressure is so diminished as to be less than that from without, and then it opens. This does not occur at the beginning of the operation of his apparatus upon the occasion of a fire, before the pressure from the reservoirs by reason of the gas generated exceeds that from without, until the contents of the reservoir are almost exhausted, and the fire may be entirely quenched without the use of any water from the main. This differs widely from the operation of the complainant's valve, which is thrown open mechanically by the falling of the lever upon the parting of the fusible connection of the wire at the location of the fire, and at once admits the water from the main. Let us look at it in another view. Suppose the complainant's reservoir be charged, as in defendant's, with a fire-extinguishing fluid. The pressure fills his distributing pipes with the fluid, and his is then no longer a dry-pipe system. A fire breaks out. His fusible wire connections are severed by the heat; his supply-valve is thereby thrown open; and at the same time the valves of his sprinklers are released, and his apparatus is in full play. What effect will the pressure from his reservoir, acting through the open supply-valve in the direction opposite to that of the fire, have upon the water

in the pipe leading from the main? Until the pressure is reduced below that from the main, it must drive that water back. In other words, the complainant's apparatus, under such conditions, would operate in both directions,—towards the fire and away from the fire. It would be like a gun firing from the muzzle, and kicking from the breech. It is true the complainant might put in a check-valve, which is common property, but that is not suggested in the patents or either of them; and if he did so, then, under the conditions stated, his supply-valve, with its levers and wire attachments, would be unnecessary, and better be discarded. But he cannot operate his apparatus as a dry-pipe system with a check valve only, for there would be no pressure from within. It is clear, then, that there is no infringement by the defendant of the second claim of complainant's patent No. 216,821, nor the third claim of complainant's patent No. 233,393.

This brings us to consider whether the defendant infringes the first claim of complainant's patent No. 216,821, and the fourth, fifth, and sixth claims of complainant's patent No. 233,393. The valve of defendant's sprinkler or distributer is, first, a rubber sphere of about twice the diameter of the nozzle or ajutage of the distributing pipe. This sphere is held firmly against the mouth of the nozzle (as the defendant states in the specifications of his patent No. 318,508, dated May 26, 1885) by the following instrumentalities: That part of the valve or sphere remote from the ajutage occupies a hemispherical cell, which is, in turn, inclosed in a cup-formed guard. It is plain that, so far, we have in effect the lower end of the first section of the valve-stem of complainant's patent No. 233,393, the hemispherical cell, and the inclosing guard, answering, under the doctrine of equivalents, in every essential particular to the section of the complainant's valve with the end bored out. With the rubber sphere in place, we have the first section of complainant's valve-stem complete, but inverted, which is a mere change of position, not in the least affecting the result. But to return to the description. This guard, with its inclosed shell and valve, (or sphere,) is confined in a cage composed of a pan-shaped deflector and the ajutage, and within them the valve, when at liberty, freely slides. A staple-formed projection is stamped out from the under side of the deflector. This receives an arm, projecting radially from the deflector, as shown in the models and in drawings of the patent. Another portion of the deflector, diametrically remote from (to use the phrase of the specification) the point where the staple projection was stamped, a lip-formed projection is stamped, also downward, and projecting perpendicularly from the deflector. Through the opening created by this stamping is introduced the short arm of a lever, bent into a hook form, its arms forming an acute angle. When the longer arm of this lever is drawn up close to the arm above referred to, as projecting radially from the deflector, the two extending the same distance beyond the edge of the deflector, the short arm of this bent lever presses up against and at or near the center of the bottom of the outside of the guard containing the hemispherical cup and the valve, and so as to hold the valve close against the mouth of the

ajutage, and to close the same. Here we have the second and remaining section of the stem of complainant's valve, and there is before us an illustration of that ingenuity in evasion which is not invention, and does not avoid infringement. The outer ends of the lever and the radial arm are held together by a tube ring or band of fusible alloy, and here we have almost exactly the device by which the complainant connects his wires controlling his supply-valve, and we have also the equivalent of the complainant's device for retaining in position the valves of his distributers. The equidistant bars which connect the deflector to the ajutage, and within which the guarded valve, when at liberty, freely slides, are provided with screw-threads upon their points of engagement with the top piece, and can be used to adjust the seating of the valve, and prevent leakage. This device is the equivalent of the screw which is tapped through the lever arm of the complainant's distributer in his patent No. 233,393.

The defendant substitutes for the perforated rose-head distributer described in complainant's patents the circular deflector already referred to. When the valve is opened, the water, "striking the valve, the edge of the guard, the deflector, and the cage bars, is scattered or projected in a spray in every direction,—upward, downward, and sidewise,—so as to reach every object within the range of its delivery." This description, quoted from the specification of the defendant's patent, accurately describes also what is accomplished by complainant's rose-head distributer, in which the water from the distributing pipe, striking the bottom, is scattered or projected through the perforations in a spray "in every direction, upward, downward and sidewise, so as to reach every object within the range of its delivery." The defendant's device is therefore the equivalent of the complainant's. The deflector was known before the date of complainant's invention. It is shown in the Alderson & Loftus patent No. 225,092, of March 2, 1880.

The conclusion of the court is that the defendant infringes the fourth, fifth, and sixth claims of complainant's patent No. 233,393, of October 19, 1880, but does not infringe the first claim of complainant's patent No. 216,821, of June 24, 1879; and a decree for an injunction and account will be entered accordingly.

YALE LOCK MANUF'G CO. and another *v.* NEW HAVEN SAV. BANK.

(*Circuit Court, D. Connecticut.* September 10, 1887.)

1. PATENTS FOR INVENTION—TIME-LOCKS—REISSUE—ENLARGEMENT OF ORIGINAL PATENT.

Reissued letters patent No. 8,550, to Samuel A. Little, for improvements in "time-locks," by which the multiple bolt-work of a safe or vault door could be automatically both dogged or locked and unlocked at predetermined times,—the dogging and releasing being caused by the operation of the time mechanism, and the time for locking or unlocking being capable of altera-

tion at the will of the operator, without disturbance of the clock-work,—contained, *inter alia*, the following claim: "(7) In a time-lock the combination * * * of the time movements and two adjustable devices; one for determining the time of locking, and the other of unlocking." The original letters of the same patent contained, among others, the following claim: "(2) The wheels, B and C, with the depressions, *d* and *f*, and the projections, *e* and *g*, located relatively to each other as described, to increase and diminish the surface of a common cam, *i*, or depression, *h*, by rotation on each other. * * *" *Held*, that the seventh claim of the reissue was not an enlargement of the second claim of the original patent; because the latter should be construed broadly, and should not be confined to "a common cam," or to a device which was connected with the compound wheel in the same way in which the cam was connected, but was broad enough to include equivalent means of connection with the dog.

2. SAME—REJECTION OF CLAIM—SUBSEQUENT APPLICATION AND REISSUE.
The third claim of the application for a second reissue of the Little patent for time-locks was for devices consisting of "a compound disc, composed of two single discs of the same shape and size, placed face to face on a common axis." When these two discs or wheels were fastened together by a thumb-screw, they formed one wheel or disc. In said third claim this compound disc was called "*two* adjustable devices." The patent-office held that the compound disc constituted but a single adjustable device, or single disc, and rejected the third claim, to which rejection the owners of the patent assented. *Held*, that they did not thereby abandon the right to claim, in a subsequent reissue, a double or compound disc, and obtain a valid patent therefor.

Samuel A. Duncan, for petitioner.
Edmund Wetmore and *Causten Browne*, for respondent.

SHIPMAN, J. On or about April 19, 1881, this court made an interlocutory decree in the above-entitled cause, by which the defendant was enjoined against infringing the first and seventh claims of reissued letters patent No. 8,550, to Samuel A. Little. *Lock Manuf'g Co.* v. *Bank*, 19 Blatchf. 123, 6 Fed Rep. 377. No final decree has ever been made. The original Little patent was dated January 27, 1874, the three reissues were respectively granted May 9, 1876, January 8, 1878, and January 21, 1879. The answer of the defendant alleged that the original patent was not reissued for the purpose of correcting any supposed defective or insufficient specification, but to secure claims not warranted by the invention disclosed in the original patent, and that in the several reissues, and particularly in the last reissue, claims were inserted which were broader in their scope than the invention of the original patent warranted. The original patent and the application for the third reissue were introduced in evidence by the defendant.

This is a petition by the defendant to vacate the interlocutory decree, and to grant a rehearing, with leave to the petitioner on such rehearing to introduce in evidence certified copies of the file wrappers of the several issues of the patent, and certain other documentary evidence, with such amendment of the pleadings as the newly-offered evidence may render expedient. The object of the rehearing and of the new evidence is to show that the first and seventh claims of the third reissue were improperly allowed by the commissioner, and are void.

Passing by the consideration of any question in regard to the laches of the defendant, or whether the evidence can properly be considered to

be newly discovered, the claims of the several patents which are the subject of controversy upon this motion are as follows: Claim 2 of original patent, and claim 5 of the first reissue:

The wheels, B and C, with the depressions, *d* and *f*, and the projections, *e* and *g*, located relatively to each other as described, to increase and diminish the surface of a common cam, *i*, or depression, *h*, by rotation on each other, for the purposes described.

Claim 3 of first reissue:

In a chronometric locking mechanism, the combination, as before set forth, of the clock-work and two adjustable devices, for determining, respectively, the times of locking and unlocking.

Claim 2 of the second reissue:

In a time lock, the combination substantially as above set forth, of the time movements and an adjustable device for determining the time of locking.

Claim 7 of third reissue:

In a time lock, the combination, substantially as above set forth, of the time movements and two adjustable devices, one for determining the time of locking, and the other of unlocking.

The first claim of the third reissue is substantially like the seventh. The second claim of the original, and the corresponding fifth claim of the first reissue, were omitted, by direction of the patent-office, in the second reissue, by reference to a patent deemed to be anticipatory, and do not appear in the third reissue.

The first and the important question, and one by no means free from difficulty, is whether the seventh claim of the third reissue is an enlargement of the second claim of the original. The defendant's position is that the new claim, which was also the third claim of the first reissue, is for "the combination in a time lock of two adjustable devices, whose function is simply to determine the times of locking and unlocking, without regard to the character of the devices or means by which the locking-dog is held in either its locking or in its retracted position, while in the original claim it is made a necessary element of the combination that there shall be a 'common cam, *i*,' the function of which is to hold the dog in its locking position." The defendant's construction of this claim is undoubtedly what was wanted by the draughtsmen when they drew it, and if that construction is the proper one, the claim was improperly allowed by the patent-office; for if it could ever have been properly obtained, it was unseasonably applied for, and is therefore invalid.

It should not be thus construed, and was not so construed in the opinion of the court, which made the described holding part of the dogging mechanism and its equivalents a part of the claim. Upon the question of one of the alleged differences between the Little and the Holmes or Chinnock lock, viz., that the locking devices are actuated by mechanism of different methods of operation, the court said:

"I do not regard the latching-gear, and the tripping of the latch that holds the dog, as strictly a mechanical equivalent for the direct action of the cam upon the dog, but it is plain that, at the date of the Little patent, the Chinnock method of holding and releasing a dog was a well-known substitute for

that part of the Little mechanism which performs the same office, and, therefore, so far as this mechanical combination is concerned, the latching-gear and the tripping mechanism are a mechanical equivalent for the action of the cam upon the dog."

While the claim should be made to include mechanism which is the equivalent of the described holding mechanism, inasmuch as Little was the first who applied time mechanism to a safe door, by means of which locking could take place automatically at a predetermined period, he should not be confined to a narrow line of equivalents. In the case of *Plaintiff* v. *Bank*, 17 Fed. Rep. 531, which was decided in August, 1883, Judge LOWELL was called upon to determine whether the seventh claim was an undue expansion of the original patent, in view of the decision in *Miller* v. *Brass Co.*, 104 U. S. 350. He said:

"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 conclusion is that, although the owners of the patent attempted to enlarge it, the seventh claim should be limited to the invention which was described and claimed in the original patent, which invention was not confined to "a common cam," or to a device which was connected with the compound wheel in the same way in which the cam was connected, but was broad enough to include equivalent means of connection with the dog.

The defendant further insists that the application of the patentee for the second reissue contained a proposed third claim in the following language, which was substantially the third claim of the first reissue:

(3) In a time-lock, the combination, substantially as above set forth, of the time movements and two adjustable devices, for determining, respectively, the times of locking and unlocking.

—that this claim was rejected by the patent-office, and the patentee acquiesced in such rejection, without appeal, and thereupon the patent was issued, claiming only a single adjustable device in the second claim. That claim has been already quoted. From these facts, the defendant says, it results that the claim for two adjustable devices was abandoned and could not be resumed in the third reissue.

The circumstances of this rejection and acquiescence are somewhat peculiar. The Little invention contained, in addition to the "adjustable devices," what was known as the Sunday device, for preventing unlocking during a period greater than 24 hours. The adjustable devices were, in brief, "a compound disc, composed of two single discs of the same shape and size, placed face to face on a common axis, each having an equal portion of its periphery cut away so as to leave in each a depression of the same form and size as that in the other. When these two discs or wheels are fastened together by a thumb-screw, they form one wheel or disc having a depression in its periphery." This compound

disc was called in the proposed third claim "two adjustable devices." The patent-office thought that it should be called one device, and therefore rejected the claim. The reason was stated as follows: "The third claim is objectionable, as it appears to be for two devices for locking and unlocking, while applicant shows only one device for locking and unlocking, and another for preventing unlocking at a particular time." Thereupon the owners of the patent assented, the claim for two adjustable devices was withdrawn, the claim for one adjustable device remained, and the second reissue became very open to attack, because the courts might hold that the patent was in terms for a single device, and should be so construed.

It is now insisted that because the patent-office called the compound disc a single disc, and the owners of the patent assented to the name, therefore they abandoned a right to claim a double or compound disc, and can have a valid patent only for a single wheel. Such a conclusion rests too entirely upon technicality to merit favor. It may be the outcome of the principle suggested in *Leggett* v. *Avery*, 101 U. S. 256, and confirmed in *Shepard* v. *Carrigan*, 116 U. S. 593, 6 Sup. Ct. Rep. 493, but such a result would carry the principle to an improper extreme. The facts in the case are similar to the special circumstances in *Morey* v. *Lockwood*, 8 Wall. 230, in consequence of which that decision is not considered to be incompatible with the other recent decisions upon the subject of reissues. *Russell* v. *Dodge*, 93 U. S. 460; *Eames* v. *Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073.

The prayer of the petition is denied.

SEIBERT CYLINDER OIL CUP CO. *v.* NIGHTINGALE and another.

(*Circuit Court, D. Massachusetts.* September 9, 1887.)

1. PATENTS FOR INVENTIONS—IMPROVED LUBRICATOR—INFRINGEMENT.
   In letters patent No. 138,243, dated April 29, 1873, issued to John Gates for an improved lubricator, the first claim was upon the "method of feeding oil, consisting in delivering the oil from the reservoir up through a body of water inclosed in a glass chamber, and discharging the same through the feed-cocks." The second was upon "the combination of an oil chamber with a water chamber, the latter being located over the former, and adapted to receive oil from it, and deliver the same above the body of water inclosed in it." The defendant's lubricator, called the Lunkenheimer, adopted the device described in the first claim of the Gates patent, but the oil chamber was located at the side of the water in the feed-glass, instead of under, as in the second claim. *Held* an infringement.
2. SAME—ANTICIPATION—SPECIFICATIONS.
   The patent taken out by John Absterdam, November 21, 1854, for an improved lubricator, neither the specifications nor drawings disclosing a sight-feed where the oil is delivered up through the water, was not an anticipation of the Gates patent.
3. SAME—EVIDENCE.
   Absterdam testified to having invented and put in operation, 30 years before, a lubricator of the Gates design, and several witnesses testified to

having then seen the lubricator in use. The alleged improvement was not described in Absterdam's patent taken out about that time. *Held*, that the evidence was insufficient to show an anticipation of the Gates patent.

4. SAME—CONSTRUCTION OF CLAIMS.

In letters patent No. 111,881, dated February 14, 1871, granted to Nicholas Seibert for an improved lubricator, the first claim covers mechanism whereby steam is communicated to a tube, and an annular space between the two tubes within the oil-cup is kept hot. This device is not found in defendant's lubricator. The second claim is upon "the improved lubricator, consisting of the parts herein described, constructed and arranged substantially as herein specified." *Held*, that the second claim embraces all the parts specified in the first claim, and therefore defendant's lubricator is not an infringement.

In Equity.

T. W. Clarke, for complainant.

Arthur Stem, for defendants.

COLT, J. This bill alleges infringement of letters patent No. 111,881, dated February 14, 1871, granted to Nicholas Seibert, and of letters patent No. 138,243, dated April 29, 1873, issued to John Gates. Both patents relate to improvements in lubricators. The claims of the Seibert patent are as follows:

"(1) The arrangement of the cock, M, passages, S, S′, and tubes, O and P, with the oil reservoir, F, and gauge, J, R, as herein shown and described, for the purpose specified. (2) The improved lubricator, consisting of the parts herein described, constructed and arranged substantially as specified."

The first claim covers mechanism whereby steam is communicated to a tube, and an annular space between the two tubes within the oil-cup is kept hot. It is admitted that this device is not found in the defendants' lubricator, and therefore the complainant confines the charge of infringement to the second claim. But if the second claim embraces as part of the combination that which is found specifically described in the first claim, then it is manifest that there is no infringement. The complainant contends that the word lubricator, as used in the second claim, includes those parts only which do the lubrication, namely, the condensing pipe and chamber, the oil reservoir, delivery pipe from the oil reservoir, cocks, etc., and that the claim should be construed as covering only those parts. But it seems to me that this is a forced construction, and one which the language of the claim will not warrant. The claim is for the "*improved* lubricator, consisting of the parts herein described, constructed and arranged substantially as specified." Now, one of the main improvements described in the Seibert lubricator is the mechanism covered by the first claim, and when the patentee says, in effect, that the second claim is for the improved lubricator, consisting of the parts described in his specification and drawings, his manifest intention was to cover the devices which form the subject-matter of the first claim, as well as the other parts of his lubricator, and such is the natural and proper meaning of the language used. The question before the court in *Garratt* v. *Seibert*, 98 U. S. 75, was one of priority of invention in the case of interfering patents, and suit was brought under section 4918, Rev. St. The question of the proper construction of claim 2 of the Seibert pat-

ent was not before the court, and was not passed upon by it. I deem it unnecessary to consider the other defense raised to the Seibert patent, because I am satisfied that defendants' lubricator does not infringe the second claim.

I now come to the Gates patent. The gist of the Gates invention is a sight-feed lubricator, where the oil is delivered up through a body of water inclosed in a glass chamber. The claims relied upon are the first and second:

"(1) The described method of feeding oil, consisting in delivering the oil from the reservoir up through a body of water inclosed in a glass chamber, and discharging the same through the feed-cocks, substantially as described. (2) The combination of an oil chamber with a water chamber, the latter being located over the former, and adapted to receive oil from it, and deliver the same above the body of water inclosed in it, substantially as described."

The defendants' lubricator is called the Lunkenheimer, and it is manifest upon inspection that it adopts the method described in the first claim of the Gates patent, of delivering oil up through a body of water inclosed in a glass chamber, and discharging the same through a feed-cock. I am satisfied, also, that the Lunkenheimer lubricator infringes the second claim of the Gates patent, notwithstanding the oil chamber is located at the side of the water in the feed-glass, instead of the water being located over the oil chamber. The result accomplished is the same, and while the Lunkenheimer may be an improvement over Gates, I do not think the change made relieves the defendant from the charge of infringing the second claim.

The most serious defense to the Gates patent is the alleged Absterdam anticipation. It is urged that John Absterdam took out a patent, November 21, 1854, for an improved lubricator which exhibits a sight-feed, and that prior to that time he had made a sight-feed lubricator which delivered the oil up through the water as shown in the patent of Gates. With respect to the Absterdam patent it may be observed that neither the specifications nor drawings disclose a sight-feed where the oil is delivered up through the water. The more serious question is whether the defendants have not shown that Absterdam did in fact construct a lubricator, about this time, which has the sight-feed and delivery of Gates. Absterdam produces a drawing made in 1883, in the suit of this complainant against William Burlingame for infringement of the Gates patent. This drawing shows the Gates method, and Absterdam swears that it is a substantial copy of a drawing made by him in 1853 or 1854; that he made several lubricators of the construction here shown; that one was in operation in the shop of J. J. Walworth & Co., Boston, and another on a locomotive named Washington, which was run on the Boston & Providence Railroad. This statement of Absterdam, as to the lubricators in Walworth's shop and on the Washington, is confirmed to a great extent by several witnesses who saw these lubricators. But, after carefully reading this evidence, I am not clearly satisfied that Absterdam did what he claims to have done. Here are witnesses testifying to what they saw 30 years ago. It is more than probable that what they

actually saw was the sight-feed which Absterdam patented, and not the sight-feed of Gates, which he says he invented previously, but which we do not find described in his patent. To my mind it is a circumstance of some weight, notwithstanding his explanation, that Absterdam should not have described this improvement in his patent. Upon this record I have still some doubts whether Absterdam was the first inventor, and under these circumstances it is clearly my duty to sustain the Gates patent. The bill should be dismissed as to the Seibert patent, and sustained as to the first and second claims of the Gates patent; and it is so ordered.

THE PAOLA R.[1]

ZEIGLER *v.* THE PAOLA R.

(*Circuit Court, E. D. Louisiana.* June 17, 1887.)

1. MARITIME LIENS—WHAT CONTRACTS GIVE RISE TO.
   Maritime liens are *stricti juris*, and do not arise on all contracts made by the owners to result in profit to the ship. The test is to be applied to the subject, and not to the object. It is the subject-matter of the contract which must be maritime, and not the mere object,—the ship.
2. SAME—COMPRESSING COTTON.
   No maritime lien exists for the compressing of cotton, when the compressing was performed inland, and before any contract of affreightment, binding on the ship, was made.

Admiralty Appeal.

B. Frank Jonas and *I. O. Nixon, Jr.*, for libelant.

E. H. Farrar and *E. B. Kruttschnitt*, for claimant.

PARDEE, J. Compressing cotton for shipment by vessel or railroad is land business. The demand of the libelant in this case is, in effect, to establish a maritime lien for the compressing of cotton, when the compressing was performed inland, and before any contract of affreightment, binding on the ship, was made. The statement of the case shows that there can be no lien for such compressing. But the libelant says that in the port of New Orleans the custom and usage was and is that bills of lading of cotton are made, and rates are fixed, with reference to the delivery to the ship of uncompressed cotton, and that when compressed cotton is delivered to a ship the ship repays the cost of compressing. Concede such a custom, and it can have no greater effect than an express contract to the same purport between the master and the shipper. Such an express contract would be, in substance, an agreement to make a rebate on the freight of compressed cotton, and to pay such rebate before the freight is earned, or, in other words, the ship, in consideration of freight to be earned, agrees to pay down a cash amount.

Maritime liens are *stricti juris*, (see *Vandewater* v. *Mills*, 19 How. 82,)

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

and do not arise on all contracts made by the owners to result in profit to the ship. Many examples might be given. It is only where the contract to result in benefit to the ship is a maritime contract that a lien on the ship arises. Whether a contract is or not a maritime contract depends on its subject-matter, *i. e.*, whether it provides for maritime services, maritime transactions, or maritime casualties. *Insurance Co.* v. *Dunham*, 11 Wall. 1. In the present case the contract has reference to the obtaining of a cargo, and is to be performed before the voyage is commenced, and without reference to the result.

A policy of insurance on a ship is a maritime contract, (*Insurance Co.* v. *Dunham*, *supra*,) but no lien results for a premium, (*The John T. Moore*, 3 Woods, 61.) There is no lien for commissions on advances, nor for obtaining freights. *The J. C. Williams*, 15 Fed. Rep. 558. In *Ferris* v. *Jewett*, 2 Fed. Rep. 111, a lien was denied a shipping broker for services in obtaining a crew. A shipping broker has no lien for services in procuring a charter-party. *The Thames*, 10 Fed. Rep. 848. The services of a solicitor of freight are not maritime in character, and create no lien on the vessel. *The Crystal Stream*, 25 Fed. Rep. 575.

In *The Thames*, *supra*, Judge BROWN says:

"The distinction between preliminary services leading to a maritime contract, and such contracts themselves, have been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference more or less near or remote to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed."

And so the responsibilities of the ship on account of cargo must be held to commence with the delivery of the goods to the ship, and be confined to the transportation to and safe delivery of the goods at the port of delivery, and to the performance of such maritime services as may lawfully be agreed upon.

If charges and expenses necessary to the ship, and to the conduct of its business, but preliminary to the contract of affreightment, are admitted as maritime liens, there will be no end to the business that may be drawn to the admiralty. Compressing, ginning, baling, and perhaps picking cotton may each ripen into a lien on the ship that eventually contracts to carry the cotton from the country. The principle on which the decisions rest as to lien or no lien is "that the test is to be applied to the subject, and not to the object; that is to say, it is the subject-matter of the contract which must be maritime, and not the mere object,—the ship." See 21 Amer. Law Reg. (N. S.) 1. *Leland* v. *Medora*, 2 Woodb. & M. 109.

The subject of the libelant's contract under the custom claimed was not the carrying of the cotton, but was preliminary thereto, and was not a maritime contract, and no lien arises.

The exception will be maintained, and the libel dismissed, with costs.

THE SAGINAW.

(*District Court, E. D. Michigan.* October 19, 1885.)

MARITIME LIEN—WHARFINGER—ACCOUNT.

A libel for a balance of an account between a wharfinger and a steam-boat, most of the items of which account were not maritime, was held not to be maintainable.

(*Syllabus by the Court.*)

On Exceptions to Libel.

The libel averred that libelant was the owner of a wharf at Port Hope, one of the regular stopping places of the steamer; that it was customary for the Saginaw to deliver her consignments for that port upon this wharf, subject to her claim for freight and advance charges, which were collected by the libelant, and credited to the steamer; that the steamer, upon the other hand, was charged with such collections for freight and advance charges as were paid over, with dockage, and also for merchandise, (salt and hay,) which libelant was accustomed to turn over to the steamer, to be disposed of at the lower ports by her officers, and accounted for; and that there was a balance due libelants upon this account of $146.20, for which he claimed a lien.

James J. Atkinson, for libelant.

George E. Haliday, for claimant.

BROWN, J. This libel is for the balance of an account between a wharfinger and a steam-boat, and is clearly not maintainable. The items of libelant's claim are (1) for freight collected for the steamer, and paid over to her, for which there is clearly no lien, even if more were paid than was due; (2) for wharfage; and (3) for merchandise delivered to the steamer, to be disposed of and the proceeds credited to the libelant.

The last item I held not to be a lien in *The New Hampshire*, 21 Fed. Rep. 924.

Perhaps the items for wharfage might be a lien under the state law, if the suit were for a wharfage alone; but, if it be for a balance of a running account, the fact that some of the items are maritime in their character will not confer jurisdiction upon this court. *The Gold Hunter*, 17 How. 477.

The cases wherein a court of admiralty will take jurisdiction of accounts are well stated by Judge WARE in *The Larch*, 3 Ware, 28, 34. If all libelant's items were a lien upon the vessel, and the credits could be treated as so much payment upon account, I would entertain jurisdiction; but where it is apparent from the pleading that the suit is in reality to settle an account, and to recover a balance due, the libel will not be sustained.

WILLIAMS and others v. MORRISON and others.

(Circuit Court, E. D. Missouri, E. D. September 22, 1887.)

1. COURTS—CONFLICT OF STATE AND FEDERAL JURISDICTION—REPLEVIN—CONFUSION OF GOODS.
   An action of replevin was brought in a state court to recover a quantity of paving stone alleged to have been wrongfully taken from plaintiff's quarry, and the property was seized by the sheriff. Pending this action, the defendant brought suit in the United States circuit court for the recovery of the property so seized, together with other stone that had been quarried subsequent to the seizure. *Held*, that the United States court had no power to determine the rights of the parties to the property seized, under process of the state court, as the same question was before the state court; and that if, through the fault of plaintiff, the other property sought to be recovered had become so mixed with that seized by the sheriff that the two lots could not be distinguished, none of the property could be recovered.[1]
2. LICENSE—REVOCATION—ORAL LICENSE TO QUARRY STONE—POSSESSION OF STONE AFTER LICENSE REVOKED.
   An oral license to take out stone from a quarry for a term of years is subject to revocation at any time, upon notice to the *licensee*, and he is not entitled to possession of the stone taken out subsequent thereto.

Chas. A. Davis, *Geo. A. Castleman*, and *C. D. Yancey*, for plaintiffs.
Frank M. Estes and *Dinning & Byrnes*, for defendants.

THAYER, J., (*charging jury.*) The case that you were engaged in trying all of yesterday is what is known as an action of replevin. The action involves the question whether the plaintiffs in this case or the defendants were entitled to the possession of 8,000 or more granite paving blocks, on April 23, 1886, when this suit was brought. It is not denied that the defendants were in possession of the granite blocks in question when this suit was brought; and it is not denied that they were taken by the United States marshal, under an order of delivery in this case, from the possession of the defendants, and that they were delivered to the plaintiffs, and are now in plaintiffs' possession. The question which you will have to determine is whether the plaintiffs shall retain in whole or in part the granite blocks so delivered to them by the marshal, or shall in whole or in part restore them to the defendants. That is the general question to be settled, and the settlement of it depends upon the question who was the owner of those granite blocks on April 23, 1886, when this suit was brought?

Now, the facts which plaintiffs rely upon to support their title are, in substance, as follows: They claim that in November or December, 1885, Mr. Lorenz, acting in behalf of himself and Morrison, gave them verbal permission to take immediate possession of the granite quarry and work it for two years, paying therefor $1.50 per 1,000 for all granite blocks taken out ready for shipment. On the other hand, the defendants deny

[1] As to the principles which govern in cases of conflict between courts of concurrent jurisdiction, see Senior v. Pierce, 31 Fed. Rep. 625; Melvin v. Robinson, Id. 634; Kohn v. Ryan, Id. 636.

that any such oral license or permission to work the quarry was given. They claim the fact to be that Williams made application to them for a two-years lease of the quarry; that Lorenz and Williams came to an oral agreement as to some of the terms of the lease; that it was arranged that Lorenz should prepare a written form of lease, and mail it to Williams for approval, and, if satisfactory, it was then to be executed by all of the parties. The defendants say that a form of lease was prepared by Lorenz, and mailed to Williams in accordance with this understanding; that the lease was incomplete, being only signed by Lorenz; and that for nearly two months thereafter they did not hear from Williams respecting the lease, but that in the mean time, supposing the negotiation for a lease had fallen through, they leased the quarry to other parties. I only aim to state the substance of the respective theories of the parties; it is for you to recollect the testimony on this point as it was given in your presence by the witnesses.

Now, gentlemen, your first duty will be to determine from the testimony which of the two theories last stated is correct. In other words, you must determine which party tells the truth as to the transaction,—Williams on the one side, or Morrison and Lorenz on the other. Assuming that under the evidence you find in favor of the plaintiffs, (that is to say, if you credit Williams' statement concerning the oral license,) then the court instructs you that all the granite blocks taken out under such an oral license, and before it was duly revoked by the defendants, belonged to the plaintiffs in this case; and it follows that your verdict should be for the plaintiffs for so many of the granite blocks, delivered to them by the marshal under the writ of replevin in this case, as were taken out under such oral license before it had been revoked. It will be for you to determine the number of the blocks so taken out, if any.

Now, on the other hand, assuming that you adopt the defendants' theory of the case, and find that no oral license to take out rock was ever granted, and that the lease for the quarry was not executed and delivered by all the owners of the property as intended at the time of the negotiations for the lease, then it follows, as a matter of law, that plaintiffs had no right at any time to take possession of the quarry and take out rock, and that in doing so before they had a valid lease, or any oral license, they acted at their peril, and have no right to any of the granite blocks in controversy, and you should so find.

Furthermore, gentlemen, if you believe that there was an oral license given at one time to take out rock, the court instructs you that such oral license was of such character that it might be revoked at any time by the defendants by giving the plaintiffs personal notice that the license was terminated, and notifying them to leave the premises; and therefore, if it appears from the testimony that there was an oral license, but a subsequent revocation of the same, and that after the revocation plaintiffs continued to take out rock in opposition to the wishes of the defendants, then plaintiffs have no right to the possession of the rock taken out after the revocation of the license, and you should so find. If you find that there was an oral license at one time, then you must further

determine if there was a subsequent revocation of the same, and the date of the revocation, and whether plaintiff after the revocation took out rock, and how many, if any, of the blocks of granite now in controversy were taken out under such circumstances, and for that reason belonged to the defendants.

There is another feature of the case to which I must also direct your attention. It appears from the testimony, and of this there is no dispute whatever, that on the eighth day of April, 1886, Lorenz and Morrison sued out a writ of replevin in the circuit court of Wayne county, Missouri, and that under that writ, on the ninth day of April, 1886, certain of the granite blocks in controversy in this case were taken out of the plaintiffs' possession, and delivered to the defendants; that is to say, they were delivered by the sheriff of Wayne county to Morrison and Lorenz. It will be for you to determine, as a question of fact, how many of the blocks of granite in controversy in this case were the same blocks of granite that were so taken by the sheriff of Wayne county, and delivered to the defendants on April 9, 1886. It appears very clearly, and on this point you will have no room for doubt, I take it, that all of the granite blocks at the quarry, on April 9, 1886, were so taken and delivered by the sheriff of Wayne county to the defendants; but you must determine from the evidence, as nearly as you can, how many blocks there were at the quarry at that time, that is, April 9, 1886, and how many blocks were quarried by the plaintiffs between that date and April 28, 1886, when the marshal of this court seized all the blocks at the quarry, including those taken by the sheriff, and turned the whole lot over to the plaintiffs, that is, to Williams and James.

Now, gentlemen, the suit in the Wayne county circuit court was a suit that was pending in the state court, and was undetermined when this action was brought in the federal court, on April 24, 1886, and for that reason all of the blocks taken by the marshal of this court, on April 28, 1886, which were the same that had been seized by the sheriff on April 9, 1886, under the writ of the Wayne county circuit court, must be restored to the defendants by your verdict. The right to those blocks that were seized by the sheriff of Wayne county, Missouri, must be determined and adjudicated, as between the parties to this suit, by the state court in which that replevin suit is now pending, and not by this court, so that in no event can you find in plaintiffs' favor for all the blocks which the marshal seized under the writ in this case. You must in any event find in the defendants' favor for the blocks delivered to them by the sheriff on April 9, 1886, stating in your verdict the number of blocks and their value.

There is yet another feature of this case to be alluded to, and it is this: It seems that after the sheriff seized all the blocks at the quarry on April 9, 1886, they were left there on the ground at the quarry by the defendants, and plaintiffs went on until the twenty-eighth of April, 1886, getting out other and additional granite paving blocks. Now, there is a controversy here as to whether the blocks taken out after April 9, 1886, were piled or laid by themselves, so that they could be distinguished

from those seized by the sheriff, or whether they were so mixed and mingled by the plaintiffs with the blocks taken by the sheriff that the two lots could not be distinguished, the one from the other. You will have to determine that issue from the evidence before you; and if it appears from the evidence, and you so find, that plaintiffs so mixed the rock taken out by them after April 9, 1886, with the rocks seized by the sheriff of Wayne county, that the two lots could not be distinguished when the marshal arrived, then the plaintiffs had no right under the process of this court to take any of the rock found at the quarry on April 28, 1886, whether they were taken out prior to or subsequent to April 9, 1886, and you will have to so find. This last conclusion which I have stated to you is the result of a rule of law that, if a man wrongfully mixes his own goods with like goods of another person, so that they cannot be distinguished, the wrong-doer must lose his property.

With these general directions you may take the case with the following forms of verdict, which have been prepared for you by the court: If under the evidence and the instructions which I have just given to you, you find that the defendants are entitled to have all of the granite blocks taken by the marshal restored to them, your verdict will be in this form:

"*John H. Williams and others* vs. *Jasper N. Morrison and others.*

"We, the jury, find that the defendants are entitled to the possession of all of the granite blocks described in the petition in this case which were taken from their possession on April 28, 1886, under the order of delivery in this case, and we assess the value of said blocks at the sum of ——— dollars."

And in case you adopt this form of verdict, you will have to find the value of the granite blocks, and you will assess the damages for the taking and detention of the same at one cent. There is no evidence here warranting you in giving any substantial damages in case you find that the defendants are entitled to have all these granite blocks restored to them. There is no evidence here entitling you to give the defendants any damages other than nominal damages. You will simply state in your verdict the value of the granite blocks that are to be restored, for the further purposes of the suit.

If under the evidence and instructions you find that the plaintiffs are entitled to retain a portion of the blocks now in their possession, which were seized by the marshal and delivered to them, your verdict will be as follows:

"*John H. Williams and others* vs. *Jasper N. Morrison and others.*

"We, the jury, find the plaintiffs are entitled to the possession of ——— granite blocks seized by the United States marshal, under the order of delivery in this case, on April 28, 1886, being a part of those described in the petition in this case, and we assess the plaintiffs' damages for the detention of the same by the defendants at one cent; and we furthermore find that the defendants are entitled to all the residue of said granite blocks described in the petition herein, being the same which were seized by the marshal under the order of delivery, that is to say, ——— granite blocks, and we assess the value of those granite blocks to which the defendants are entitled at the sum

of ——— dollars, [giving the amount,] and we assess the defendants' damages for the taking and detention thereof at one cent."

You will take these two forms of verdict with you to your room, and use them in making up your verdict.

GOULD v. MULLANPHY PLANING-MILL CO.

(Circuit Court, E. D. Missouri, E. D. September 28, 1887.)

COURTS — CONFLICTING STATE AND FEDERAL JURISDICTION — ASSIGNMENT FOR BENEFIT OF CREDITORS.

Pending proceedings in the state court under an assignment for the benefit of creditors, a creditor who was not a party to such proceedings, and who was a non-resident of the state in which the assignment was made, brought suit in the United States circuit court to determine the validity of a deed of trust made prior to the assignment, and covering a large amount of the assets assigned. The assignee had entered upon the duties of his trust, but had taken no steps to contest the deed. *Held* that, as the question of the validity of the deed was one which was so entirely separate and distinct from those questions involved in the general proceedings that it could properly be eliminated therefrom without prejudice to such proceedings, it was one which the United States court had jurisdiction to determine.

On Plea of Jurisdiction.

Charles B. Stark, for complainant.

William R. Walker, for respondents.

MILLER, J., (*orally.*) In the case of *Gould* v. *The Mullanphy Planing-Mill Company*, which was argued before us on Monday, we have come to the conclusion that the plea to the bill in the case is insufficient. The argument was that the plea set up the pendency of a proceeding in one of the state courts, which involved the same subject-matter that is in controversy in the present bill brought by Mr. Gould. These questions come up very often in regard to a class of cases which arise under the laws of the state, for the purpose of administering estates of decedents, and administering assignments, and, in general terms, cases in which a fund is to be administered in a court of law of the state, and to some extent that is the case here. An assignment was made by the planing-mill company, and the assignee undertakes to administer the trust imposed upon him by the assignment, and although it is not alleged that he has filed an inventory, he has given bond, and it is probable that he has entered upon the trust devolving upon him by the assignment. But as far as the case shows he has been inclined to recognize the validity and existence of a prior deed of trust which covers a very large amount of the assets assigned to him. As he has not taken any steps to contest that deed of trust, and as this present bill, filed by Mr. Gould, one of the creditors interested under the assignment, does contest it, and declares it to be void or invalid for reasons set out in the bill, it would seem that

he ought to have the right, and must have the right, certainly in some court, to have an inquiry made into the validity of that deed of trust, as he is a large creditor under the assignment. If the deed of trust is held void, it will increase his dividends very largely, and may make his debt entirely good, and if it is to be held valid it would diminish them. The argument that that is a matter which belongs to the state court in which the assignment is filed, is not conclusive or satisfactory. It very often happens in cases of the kind that I have alluded to that a single issue, a single question, can be eliminated from the general proceedings, (a question which might be adjudicated in the state court, if anybody were made the proper parties,) that makes such a distinct separate transaction, such a distinct principle of adjudication, that a party may bring suit in another court to have that question settled. Especially is that so of one who is not a party to a proceeding in the state court.

In this case Mr. Gould is no party to the proceeding in the state court. He has not been sued. He has not been served with any process. He is not so subjected to that court by any mode of proceeding that we know of. At least no such thing is stated either in the bill or in the plea. Mr. Gould is therefore at liberty to exercise any of the rights which he may have to contest that deed of trust covering the property out of which he expects his debt to be made, and as he could go to any other court in the state which had competent jurisdiction of the subject-matter, so, being a citizen of another state than the assignee and the other parties to this suit, he has a right to bring that suit and have that question determined in the courts of the United States. The inconvenience, it is said, of having two courts administering the same fund at the same time has been considered in this class of cases, and it is not insuperable. This court will consider when it comes to render a decree, how far it will go. It is not necessary to decide now that the court will take that fund out of the hands of the assignee, or, the assignee being a party, will command him to pay over to Mr. Gould any more or any less money than he would otherwise; but it is perfectly competent for this court to make a decree, having all the parties before it,—having the assignee representing all the other creditors, and having the planing-mill company, and he himself being, before it,—it is perfectly competent for this court to decide whether that original deed of trust is valid or void. When that decision is made, it binds all that were parties to the suit; it therefore binds the assignee, and the idea of conflicting orders of the court is not to be conceived. When that decision is made, the assignee will file with the court, which it is said has some kind of jurisdiction now,—I don't know what it is,—he will file the decree of this court, holding that that deed of trust is valid, or holding that it is void and set it aside; and that decree will bind the subsequent proceedings in the state court in the administration of the fund.

For these reasons the plea is held to be bad, and is overruled.

COUNTY OF YUBA *v.* PIONEER GOLD MIN. CO. and others.

(*Circuit Court, N. D. California.* August 29, 1887.)

1. REMOVAL OF CAUSES—ACT OF MARCH 3, 1887.
Under section 1 of the removal act, as amended by an act of March 3, 1887, the circuit court cannot take cognizance of a suit brought against a party in a district of which he is not an inhabitant; and section 2 does not authorize the removal of a suit brought in a state court against a party not an inhabitant of the district.

2. SAME.
Section 2 of said act, as amended, does not authorize the removal of a suit from a state court to the United States circuit court, which could not have been originally brought in said circuit court.

(*Syllabus by the Court.*)

A. L. Rhodes, for plaintiff.

Wm. M. Stewart, for defendant.

Before FIELD, Justice; SAWYER, Circuit Judge; and SABIN, District Judge.

SAWYER, J., (FIELD, Justice, and SABIN, J., *concurring.*) The county of Yuba—a county of the state of California—brought a suit in equity, in the superior court of Yuba county, against the Pioneer Gold Mining Company, and the Cleveland & Sierra Gold Mining Company,—two corporations,—both organized in the state of Nevada, and existing under the laws of that state. The defendant, the Pioneer Gold Mining Company, removed the case from the state court to the United States circuit court, under the act of March 3, 1887, on the ground that the complainant is a citizen of the state of California, and the defendants are citizens of the state of Nevada. The question now presented, is, whether the act of March 3, 1887, authorizes a removal of this case? and we are all of the opinion that it does not. So far as applicable to this question, the act of 1887, § 1, provides 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 law, or in equity, * * * in which there shall be a controversy between citizens of different states, * * * and no civil suit shall be brought before either of said courts, against *any* person, by any original process of [doubtless, intended to be 'or'] proceeding, *in any other district than that whereof he is an inhabitant.*"

The habitation of a corporation, is, necessarily, in the state under whose laws it exists. It can have no other, and it is only recognized in other states and countries, upon principles of comity. Clearly, under the express and pointed prohibitory clause quoted, under this section alone, the suit could not have been originally brought in this court; and it could not have original jurisdiction, or, in the language of the act, "original cognizance," because a suit anywhere in the state of California, would not be in the district whereof either of the defendants is an inhabitant.

It is insisted on the part of the party removing, that the prohibitory clause is limited by the words, "original process of proceeding;" that

the prohibition does not extend to cases brought before the court by any other than "original process of proceeding," and does not prohibit a removal of a suit from a state court. But section 1, to which we must look for jurisdiction, does not provide for, or authorize, the obtaining of jurisdiction by removal, or otherwise. It defines and limits the jurisdiction of the courts, and goes no further. Section 2 is the section, that authorizes removals, and declares what cases may be removed. The clause of section 2 which covers this case, if any, authorizes the removal of "any other suit of a civil nature, at law or in equity, *of which the circuit courts of the United States are given jurisdiction by the preceding section*," —that is to say, by section 1. But section 1 does not give jurisdiction of a suit brought against defendants, who are not inhabitants of the district wherein the suit is brought. Such a suit cannot be brought in the circuit court, nor can the court obtain jurisdiction under section 1. Strike section 2 from the act, and no jurisdiction at all could be obtained. If the court can have jurisdiction by removal, therefore, it must get it by virtue of the provisions of section 2, and not of the provisions of section 1; and section 2 only authorizes a removal of a case over which jurisdiction is given by section 1, thus referring to section 1 for the classes of cases that are authorized to be removed. Section 2, therefore, does not reach this case. It is clear to our minds, that congress only intended to authorize the removal of such cases, as could be brought originally, in the United States courts, and in the court to which the removal is to be made.

A consideration of the statute, as it stood before the amendment, and the practice under it apparently sought to be changed, sustains this view. The limiting prohibition in section 1 of the old statute, was in these words: "And no civil suit shall be brought before either of said courts, against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, *or in which he shall be found at the time of serving such process, or commencing such proceeding.*" Thus, a party under the old act, could be sued out of the district of his residence, provided he could be found, and served in another district, where the suit was brought. But this last clause was cut off by the amendment, and now he cannot be sued, at all in the national courts, out of the district whereof he is an inhabitant. So, under section 2, of the act before the amendment, in the case of "any suit at law, or in equity," with the other necessary requisites "between citizens of different states," "either party may remove said suit into the circuit court," etc., without any limitation by reference to the first section giving jurisdiction. Under this act, it was the practice, to bring a suit in the state court, get such service as they could, by publication of summons, and the defendants would often, then, appear, and remove the case, or the plaintiff, after appearance of defendant, would remove it; and thus a large number of cases, which could not be originally brought in the circuit courts, was brought into those courts from the state courts in this roundabout way. The present act was, apparently intended to abolish this practice, and in many other respects to limit the jurisdiction of the

circuit courts. One mode of limiting the jurisdiction was to cut off, by amendment, the authority to entertain jurisdiction of all cases against parties residing out of the district, whether found in the district or not, by omitting the clause quoted from section 1; and another, was, by amending the general language of section 2, by introducing the limitation of the right of removal to suits over which the courts had jurisdiction by section 1; that is to say, to such suits as could be, originally, brought in the circuit court. If this be not the proper construction, then it is difficult to perceive, what office these amendments, making such express limitations, were intended to perform. They were, certainly, introduced for a purpose, and that purpose seems obvious to us. The clause in section 1, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought *only* in the district of the residence of either plaintiff, or defendant," is prohibitory in form. It does not *enlarge* the jurisdiction, or confer jurisdiction in a case otherwise expressly prohibited.

We are of opinion that the removal of this case is not authorized by the statute, and it was improperly removed. It follows that the case must be remanded to the state court, with costs, and it is so ordered.

Dow and others *v.* MEMPHIS & L. R. R. Co.

(*Circuit Court, S. D. New York.* January 19, 1885.)

RAILROAD COMPANIES—MORTGAGE—COMPENSATION OF TRUSTEES.

A mortgage for $2,600,000, given to trustees for the security of the holders of the mortgage bonds, provided that the trustees should be allowed a reasonable compensation for executing their trust. *Held* that, in the defense of an action to set aside the mortgage, the trustees were entitled to only 1 per cent., the compensation allowed by Rev. St. U. S. pt. 2, *c.* 6, tit. 3, art. 2, § 58, to trustees for receiving and paying out sums of more than $10,000.

In Equity.

Platt & Bowers, for plaintiffs.

Dillon & Swayne, for defendant.

WALLACE, J. The defendant filed a bill to set aside a mortgage for $2,600,000 to trustees, for the holders of the mortgage bonds. 22 Blatchf. 48, 19 Fed. Rep. 388. The mortgage, among other things, provided that the trustees should receive a reasonable compensation for executing their trust. The trustees filed the present cross-bill, and obtained a decree adjudging the complainant to pay to them the amount of compensation to which they are entitled, and the costs, charges, and expenditures which they have incurred in defending their trust, by reason of the suit brought to set aside the mortgage. It was referred to a master to take an account and report. He has reported that they should be allowed the sum of $17,000 for counsel fees, and an additional sum

for disbursements actually incurred in defending the suit. He has also reported that they should be allowed the further sum of $45,000, for their personal compensation in defending the suit. Exceptions have been filed to that report.

Upon the argument of the exceptions it was conceded that the amount which should be allowed them as incurred for counsel fees was fixed by the master at a reasonable sum. It is obvious that any sum paid to the trustees must really come out of the bondholders, because the property of the corporation is not sufficient to discharge the mortgage which is a lien upon it. The trustees are entitled to reasonable compensation for their services in defending the suit brought to set aside the mortgage, and protect the rights of the bondholders, but it is not easy to determine what is a fair compensation in this behalf. Although there were issues of fact in the case, the controversy turned essentially upon questions of law presented by record evidence. The attack upon the mortgage was so manifestly unjust and inequitable that it was apparent that it could never succeed, unless there were inflexible legal rules to justify it which could not be parried. Yet the mortgage was assailed by able counsel, upon technical grounds, which were not without plausibility. The trustees were bound to assume that these grounds might be held to be tenable. It became their duty, therefore, to employ competent counsel, and put them in possession of the facts, and assist them in procuring the necessary evidence. When they had done this, their duties to the bondholders were discharged. Their compensation should be adjusted largely as an equivalent for the responsibility which they were thus obliged to assume. If the result of the suit had been adverse, they would doubtless have been subjected to criticism, although there would have been no reason for it. The amount involved was very large, and the trustees should not be exposed to contingencies, in which their discretion and fidelity might come in question, without an adequate remuneration. The usual commissions allowed to trustees, by the laws of this state, for receiving and paying out sums of above $10,000 in amount, is 1 per cent., besides their necessary expenses. This is assumed to be a fair return for their time and services, and for the responsibilities which they incur. As the whole trust fund was at stake in the suit brought against them, it would seem to be fair to allow them this commission here. They are, accordingly, allowed the sum of $26,000.

In apportioning this sum between them, reference should be had to the services rendered by each. Mr. Matthews has not taken an active part in the defense of the suit, but Mr. Dow and Mr. Moran have devoted a great deal of time to it. Mr. Dow has been especially active in the preparation of evidence, and has been unremitting in his efforts from the beginning of the litigation, while Mr. Moran has been active and zealous in consultations with the bondholders and with counsel. Eleven thousand five hundred dollars should be awarded to Mr. Dow, $8,500 to Mr. Moran, and $6,000 to Mr. Matthews.

CENTRAL TRUST CO. OF NEW YORK and others *v.* WABASH, ST. L. & P. RY. CO. and others. (Nos. 2,357 and 2,464. Consolidated Cause.)

(*Circuit Court, E. D. Missouri, E. D.* September, 19, 1887.)

RECEIVERS—INSOLVENT RAILROAD—COMPENSATION.

Tutt and Humphreys, receivers of the Wabash, St. Louis & Pacific Railway Company, allowed $70,000 each for their services to date.

In Equity.

Martin, Laughlin & Kern and *Phillips & Stewart*, for the purchasing committee.

H. S. Priest and *Hough, Overall & Judson*, for the receivers.

BREWER, J. The question now presented for determination is the compensation to be allowed to the receivers. The master, upon consideration of the testimony, allowed each $112,500. Exceptions were taken by the purchasing committee, and these exceptions bring the matter before us for consideration. Heretofore all the principal allowances in this case have been settled by the agreement of the parties, and after such agreement all the court's action has been a *pro forma* approval. But this allowance is contested, and a large volume of testimony taken.

As preliminary I remark that there has been no little implied criticism in the language of appellate courts of the magnitude of the allowances made in foreclosure cases to counsel, receivers, and others. We are admonished by utterances of the supreme court to be cautious in this respect. In the case of *Hinckley* v. *Railroad Co.*, 100 U. S. 153, the amount allowed to the receiver was $10,000, for nearly two years' services. He claimed $1,000 per month. Upon this the supreme court, through Mr. Justice MILLER, made this observation:

"The principal witnesses of appellant to sustain this exception are two gentlemen who were themselves receivers of other roads, and thought they rightfully received $900 in one case, and $1,000 in the other, per month. Perhaps they were the best judges of the value of their own services; but such is not always the case, and as there is conflicting testimony, and as this is the first time we have been called on to review the allowance made to railroad receivers by the circuit courts, we do not see that the economical administration of insolvent companies will be promoted, or that justice requires a higher standard of compensation than these courts generally give, to whose discretion the subject must be largely remitted."

In the case of *Trustees* v. *Greenough*, 105 U. S. 527, certain allowances were set aside by the supreme court, and in respect to this matter of allowances generally this language is to be found:

"In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subjected to the control of the court, and placed in the hands of receivers or trustees, it has been the common practice, as well in the courts of the United States as in those of the states, to make fair and just allowances for expenses and counsel fees to the trustees, or other

parties, promoting the litigation, and securing the due application of the property to the trusts and charges to which it was subject. Sometimes, no doubt, these allowances have been excessive, and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers, and counsel as have sometimes been made, and which have justly excited severe criticism. Still, a just respect for the eminent judges under whose direction many of these cases have been administered, would lead to the conclusion that allowances of this kind, if made with moderation and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice."

This court has, in the progress of this very case, as well as at other times, expressed its intention to proceed cautiously, and, while giving adequate compensation, to not overstep the bounds of such compensation. I remark again that the question of allowances is a judicial one, and while, as it is said, the matter is left to the discretion of the court, it is discretionary only in the sense that there are no fixed rules to determine the proper allowance, and is not discretionary in the sense that the courts are at liberty to give anything more than a fair and reasonable compensation. We desire to see the officers and agents of the court well paid, in order that men of character and ability may be willing to accept the burdens and responsibilities of these trusts; but at the same time we may not forget that the property to be charged with these allowances is not ours, that there are many thousands scattered all over the land who are the owners, whose property by the strong hand of the law has been taken out of their custody, and who look to us to see that no unjust or excessive burden is cast upon them. We may not exercise the generosity of owners, but are closely limited to the justice of judges. Our duties are as sacred, our responsibilities more solemn than those of any other parties connected with this foreclosure, for our action is almost certainly final.

With these preliminary observations I pass to a consideration of the facts. We have already allowed these receivers $50,000 each, and the purchasing committee, representing the present owners of the property, insist that this is full compensation. The master, estimating the duration of the trust at three and one-half years, has allowed, as I have stated, $112,500 to each. It is well said by Mr. Justice BRADLEY, in the case of *Cowdrey* v. *Railroad Co.*, 1 Woods, 331:

"It would hardly be a proper rule for governing this case to inquire what another even competent person would have been willing to do the work for. The receiver's office is not put up at auction. His compensation is not fixed on that principle at all. The chancellor selects a person whom he regards competent and trustworthy, and the amount of compensation is graduated somewhat by the duties, and somewhat by the responsibilities, of the situation. It seems to me that the peculiar duties, responsibilities, and accountability of a receiver entitle him to a larger amount than would be demanded by the head officer of an ordinary railroad of this size."

The administration of this Wabash property has been under my supervision. It is true that my then associate, Judge TREAT, was more familiar with all the details, and therefore exercised a more immediate and constant supervision, and was doubtless more familiar with all the

varied steps taken in it, and we lose the benefit of his knowledge in coming to our conclusions; but I am familiar enough with its administration to appreciate its magnitude, and the labor and responsibility of the receivers; and beyond the testimony which was given before us of the general outlines of the administration, I rest upon my own recollection and knowledge of what took place. In determining the amount of compensation, we are to regard the magnitude of the trust, the care and responsibility springing therefrom, the time occupied in performing its duties, the skill and ability displayed, and the success which has attended its administration. Messrs. Tutt and Humphreys were appointed receivers in the latter part of May, 1884. The last of the property was surrendered to the purchasing committee on the first of April, 1887. During the trust they have received and paid out about $60,000,000. The mileage at the time of their appointment was about 3,600 miles. The property did not consist of a single line covered by a single mortgage, but was a system made up of the consolidating and leasing of some 30 or 40 different roads, upon each of which was one or more mortgages. About $4,000,000 of floating and pressing debts were resting upon the company; its credit was gone; it was a wreck. The property itself in many parts of the system was in very poor condition. Within a short time after their appointment the disintegration of the property commenced. Line after line was surrendered to trustees, mortgagees, and lessors, so that by the first of January, 1887, they had less than 1,000 miles under their control. Of course, to take charge of a system so complicated, with so many varied and conflicting interests, so many underlying mortgages and separate branches, in such poor physical condition, with such a load of pressing debts, and with such a complete loss of credit, cast an immense burden of care and responsibility on these gentlemen, and required on their part the exercise of the highest skill and ability. It has been often said, and I think with truth, that no vaster and more complicated trust has, within the history of railroad enterprises in this country, been committed to any one. To say that full and complete success attended their labors, under such adverse circumstances, is in itself the highest encomium that can be placed. I had occasion to say, nearly a year ago, in respect to their action: "Their administration has been so successful that during the length of two years and a half, in which it has been carried on, not only has there been no challenge in the court of primary administration of the propriety of their appointment, but there has not been even a suspicion suggested here of any impropriety of conduct on their part, or any lack of fitness for the duties intrusted to them." And I can at this day repeat that language and say that there has been no complaint in this court of a dollar improperly withheld by these gentlemen, and that the only charge made against them, a charge which upon examination was proved to be without foundation, was that they had in the payment of interest preferred the bonds of one division to those of another. Another matter to be considered is this: At the inception of their administration they found many labor claims pressing, and laborers threatening to quit for lack of payment.

On their personal guaranty they obtained money to satisfy the most pressing of these claims, and from time to time, as emergencies arose, they continued in like manner to obtain whatever was necessary to satisfy present and pressing needs. The aggregate of the sums thus advanced on their personal guaranty during the years of this administration is about $22,000,000. The value of this action on the part of these receivers (action which has secured the continuous and smooth working of the system) can hardly be overestimated.

On the other hand, it must be noticed that neither one of these gentlemen devoted his entire time to the business of the receivership. Mr. Tutt was prior to his appointment the president of the Third National Bank of St. Louis, and continued to discharge its duties in connection with those of the receivership. Mr. Humphreys, who had been a member of the firm of E. D. Morgan & Co., and at the time of his appointment engaged in winding up its affairs, continued to devote part of his time to the same duties. It is also true that, early in this administration, authority was given by this court to the receivers to issue $2,000,000 of receivers' certificates, to meet the urgency of these floating debts, and that the daily receipts from the system were large, so that these gentlemen had something to fall back upon and protect them against loss in their personal guaranties. It is also true that they had a most accomplished general manager, Mr. Talmage, who had the personal charge of the operation of the road, and who was assisted by very competent and able gentlemen in the various departments under him. It would be a waste of time, I think, to go more into details of this administration; the main features are detailed in the testimony before us, as well as familiar to myself, at least, from personal observation. Beyond these facts we have the testimony of several gentlemen as to the value of the services. The receivers themselves, with the dignity which has characterized their conduct throughout this entire administration, have placed no estimate upon the value of their services; they have briefly and modestly told the story of their labor and cares.

The gentlemen who have given us the benefit of their opinions are these: Gerard B. Allen, one who for many years was one of St. Louis' best citizens, a merchant and manufacturer here, and who had no little experience in the administration of trusts, thought that $100,000 to each receiver was a fair compensation. S. W. Fordyce, the president of the St. Louis, Texas & Arkansas Railroad, at one time receiver of that road, placed his figures at $125,000. Robert E. Carr, at one time president of the Kansas Pacific Railroad, and a gentleman of considerable experience in railroad matters, named $100,000. S. M. Breckenridge, a lawyer of distinction in this city, and of experience in railroad foreclosures, thought the sum fixed by the master, $112,500, was reasonable. William Taussig, general manager of the St. Louis Bridge & Tunnel Company, said $30,000 per annum. On the other hand, George H. Nettleton, general manager of the Kansas City, Ft. Scott & Gulf road, and the Kansas City, Springfield & Memphis road, with its extensions, and a railroad man of large experience, having served as a receiver, thought

$15,000 a year fair compensation. Henry Morrill, general manager of the St. Louis & San Francisco, said from $10,000 to $12,000. G. W. Parker, general manager of the Cairo Short Line, said from $6,000 to $12,000. H. C. Moore, at one time superintendent of the Missouri Pacific, fixed it at from $8,000 to $10,000. Charles Hamilton, superintendent of the Mobile & Ohio, thought $10,000 to $12,000. F. C. Wyatt, at one time superintendent of the Humeston & Shenandoah, named $15,000; and John O'Day, the first vice-president of the St. Louis & San Francisco, fixed it at from $10,000 to $15,000.

Obviously, there is a vast difference between the figures of these various gentlemen. They are all witnesses whose opinions are entitled to the highest respect on account of their characters, their abilities, and their experience; and yet the very differences that exist between them show that there is no fixed standard or rule to guide us, and that we must fall back at last upon our own judgment of what under the circumstances would be fair and reasonable compensation for the services. Beyond the opinions of these witnesses, we have been furnished with evidence of the salaries and compensations paid to railroad officials and receivers in other places; some of them quite high, some of them very low. These furnish but little assistance, because we are not advised of the circumstances under which they were fixed; each case must stand by itself. Bearing in mind the successful administration and felicitious outcome of this trust, and also bearing in mind the admonition of the supreme court on the subject in controversy, and remembering that we can only allow "fair and just" compensation for services actually rendered, and not that which the generosity of an absolute owner might prompt, we have fixed upon a rate of compensation intermediate between the high and low estimates above mentioned. The property was in the custody of these gentlemen less than three years, but, of course, subsequent to the surrender of the property they have been and are still engaged in closing up the trust. There are contingencies which may expose them in the future to tedious and painful litigation. We cannot as yet say definitely to what annoyance they may be exposed, or what labor may yet be cast upon them. Therefore we shall not fix the amount, as did the master, to cover all the services of this trust, but simply make an allowance to cover everything to date. The fact that there were two receivers, doubtless enabled each to devote some time to his other business; and so, if we allow $140,000, or $70,000 each, for services to date, we think the owners of the property will have paid no more than they ought to have paid for the services of these gentlemen; and the receivers, if disappointed in not receiving what from the action of the master they may have expected, will remember that we are trying to be as careful with this property as they were during their administration; and that a sense of duty to the owners prevents us from sustaining in full the allowances made by the master.

The exceptions of the purchasing committee will be sustained, and the allowance to each of the receivers for services to date will be fixed at $70,000.

DUNDEE MORTGAGE TRUST INVEST. CO. *v.* CHARLTON, Sheriff, etc.

(*Circuit Court, D. Oregon.* October 10, 1887.)

1. TAXATION—ASSESSMENT—OVER-VALUATION.
   Any person who has property listed on the assessment roll of a county for taxation is "interested" in the proceedings of the county board of equalization, and may appear before it, and have redress against an unjust and unequal valuation of property on said roll, to his injury, whether the same is caused by an over-valuation of his own property, or an under-valuation of that of others.
2. SAME—INJUNCTION.
   A person who is aggrieved by the wrongful action of an assessor, in the valuation of his own or other's property for taxation, cannot maintain a suit in equity to enjoin the collection of any portion of the tax resulting from such action, unless he first seeks redress at the hands of the county board of equalization, as provided by statute.[1]

(*Syllabus by the Court.*)

John W. Whalley, for plaintiff.
W. R. Bilyeu, for defendants.

DEADY, J. This suit is brought to restrain the county of Linn, and the defendant Charlton, its sheriff, from collecting the one-half of the taxes levied by the county in 1884 on the mortgages owned by the plaintiff on real property therein, amounting to $1,172.85. From the bill it appears that the plaintiff is a foreign corporation, formed under the laws of Great Britain, and is the owner of promissory notes of the nominal value of $150,348.71, secured by mortgages on lands in Linn county; that the same were assessed by the assessor of said county, in the year 1884, for taxation as real property, under the act of October 26, 1882, at their nominal value, while all real property not under mortgage was only assessed at from one-third to one-half its value; that the tax levied on said assessment of the plaintiff's notes and mortgages amounts to $2,345.90,— one-half of which is in excess of the taxes levied on property generally of the same value, and is therefore alleged to be illegal. It also appears that the plaintiff has paid the one-half of said taxes, and that the county, through its proper officers, will, unless restrained by the decree of this court, proceed to make the balance of said tax by the sale of said notes and mortgages. The answers of the defendants admit the allegations of the bill, except as to the valuation of the real property not under mortgage, and aver that the same was valued for taxation at its true cash value, as required by law.

The evidence in the case is quite voluminous and contradictory. But considering the relation of the witnesses to the subject-matter, and the interest which most of them have in the question involved in the controversy, their several means of knowledge, the character of their testi-

[1] Where a remedy is provided by statute for the excessive assessment of property, the tax-payer must avail himself of it, at his peril. New York & C. G. & S. Exchange v. Gleason, (Ill.) 13 N. E. Rep. 204, and note.

mony, and the difference in the value of lands as appears from the assessment roll, and that for which they were sold by the owners, as appears by the county record of conveyances, it is evident that the average valuation of lands in the county, not under mortgage, did not exceed 60 per centum of their "true cash value," and probably not over 50 per centum thereof; such "value," as defined by statute, (2 Laws Or. 1887, p. 1285,) being "the amount such property would sell for at a voluntary sale, made in the ordinary course of business, and not what it would bring at public auction or forced sale." And this discrimination appears to have been the result of a deliberate purpose on the part of the county assessor, and made in accordance with the established practice of his office, and the prevailing power of public opinion.

On these facts, the plaintiff appears to be entitled to an injunction to restrain the collection of so much of this tax as results from this unlawful discrimination between its mortgages and other real property, in the valuation of the same for taxation. *Dundee M. T. I. Co.* v. *Parrish*, 11 Sawy. 92, 24 Fed. Rep. 197; *Cummings* v. *Bank*, 101 U. S. 153. Nor is it material that, at the filing of the bill, the plaintiff had only paid 50 per centum of this tax, instead of 60. All was paid that was then conceded or appeared to be due. That was sufficient to give the company a standing in court to litigate the question; and the fact that the court has, at the end of such litigation, found there was 60 per centum due, does not affect such standing, or the plaintiff's right to relief against the payment of the remaining 40 per centum. *State Railway Cases*, 92 U. S. 617; *Bank* v. *Kimball*, 103 U. S. 733.

But, on the hearing, the defendant made the objection that, conceding the error and injustice of the assessor, the remedy of the plaintiff in the first instance was an appeal to the county board of equalization to correct the same; and that, unless it appears that it has resorted to this means of redress without avail, it cannot have relief in a court of equity. By the statute of the state on the subject of assessing property for taxation, it is made the duty of the assessor to list all lands in the county subject to taxation, and assess them at their true cash value, or what they would bring at a voluntary sale under ordinary circumstances, and a mortgage on land which is a security for a debt is required to be assessed as real property, in the county in which the land lies, for the nominal value of the debt, unless the land is not worth so much. When the assessment is completed, the roll is returned to the county clerk, and public notice is given by the assessor that, on a day named, the board of equalization, consisting of himself, county judge, and clerk, will attend at the office of the latter and publicly examine the assessment roll, and, among the other things, correct all errors of valuation therein. If property has been valued by the assessor "under or beyond its actual value," this board is authorized to make the proper correction; but it cannot increase the valuation of any person's property without first giving him notice to show cause. It is also declared to be "the duty of any person interested to appear" before said board at said time and place. 2 Laws Or. 1887, *c.* 17.

Counsel for the plaintiff insist that it was not bound to appear before the board of equalization and seek a revision and correction of the assessment in this particular, for the reason, if none other, that it could not be heard, and had no standing there to complain of the under-valuation of other people's property. Neither could it complain of the over-valuation of its own, considered by itself. The injustice done by the assessor was caused by the fact, not that the plaintiff's property was assessed too high, but that of others was systematically assessed too low. The constitution of the state (article 9, § 1) requires that "the legislative assembly shall provide by law for uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property." Now, this board of equalization is the only provision that the legislature has made for the correction of errors, or the equalization of values, in the work of the assessor. The presumption is that the legislature has thereby undertaken to comply with the injunction of the constitution, to secure uniform and equal assessment and valuation of property for taxation; and the statute should be so construed, if it reasonably can. But if the assessor can assess one class of property at its cash value, and another at anything less, and the owners of the first class cannot be heard to complain of the result because their property, abstractly speaking, is correctly valued, and the owners of the second will not complain because they are not injured, but the contrary, then the legislature has made no sufficient provision on the subject.

The statute gives any person "interested" a right "to appear" before the board of equalization. The right "to appear" before a tribunal engaged in the transaction of particular business implies the right to be heard thereabout; so far, at least, as the party is "interested." Now, every one who has property on the assessment roll is so far "interested" in seeing that all other property subject to taxation in the county is put on such roll, and is valued thereon, relatively, as high as his own, or that his own is valued no higher than others. In the assessment of property for general taxation, a "just" or equal valuation thereof is of more importance than an absolutely "true" one; therefore it is no answer to the complaint of a property holder of an unequal assessment or valuation, that his property is assessed at its "true cash value." For, although that may be true in the abstract, he is entitled to have it valued at its true cash value relatively, or according to the standard of cash value adopted in the valuation of other property, either by lowering the valuation of the one, or raising that of the other. The owner of a mortgage on real property given to secure the payment of a debt, which is valued by the assessor at the face of the latter, has cause to complain of an unjust valuation, contrary to the constitution, when an adjoining tract of land, not under mortgage, is valued for taxation at less than the owner would dispose of it at a voluntary sale under ordinary circumstances, and he is "interested" in having the error corrected; and in my judgment he has a right to appear before and be heard by the board of equalization for that purpose.

But the plaintiff, having neglected to avail itself of this means of redress, cannot maintain a suit for relief in this court. It is no excuse for this neglect that the board of equalization, as well as the assessor, were committed to the rule of taxing mortgages, which were generally owned by non-residents, at their face or cash value, and the property in lands, which generally belonged to residents of the county, at much less than such value. Notwithstanding this, it was the duty of the plaintiff, if dissatisfied with the assessment, to pursue the mode prescribed by the statute, relating to assessments, for its correction; when, if it failed, it might have taken the matter before the circuit court of the state on a writ of review, (*Rhea* v. *Umatilla Co.*, 2 Or. 298,) or brought this suit to restrain the county from collecting the illegal portion of the tax.

There must be a decree dismissing the bill, and for the defendants for costs.

UNITED STATES *v.* FREYBERG and others.

(*Circuit Court, E. D. Wisconsin.* December, 1886.)

1. PUBLIC LANDS—CUTTING TIMBER—ENTRY OF HOMESTEAD—PROCURING PATENT.
   One K. sold to defendants timber cut from the land that he had entered as a homestead, but for which he had not yet paid or procured the patent. After the commencement of an action by the government for the recovery of the timber, K. commuted his entry as provided by Rev. St. U. S. §§ 2301, 2259, and paid for the land, receiving the receipt therefor from the land-office. *Held*, that this proceeding made a completed purchase of the land, and so changed the *status* of the original entry as to deprive the United States of the right to recover for timber previously cut from the land.
2. SAME—RIGHT TO HOMESTEAD—GOVERNMENT AS TRUSTEE.
   Where the right to a patent for land has become vested in a purchaser, the government holds the legal title in trust for the purchaser until the patent is issued.

A. K. Delaney, for the United States.
G. W. Hazelton and *Jenkins, Winkler, Fish & Smith*, for defendants.

DYER, J. This is a suit by the United States to recover the value of a quantity of timber cut by the defendants from lands which, on the twenty-first of November, 1883, were entered by one Klingenberg as a homestead. The cutting was done with the consent of the homesteader, who, at the time, was living on the land with his family. On the trial of the case, the jury found the following facts in the form of a special verdict:

"*First.* That the lands mentioned and described in the complaint were duly entered as a homestead by the witness, Christian Klingenberg, on the twenty-first day of November, 1883; that the said entry was made in good faith, and that he has since continuously occupied the same, and lived thereon with his family, as a homestead, and improved a part thereof for agricultural purposes.

"*Second.* That the defendants herein, with the consent of, and by agree-

ment with, the said Christian Klingenberg, and for a pecuniary consideration paid to him, cut and removed from said land 210,668 feet of pine timber, board measure, during the years 1884 and 1885, of the value of $1,363.25; that the stumpage value of said timber was one dollar per thousand feet, and the manufactured value of said timber, at the place of manufacture, was $7.50 for common lumber, and $3.50 for culls, per thousand feet; that one-quarter of said lumber was culls, and that said timber was not so cut and removed for the purpose of improving and cultivating the land, but for the purpose of sale, and to enable Klingenberg to realize means to pay for supplies for himself and family in connection with the occupancy of the land.

"*Third.* That on the fifteenth day of January, 1886, and after the commencement of this action, the homesteader, Klingenberg, made the necessary proofs of entry and occupancy under the law, and paid the money required by the commutation act, to-wit, one and 25-100 dollars per acre, and the legal fees, to the receiver of the land-office at Menasha, Wisconsin, who forwarded said proofs to the proper department at Washington, but no patent has been issued to said homesteader."

Upon the facts so found, the question is, should judgment be entered against the defendants for the value of the timber in question? In *U. S.* v. *Lane*, 19 Fed. Rep. 910, this court held that one who has entered upon public land according to law, for the purpose of claiming a homestead, and is residing thereon in good faith, and improving it for agricultural purposes, is entitled to cut so much timber from the land as is necessary for his actual improvements, and no more. The rule that a homestead entry, although it gives the party entering the land certain rights of occupation, does not so convey title, or divest the United States of property in it, as to authorize him to cut the timber, except where the cultivation of the land is the primary object of the cutting, was also enunciated and enforced in *U. S.* v. *Stores*, 14 Fed. Rep. 824, and in the *Timber Cases*, 11 Fed. Rep. 81. See, also, *U. S.* v. *Smith*, 11 Fed. Rep. 487. Counsel seemed disposed, on the argument, to combat these rulings, but it must be regarded as the settled law that a homestead claimant, in occupancy of lands which he has entered, but which he has not paid for, has no right to cut the timber growing thereon, except for the purpose of improving the land, so that it may be profitably used for agricultural purposes, or may be better adapted to convenient occupation. If the timber is severed for the purposes of sale alone, then the cutting is wrongful, and the timber, when cut, becomes the absolute property of the United States. In such case the cutting becomes waste, and in accordance with well-settled principles the owner of the fee may seize the timber cut, arrest it by replevin, or proceed in trover for its conversion. *U. S.* v. *Cook*, 19 Wall. 591.

If, therefore, there were no other facts in this case than such as are stated in the first and second paragraphs of the special verdict, judgment would have to go in favor of the United States. But it appears that after the commencement of this suit the homesteader commuted his entry, as he was permitted by law to do, (sections 2301, 2259, Rev. St. U. S.,) by paying in full, to the officers in charge of the land-office and authorized to receive the same, the minimum price at which the public lands are sold, namely, $1.25 per acre, for the land which he had orig-

inally entered and was occupying with his family as a homestead, together with the legal fees incident to the proceeding. The proofs offered on the trial showed a full compliance with the law in this respect, that the purchase money was accepted and retained by the receiver at the land-office, that he gave to the purchaser a receipt therefor, and that the proofs were forwarded to the department at Washington, and have not been returned, but that no patent has been issued to Klingenberg. I am of the opinion that this proceeding, which made a completed purchase of, and payment for, the land, so changed the character or *status* of the original entry as to deprive the United States of the right of recovery for the timber previously cut from the land. Upon the consummation of such purchase, Klingenberg became the owner of the equitable title to the land, and acquired a right to the legal title as soon as the patent can issue in the due course of proceeding. *Smith* v. *Ewing*, 23 Fed. Rep. 744. The land ceased to be the subject of sale by the government. It was no longer its property; it holds the legal title only in trust for the purchaser. *Deffeback* v. *Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95; *Carroll* v. *Safford*, 3 How. 441; *Cornelius* v. *Kessel*, 58 Wis. 237, 16 N. W. Rep. 550. In *Simmons* v. *Wagner*, 101 U. S. 260, it was held that one in possession of public lands under a certificate of the register that he had paid for the same, without a patent, can successfully defend against an action of ejectment to recover the possession by the holder of a patent issued upon a subsequent purchase of the land as part of the public domain. In the opinion of the court it is said that "it is well settled that when lands have once been sold by the United States, and the purchase money paid, the lands sold are segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void so long as the first sale continued in force. Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent, after the right to it has become complete, are the mere ministerial acts of the officers charged with that duty." In *Cornelius* v. *Kessel*, *supra*, it was decided that the rights of the purchaser are the same whether he has received the register's final certificate or only the receiver's receipt.

Upon this state of the law, when applied to the facts as found by the jury, it would seem that the United States ought not to recover. The consummation of the purchase, and the payment of the purchase money in full, must be held to relate back to the original entry, and consequently to protect the occupant and purchaser from liability for acts done on the land while he was holding under his homestead entry. And the protection thus resulting to him, of course inures to the benefit of his vendees. No other conclusion seems consonant with justice. As suggested on the argument, the case is quite analogous in principle to that of a purchase of land by one person from another under contract. In violation of the contract, the purchaser, being in possession, commits waste. But when the purchase money is due he pays it in full, and be-

comes entitled to a deed. Could the vendor in such case, after receiving and retaining the purchase money, recover for the waste committed while the contract was yet unperformed? Or could he, after parting with his entire interest in the land by accepting payment, yet maintain a suit previously begun, and recover damages therein for such waste? If not, it is difficult to see how the government is entitled to recover in the case at bar.

The only ground urged by the attorney for the United States in opposition to these views was the fact that the patent has not yet been issued, and, therefore, that the legal title has not become vested in the purchaser. But this contention, as we have seen, is not tenable, in view of the legal proposition laid down in cases that have been cited, that the government now holds the legal title merely in trust for the purchaser, whose right to a patent has become vested, and is equivalent, so far as the government is concerned, to a patent actually issued.

Let judgment be entered on the verdict in favor of the defendants.

UNITED STATES *v.* PENDERGAST.

(*Circuit Court, E. D. Missouri, E. D.* April 11, 1887.)

1. EXPERT TESTIMONY—OPINIONS—WEIGHT.
   Expert testimony should be received and acted upon with much caution. It is not entitled to the same weight as the testimony of persons who speak concerning matters within their personal observation. Statements of expert witnesses should be regarded as *opinions merely*, and such weight only given them as they deserve, considering the experience which the experts have had in the matters about which they testify.
2. ACCUSED AS WITNESS—FAILURE TO TESTIFY—PRESUMPTION OF GUILT.
   There is no presumption of guilt against a defendant merely because he has not taken the stand as a witness in his own favor.

Indictment under section 5512, Rev. St. U. S.

This was an indictment under that clause of section 5512, Rev. St. U. S., which provides that "if at a registration of voters for an election of representative or delegate in congress * * * any officer of registration, * * * who has any duty to perform in relation to such registration, * * * *does any act unauthorized by law relating* to or affecting such registration or election, or the result thereof, * * * shall be punishable," etc. Defendant was registration officer, duly appointed and qualified, for the Third ward of the city of St. Louis, Missouri, at the registration for the congressional election held in the Ninth congressional district of Missouri on November 2, 1886. The laws of Missouri applicable to registrations for elections held in the city of St. Louis, Missouri, required applicants for registration to appear before the registration officer of the wards wherein they resided, and give their true names and places of residence, which were to be entered in a book called a

"Book of Registration," and furthermore to take an oath before the officer to the effect, among other things, that they had registered in no other election precinct, that they had given their true names, and lived at the places designated in the registration book, and had truly answered all questions propounded by the registration officer touching their registration. Sess. Laws Mo. 1883, pp. 38–41, §§ 2, 3, 6, 11.

The "act unauthorized by law," charged in the indictment to have been committed by the defendant, consisted in writing the names of 33 persons in the registration book while it was in his custody as an officer of registration, who had not applied to him to be registered, and who had not taken the oath required to be taken by the laws of Missouri by persons seeking registration. In behalf of the prosecution there was testimony tending to show that several of the 33 names, alleged to have been written in the registration book by the defendant, were names of fictitious persons; that no such individuals resided at the places from which they purported to be registered. Four of the 33 persons whose names were alleged to have been written in the registration book by the defendant were produced by the prosecution, and testified that they did not apply to the defendant for registration. Two experts in handwriting were called by the prosecution, who, on comparison of the 33 names in the registration book with defendant's signature to his oath of office as a registration officer, expressed the opinion that 22 of the 33 names were written by the defendant.

Other facts sufficiently appear in the court's charge to the jury.

THAYER, J., (*charging jury.*) The statutes of the United States in effect declare it to be an offense punishable by fine and imprisonment if an officer of registration, at a registration had for an election for a representative in congress, knowingly does any act relating to or affecting such registration, which act is unauthorized by the laws of the state where such registration is had, or by the laws of the United States. The registration laws of the state of Missouri applicable to the city of St. Louis, (Sess. Laws Mo. 1883, pp. 38, 39,) in substance provide that a person applying for registration to the recorder of voters, or to any deputy recorder, appointed for any given ward of the city, must appear before the registration officer, and take an oath to the effect that he has not registered elsewhere, that he has given his true name, and that he lives at the place he has designated on the registration list; and unless there is such appearance, and such information is given as to name and residence, and unless such oath is taken, the registration officer is not authorized to enter the voter's name on the registration book, or suffer it to be so entered by the voter himself, or by any other person. Such being the law of the state, it follows, gentlemen, that if the defendant did the act charged in this indictment,—that is to say, if he wrote the names of persons in the registration book who did not apply to be registered,—he did an act which was not only unauthorized by the law of this state, but was an open violation of such law, and in so doing he committed an offense against the laws of the United States.

The general question which you have to determine is whether the defendant, while acting as recorder of voters of the Third ward of this city, in September last, did knowingly and willfully enter on the registration books in his custody the names of any of the persons mentioned in the indictment, when the persons themselves neither applied for registration nor took the oath required of voters. If the evidence on the part of the government has satisfied you beyond any reasonable doubt that the defendant did so enter any or all of said names mentioned in the indictment on the registration book, then he should be found guilty. In this connection it is proper to add, gentlemen, that it makes no difference whether the names so entered on the registration books, without the appearance or request of the persons so registered, and without their taking the oath, were the names of real persons then or theretofore residing in the Third ward, or whether they were the names of fictitious persons. In either event the offense was committed by writing the names of such persons on the list without their applying for registration or taking the oath required of voters, if the proof shows beyond a reasonable doubt that they were so written by the defendant. Furthermore, gentlemen, from the fact that the act charged is an unlawful act, if you find it to have been done knowingly and willfully, you may infer that it was done with an evil or criminal intent.

Now, gentlemen, with regard to the testimony that has been offered, I shall only call your attention to certain portions of it. The prosecution have produced Tillman Puetz, William Wells, William Schwacheim, and O. M. Billmeyer, whose names appear on the registration book, and the same names also appear among the names mentioned in the indictment. These witnesses have sworn that they did not write their names in the registration book shown to you, or apply to the defendant for registration, or take the oath required of voters. Testimony has also been offered by the prosecution of the general purport that no such persons as John Rogers, Thomas Collins, and Albert Reil, whose names appear in the registration book, and in the indictment, resided at, or were known to the occupants of, the houses bearing the street numbers from which Rogers, Collins, and Reil appear to have been registered. It is for you, gentlemen, to determine in the first place what credence you will give to such testimony; and, in the event you believe the same, it will be for you to consider what inferences may be properly drawn from such facts.

There is another class of testimony before you to which the court desires to allude briefly. It is what is generally known as expert testimony. Two witnesses have been produced, and in your presence they have compared 22 of the 33 names appearing on the registration book, being the same names mentioned in the indictment, with what purports to be the defendant's own signature to an oath of office contained in a book kept last fall in the office of the recorder of voters of this city. After such comparison these witnesses have expressed the opinion that the signature to the oath and the 22 names in the registration book were written by the same hand. Now, gentlemen, assuming that both of these witnesses are disinterested and unbiased, and otherwise credible,

the nature of that class of testimony is such that it should be received and acted upon by you with much caution. Testimony of that kind is not entitled to the same weight as the testimony of persons who speak concerning matters within their personal observation, because these witnesses simply express opinions which they entertain, founded on the comparison made, and you should regard their statements in this matter as *opinions merely*, and give them such weight only as you think they deserve, considering the experience which the experts have had in making such comparisons. You are also entitled to look at the signatures yourselves, (as you have already done,) and form your own opinion, and draw your own conclusions on the subject from such comparison of the signatures as you may have yourselves made.

On the part of the defendant two persons have been produced, (John F. P. Lynch and J. P. Willi,) both of whose names appear on the registration book, and also among the names mentioned in the indictment as having been written on the list by the defendant, and both have testified that they appeared before the defendant, took the oath, and themselves signed the registration lists. The names of these two persons, however, are not in the list of 22 names which the experts say are in defendant's handwriting. These are the only witnesses produced by the defendant. But I call your attention, gentlemen, in this connection, to the unvarying and very just rule of law, that every man is presumed to be innocent until he is proven to be guilty. Even if the defendant had not offered any evidence whatsoever, it would be your sworn duty to acquit him of the charge, unless the evidence for the prosecution satisfies you beyond a reasonable doubt of his guilt.

This is the main question which you will have to consider in your retirement,—whether the evidence on the part of the government, taken altogether, is of such conclusive character as to leave no room for a reasonable doubt of the defendant's guilt. If the evidence gives you such confident assurance of his guilt, return a verdict of guilty. On the other hand, if the testimony leaves you reasonably in doubt as to his guilt, (and you must determine the question fairly and without bias, on the testimony you have heard in this court-room and in this case,) then you should return a verdict of acquittal. From the fact that defendant has not asked to testify in his own favor you cannot indulge in any presumptions against him. The law will not permit you to indulge in any presumptions against him merely because he has not taken the stand as a witness in his own favor.

You can take the case.

HANSON *v.* JACCARD JEWELRY CO.

(*Circuit Court, E. D. Missouri, E. D.* September 19, 1887.)

1. COPYRIGHT—COMPILATION OF WAR RECORDS.
A compilation from voluminous public documents, so arranged as to show readily the date and order of battles fought during the civil war, together with a list of casualties, may be copyrighted.
2. SAME—ACTION FOR INFRINGEMENT—LEGAL TITLE SUFFICIENT TO MAINTAIN.
An action for the infringement of a copyright may be maintained by the holder of the legal title thereof, though the beneficial ownership be in another.
3. SAME—PRELIMINARY INJUNCTION—SITUATION OF PARTIES TO BE CONSIDERED.
Application was made by the plaintiff for an order *pendente lite*, restraining the defendant from circulating a guide-book containing matter infringing upon the copyright of plaintiff. *Held*, that the question of the damage that might be sustained by the defendant upon granting the order, as compared with that to the plaintiff by denying it, and the financial ability of the defendant to respond to any damages assessed against him, and the fact that there was no intent on the part of the defendant to appropriate the property of the plaintiff, and that it was done without the knowledge of the defendant by one employed to compile the work, are all considerations which it is proper for the court to weigh in determining the question of granting or denying the application.

In Equity.

George P. Strong, for complainant.

Horatio D. Wood, for respondent.

THAYER, J. In the case of *A. H. Hanson* v. *The E. Jaccard Jewelry Co.*, application has been made for an injunction *pendente lite*. From the moving papers on file it appears that A. H. Hanson, the general passenger agent of the Illinois Central Railroad Company, in April last took out a copyright on a pamphlet entitled: "1861–1865. Battles for the Union, and the Union Forces Engaged Therein, Together with a Record of Casualties." As the title implies, the publication contains a record of battles fought during the late war, arranged in chronological order, and of the Union forces engaged, together with a list of casualties. The materials for the publication were collected and arranged by Thomas F. Nelson, under employment of the Illinois Central Railroad Company, but it is probable that in arranging the material he acted to some extent under the general direction of Hanson, the general passenger agent of the road. The pamphlet on its cover contains a picture of the commander in chief of the Grand Army of the Republic; it is dedicated to that organization by the Illinois Central Railroad Company; it purports to be presented to the public with the "compliments of the Illinois Central Railroad Company;" and it contains a map of that company's railroad system, showing its connections, etc.

From these and other facts it is obvious that the pamphlet in question was compiled and published at the instance and expense of the railroad company, and that it was designed by that company for gratuitous circulation at and prior to the annual encampment of the Grand Army of

the Republic, as an advertisement of its railroad system. On the other hand, the moving papers show that defendant, for the purpose of advertising its own business during the encampment, and the business of several other merchants doing business in the city of St. Louis, has published, also for gratuitous circulation, a pamphlet entitled "Jaccard's G. A. R. Guide to the City of St. Louis." It is admitted that defendant has incorporated into its guide-book about 25 pages of the printed matter which is contained in the publication copyrighted by complainant, the same being the record of battles and casualties as compiled and arranged by Nelson. In all other respects the publications are unlike. An injunction is asked to restrain the further circulation of defendant's guide-book. Several objections have been interposed against the granting of an interlocutory injunction.

In the first place it is urged that the subject-matter of complainant's publication is not such as to warrant a valid copyright, the same not being an original composition, but merely a compilation of facts gathered from various public records. This objection is clearly untenable. A compilation made from voluminous public documents, and so arranged as to show readily the date and order of certain historic events, such as battles or sieges, and the forces engaged therein, and the casualties attending the same, may be copyrighted, because such publications are valuable sources of information and require labor, care, and some skill in their preparation. Drone, Copyr. 152–154, inclusive, and cases cited; *Lawrence* v. *Dana*, 2 Amer. Law T. R. (N. S.) 423.

It is further objected that no injunction should issue because on the proof as it stands a valid copyright in behalf of the complainant, Hanson, is not shown, he being neither the "*author nor proprietor*" of the publication within the meaning of section 4952 of the Revised Statutes of the United States. With respect to this objection it is sufficient to say that under the proof as it stands it is probably true that complainant merely holds the legal title to the copyright, while the beneficial ownership (the equitable title) is in the Illinois Central Railroad Company. It has been held, however, in the case of *Little* v. *Gould*, 2 Blatchf. 366, (after careful consideration,) that the acts of congress do not prohibit the taking out of a copyright in the name of a trustee for the benefit of some third party who is the "*author* or *proprietor*," and that a defendant, proceeded against by the holder of the legal title to a copyright, cannot take any advantage of the trust relation existing between such holder and some third party. See, also, Drone, Copyr. 260, 261, and cases cited. In view of the foregoing authorities, the court is of the opinion that the second objection urged against granting a restraining order is untenable.

Is is finally urged that no injunction should issue at this stage of the case, because the defendant is financially responsible, and because complainant's pamphlet was only intended for gratuitous circulation by the Illinois Central Railroad Company, and because no substantial damage can result to the legal or equitable owner of the copyright from the circulation of defendant's guide-book. It is furthermore urged that de-

endant's guide-book contains much advertising matter of value to itself and other merchants; that it has been printed by defendant at great expense; that the objectionable matter contained therein, that is to say, the record of "Battles and Casualties," was inserted therein by the person employed to compile the same, without the knowledge of defendant's officers as to the source from whence the record was derived, and without any intent on their part to appropriate the complainant's property, and that it would be productive of great damage to defendant and others to enjoin the circulation of its guide-book at this time. Considerations of the kind last mentioned are entitled to great weight on an application for a preliminary restraining order, as such applications address themselves to the sound discretion of the court in view of all the circumstances attending the particular case. On an application for an injunction pending suit, it is proper for the court to consider the harm that would be done to the complainant by refusing such an order, in comparison with the damage that might be sustained by the defendant in consequence of granting the same. The ability of the defendant to respond to any damages that may be assessed on final hearing is also an important element; and in these respects there is no difference in the rule governing cases arising under patent and copyright laws and other equitable proceedings. *Scribner* v. *Stoddard*, 19 Amer. Law Reg. 433; *Forbush* v. *Bradford*, 21 Month. Law Rep. 471; *Chase* v. *Sanborn*, 4 Cliff. 306; *Lodge* v. *Stoddart*, 9 Reporter, 137; Drone, Copyr. 524.

In the present case I am persuaded that the damage which complainant anticipates from the circulation of defendant's guide-book would be trifling in comparison with the damage defendant and others would sustain if the defendant was precluded at this time from putting in circulation a large amount of advertising matter which is embodied in the guide-book in question. Indeed, considering the use intended to be made by complainant of his publication, it is doubtful if he or the corporation he represents would be prejudiced to any extent by a refusal of an injunction at this stage of the proceedings. In any event, the defendant is pecuniarily responsible for whatever damage may be ascertained on final hearing.

Guided by these considerations, and influenced by the fact that there is no evidence that defendant's officers were aware of the infringement of the copyright prior to the actual printing of the guide-book, the court will refuse a preliminary restraining order.

MOXIE NERVE FOOD CO. *v.* BAUMBACH and others.

(*Circuit Court, E. D. Texas.* July 11, 1887.)

1. TRADE-MARKS—INFRINGEMENT—BEVERAGE CONTAINING ALCOHOL.
Where, in an action for the infringement of the trade-mark of a beverage, it is sought to be shown in defense that the beverage contains alcohol, and the evidence shows that some chemists found a teaspoonful of alcohol in a quart, and others much less, and that it was used to cut the flavoring oils and mostly evaporated, the defense is not sustained.

2. SAME—SUIT BY LICENSER AGAINST STRANGER.
The owner of a trade-mark is not estopped from bringing suit to enjoin an infringement of it by the fact that he has made a third party his licensee for the territory in which the defendant carries on the business as to which the infringement is charged.

3. SAME—INJUNCTION TO RESTRAIN INFRINGEMENT.
In suit to enjoin an infringement on a trade-mark, it appeared that complainant, in 1885, owned and used a trade-mark, consisting of the word "Moxie," with a label containing a picture and descriptive words, in the sale of a certain beverage; that it also used a champagne bottle wrapped in a peculiar light brown paper, with the words "Moxie Nerve Food" printed prominently thereon; that after complainant had carried on business for some time, and acquired a large sale, defendant began to manufacture a preparation similar in taste, color, and flavor to that of plaintiff, and similarly put up in a champagne bottle, with a label and wrapper sufficiently resembling complainant's label or trade-mark and wrapper to deceive the general public, and bearing the words, "Standard Nerve Food," with the words, "Genuine. Beach and Claridge," written across the label. *Held*, that defendants would be enjoined from putting on the market for sale any packages or bottles of the style of champagne bottles in use by complainant, when such similar bottles contained a fluid resembling that manufactured and sold by complainant as Moxie nerve food, in taste, flavor, or appearance, and from using the words "Nerve Food," either alone or with other words, upon the outside or upon the wrapper of any package containing such a fluid.

4. CORPORATIONS—ORGANIZATION—NON-RESIDENTS.
Under Rev. St. Me. *c.* 48, § 16 *et seq.*, providing that "three or more persons may associate themselves together by written articles of agreement, for the purpose of forming a corporation to carry on any lawful business, including corporations for manufacturing," etc., and that "from the filing of the certificate of incorporation, duly certified as required by that act, the signers of such articles shall be a corporation, as if incorporated by a special act," etc., it is no defense to an action brought by such a manufacturing corporation, when it is shown that its office is located and its elections are carried on in the state where it is incorporated, and its annual return made to the secretary of such state, to allege that the incorporators were and are all residents of another state, and that it has not manufactured at all in its parent state, but carries on all its manufactures in another state.

Motion to Dissolve Injunction.

C. Anson Jones, *F. S. Burke*, and *Hutcheson, Carrington & Sears*, for the motion.

Scott & Levi, opposed.

SABIN, J. In this case it would appear that Augustin Thompson, M. D., early in 1885, manufactured a beverage called by him "Moxie Nerve Food," and, deeming it of great value commercially, filed with the United States commissioner of patents an application for a trade-mark therefor on the sixteenth day of July, 1885, and which was afterwards registered.

in the patent-office, September 8, 1885, and from which it appears that such trade-mark had only been in use since April 1, 1885; the term "Moxie," being the trade-mark word, while the label included a picture and other descriptive words. Thompson sold this trade-mark to complainant in July, 1885, and complainant has used the same as its trade-mark and label ever since. It also used the champagne bottle wrapped in a peculiar light-brown paper, with the words "Moxie Nerve Food" printed prominently thereon, as stated in the bill of complaint. It was in the full and undisputed use of its label, champagne bottle for its package, for quite a time, and the light brown wrapper, with words "Double Extract" or "Single Extract," as the case might be, of "Moxie Nerve Food," in prominent print thereon. It became quite popular and extensively used as an article of commerce under the head or class of "Beverages," and was generally known as "Moxie" or "Moxie Nerve Food." Its demand by the public was difficult to supply continuously in the same class of bottle; and it so happens that Dr. Thompson, the general manager of plaintiff, while he had used the common champagne bottle in making up his own and the complainant's packages, thereafter, having intended to put the same up in a different kind of bottle, with the words "Moxie Nerve Food" blown therein, had actually used such bottles in the business of plaintiff; but, being cautioned as to its effect upon plaintiff's trade-mark package, he desisted from so doing, and has since continued using solely the champagne bottle. The trade-mark asserts "that the Moxie nerve food contains not a drop of medicine, poison, stimulant, or alcohol, but is a simple sugar-cane like plant, grown near the equator and farther south; was lately accidentally discovered by Lieut. Moxie; and has proved itself to be the only harmless and effective nerve food known that can recover brain and nerve exhaustion," etc.

Shortly after the Moxie Nerve-Food Company got under full headway, quite a number of persons or nerve-food companies sprang up, claiming to manufacture or sell nerve-food *beverages*, and all manufacturing a beverage of the same or very similar taste, flavor, and odor to that of complainant; and as early as the fall of 1886 the defendant Baumbach and the Star Bottling Works, a corporation mainly belonging to him, were found manufacturing a preparation thus similar to complainants, and similarly put up in a champagne bottle, with the label and wrapper closely enough resembling the label or trade-mark and wrapper of plaintiff to deceive the ordinary public, and calling the same "Standard Nerve Food," and having the words, "Genuine. Beach and Claridge," written across the label. Such is the imitation of the Moxie nerve-food label, package, and wrapper that it is and was well calculated to deceive the general public, and impose upon the unwary, and derive advantage from the prestige of the Moxie nerve food, and such undoubtedly was the design in framing its label, and adopting the bottle and words "Nerve Food" thereon, and theretofore used by complainants in the manufacture and sale of its beverage. The words "Nerve Food" had never before been used upon beverages. It had been used very limitedly, indeed, upon some medicines put up in small bottles, and not widely known;

but still as a medicine the words "Nerve Food" had been used. The fluid or beverage, or preparation therefor, offered by defendants, is not enjoined. It is not objected to by complainant that defendants may put up a preparation like its own, or otherwise. But complainant does object, however, and desires to have enjoined, the putting up a fluid preparation as a beverage resembling its own in flavor, taste, and color, in *packages, wrappers, and labels or trade-marks like its own, or in such similitude as to lead the public to believe that they were buying the "Moxie Nerve Food," when in truth and in fact they were buying a preparation known as "Standard Nerve Food,"* and the contention is whether defendants have such right.

The complainant applied for and obtained an injunction, February 17, 1887, which was thereafter continued by the court, wherein it was ordered, adjudged, and decreed that the defendants, and each of them,—that is to say, August Baumbach and the Star Bottling Works, a corporation under the laws of Texas,—their and each of their servants, agents, attorneys, and employes, and all others confederating with them, be, and the same are and each of them is hereby, restrained and enjoined from in any manner simulating the trade-mark or label of complainant specified as Exhibit A in its bill of complaint, or using the same, and particularly the one specified in said bill of complainant as Exhibit B, upon *any bottle or package of fluid manufactured resembling in taste, flavor, or appearance the article of Moxie nerve food manufactured and sold by complainant under said trade-mark or label marked Exhibit A, as aforesaid;* and likewise from putting upon the market for sale, or using for making into packages or otherwise bottles, one or more of the style of champagne bottles in use by complainant, *when such similar bottles contain a fluid resembling that manufactured and sold by complainant as Moxie nerve food in taste, flavor, or appearance;* and likewise from using the words "Nerve Food," either alone or with other words, *upon the outside or upon the wrapper of any package containing the manufacture of a fluid resembling in taste, flavor, or appearance the article manufactured by complainants as "Moxie Nerve Food."*

It will be observed that the injunction did not in point of fact restrain defendants from manufacturing or selling the fluid preparation manufactured by them or any other. It did not restrain them from manufacturing or selling the same identical preparation as that manufactured and sold by complainant, nor does it now, but it restrains them from using the methods of complainant in presenting his preparation to the public for sale, or simulating the same so far as his trade-mark or label, champagne bottle, or wrapper, with the words "Nerve Food" thereon, is concerned. But it is now claimed by the defendants that the injunction ought to be dissolved because the plaintiff is not a corporation in point of fact, and because there never was such a person as Lieut. Moxie, and that the preparation of plaintiff contains alcohol, and is not manufactured from a sugar-cane like plant which grows near the equator and further south, and that the representations in reference to the same in the label are false, and calculated to mislead the public, and hence plaintiff ought not to be able to maintain this suit, or to have an injunction herein.

Either of the above objections, if well founded, would entitle the defendants herein to have the injunction dissolved.

The laws of Maine (chapter 48, Rev. St. 1883, § 16) provide that "three or more persons may associate themselves together by written articles of agreement, for the purpose of forming a corporation to carry on any lawful business, including corporations for manufacturing," etc. Sections 17 and 18 provide for the first meeting and other matters for the bringing of a corporation into actual existence. All the corporators were residents of the state of Massachusetts, and so signed themselves; one being a resident of Boston, Massachusetts, and the remaining seven of Lowell, Massachusetts, there being in all eight incorporators. The location of the corporation was at Portland, Cumberland county, in the state of Maine. John L. Hunt is stated as president, George A. Byam as treasurer, and John L. Hunt, Augustin Thompson, and George A. Byam are specified as directors, to whom the necessary oath was administered by M. L. GIBSON, justice of the peace; and on July 13, A. D. 1885, the attorney general, at his office in the state of Maine, "certifies that he has examined the foregoing certificate, and the same is properly drawn and signed, and is conformable to the constitution and laws," and which certificate is signed "ORVILLE D. BAKER, Attorney General." The certificate of incorporation so certified by the attorney general was recorded in the registry of deeds of Cumberland county, Maine, July 14, 1885, and was filed in the office of the secretary of state of Maine, July 22, 1885, and recorded volume 9, p. 11. Section 19 of the law above referred to, of the state of Maine, provides that, "*from the time of filing such certificate* in the secretary of state's office, the signers of said articles, and their successors and assigns, *shall be a corporation*, the same as if incorporated by a special act, with all the rights and powers, and subject to all the duties, obligations, and liabilities, provided by this chapter, and chapter 46. The certificate of corporation was filed by residents of Massachusetts, and so stating themselves to be, as required by law. Was it a corporation when so filed? That is the question; and I but follow the laws of Maine in declaring that, "from the time of filing such certificate in the secretary of state's office, the signers thereof were a corporation, and could sue and be sued by such corporate name. The name of such corporation was "Moxie Nerve-Food Company." "The purposes of said corporation are the manufacture of Moxie nerve food, and the purchasing, holding, and dealing in such real estate and personal property as may be deemed necessary and convenient in prosecuting said business, and to have and to exercise all the rights, powers, and privileges appertaining to such corporations under the general laws of the state of Maine."

But still it is now contended by defendants that it cannot sue in this state or elsewhere, and that it is no corporation, because its incorporators are non-residents of Maine, and do not now nor never have carried on the business of manufacturing anywhere in the state of Maine. The evidence shows that all its corporate acts are done in the state of Maine, but that it does not manufacture there, nor never has, but does so principally at Lowell, Massachusetts; but that it has sold its goods in

Maine, manufactured elsewhere, to citizens of Maine, and filled orders to its customers in Maine. If it had an existence in Maine, it can sue. It clearly had and has an existence in Maine. Whether it manufactures elsewhere in whole or in part is a matter purely between itself and the state of Maine. Maine, in its sovereign power, created it a citizen for all purposes of suit, as well as the business purposes declared in its certificate, and it is for her to deal with this person so far as its existence is concerned. It is the only power that can draw its existence in question when that existence has once been actually created. When that certificate was filed in the office of the secretary of state, it was a being, and it could have commenced the manufacture of Moxie nerve food at Portland, Maine, on that day, and it can do so now. It is a thing of life. It can sue and be sued. It can buy and sell. It can manufacture, and it can dispose of its manufactures. It could have sent to South America the day after filing its certificate for a ship-load of material for its manufacture, either in Maine or Massachusetts, and its purchase would have been good, and it can do so now. It may be contended that when the laws of Maine permitted three or more persons to associate themselves together for the organization of a corporation that they meant citizens of Maine. It may likewise be contended that when the law required the certificate to state, among other things, "the names and residences of the owners, the name of the county where it is located," that it was supposed that it would do all or a greater part of its manufacturing at that place, which is a very reasonable supposition. But suppose that, being fully organized for that purpose, it does not, but manufactures exclusively elsewhere, whose business is it? Is it not exclusively a matter between itself and its parent? I think that it is. When it sues in a court, the only question that the court can try is not whether it has disappointed the reasonable expectation of its creator or parent, but whether, in point of fact, such person or corporation has a legal existence? If it has, the suit must go on.

It is plain that the complainant did acquire the trade-mark and goodwill of Dr. Augustin Thompson for the manufacture of Moxie nerve food, and that it still owns it, and that it may sue for any misappropriation or fraud upon it, or, as used by it on its manufactures, whether such manufactures are made by it in Maine, Massachusetts, or Texas. Of course a corporation cannot migrate and transact simply corporate business elsewhere. All its corporate acts must be transacted within the limits of the sovereignty which created it. By corporate acts, I mean the election of directors and other officers, the passing of resolutions, by-laws, etc.,—all these must be transacted in the state where the corporation is created in order to be valid. But such business as the manufacture of an article, the making of a contract through its agent elsewhere, the purchase and sale of commodities, may be done through its agent at any place which has no law contravening such action. Such acts are not corporate acts. I am asked to ignore the existence of this corporation, because thus far it has failed to manufacture Moxie nerve food in the state of Maine. I cannot do this. That is a matter that belongs to

the state of Maine. This corporation, according to the testimony, keeps its office with its clerk J. F. Chute at Portland, Maine, and holds its annual meetings there on the first day of January of each year; and its annual returns, showing its condition, are made to the secretary of state at Augusta, Maine,—all of which go to show that if the state of Maine has any right to draw in question the existence of this corporation, or to call for its forfeiture, yet that it is not such a matter as could be called in question either by a person having business relations with it, or one seeking to do it harm, or maraud on its right.

The claim of defendants that the Moxie nerve food contains alcohol I think is wholly unfounded, although it is true that one witness claims to have found a little more than a teaspoonful in one quart bottle, while others found very much less. It is admitted that alcohol is used to cut the flavoring oils, but it is proven that such alcohol passes off to a great extent, if not entirely, in the evaporation incident to its manufacture. It is also proved by a preponderance of testimony that the amount used in the flavoring is too little to be perceptible, while others claim—that is to say, some of the chemists state—that while chemically speaking it does contain alcohol, yet practically speaking it does not. I do not think that the charge of defendant that it contains alcohol is well founded. It is true that alcohol exists in many substances. I have heard it claimed that it existed in rain-water; and yet, even if it does, I suppose it would be practically true that rain-water contains no alcohol, there being no trace of it that is brought or capable of being brought to the senses by its use.

Again, it is also claimed by defendants that there never was such a person as Lieut. Moxie, and that it is not made from a sugar-cane like plant from the equator and further south; that these statements in the label are mere romances, to catch the popular eye; and that such representations are in fact false, and calculated to deceive and delude the public; and hence no claim can be set up by plaintiff for any invasion of its trade-mark upon the ground that no trade-mark will be allowed to cover a false allegation deceptive to the public. The fact that there was such a person as Lieut. Moxie, and likewise such a plant, is proved by Dr. Augustin Thompson; who also states that the plant, while in appearance has resemblance to sugar-cane, still that it has no saccharine matter in it, but that it has a bitter taste, and that the extract from the plant is of a watery character. The extracts of the chemists of the contents of the bottles show a palpable quantity of an extract of vegetable matter after all else has been spirited away by the action of the heat.

It is also claimed that the complainant cannot maintain this action by reason of having made J. J. Schott & Co. its licensee of the state of Texas and other sections, and of its contract with Schott & Co., but I do not think so. The fee to the trade-mark still remains in the complainant, and any injury to it will justify an injunction. The fact that Schott & Co. circulated an advertisement disclaiming the use of the champagne bottles for its packages of nerve food, the main body of which advertisement originated with complainant, is also claimed by defendants

as an additional reason why complainants cannot enjoin the champagne bottle. Schott & Co., while not disclaiming any responsibility that might attach to them from the acts of their employes, explain that such advertisement was a use of the same in ignorance of its contents, and by an employe who acted upon his own motion without their knowledge, and that they stopped the same upon first being made aware of it. However this may be, this use of the advertisement was not used or urged before me on the application for the injunction herein, neither was the fact adduced upon that occasion that the complainants herein had on one occasion used a bottle other than a champagne bottle, and with the name of "Moxie Nerve Food Company" blown in the bottle; neither does it now appear that the defendants August Baumbach, or the Star Bottling Works, knew any of those matters anterior to the granting of this injunction. It is true that it was shown upon that occasion that either plaintiff or Schott, or both, had on several occasions used beer bottles, and perhaps some other bottles other than champagne bottles; but they also showed that upon all such occasions there was printed prominently in red ink, on the wrappers of such other than Moxie bottles, an explanation as to why such bottle was used. Nothing was ever said or claimed as to the disclaimer in the advertisement of champagne bottles, now raised for the first time.

Dr. Thompson was and is the general manager of the complainant company, and it is plain to my mind that he at one time, and perhaps for several months, contemplated the use and adoption for the company's package a bottle other and different from a champagne bottle, and that the company used at one time such other and different bottle. But he claims and swears that he always adhered to the champagne bottle, and I have no doubt that he did. He claims that upon being advised that the use of this other bottle might impair his right or that of plaintiff to the champagne bottle, that he utterly disclaimed such other bottle, and adhered to the champagne bottle as a component part of plaintiff's package known to the world as "Moxie Nerve Food." The fact seems to be that whatever change, if any, or contemplated change, was made or attempted to be made in the style of bottle of plaintiff, the package used by plaintiff was known as the champagne bottle. It appears that the introduction of this beverage was with such bottle, and that it met with great popular favor, and that its sale was immense. And, whatever may have been said about nerve food, this company it seems was the first to bring it into use and prominence as a beverage; and the question naturally arises, how was it that all the other companies or persons which suddenly thereafter sprang up, with preparations resembling plaintiff's in flavor, taste, and appearance, should make *use of the champagne bottle* in putting their preparations upon the market? These various companies carried on their business of manufacturing at but small distances from each other. If others did not desire to advantage themselves by using the style of plaintiff's package, why did they use the champagne bottle? Is it not a little remarkable that all the manufacturers of other preparations used the champagne bottle after plaintiff had first used it in con-

nection with its own? The superinducing motives to the subsequent use by others of the term "Nerve Food" and the champagne bottle in putting up their various preparations, it is but fair to infer, were to simulate, as far as to each might seem wise, the package, methods of business, and trade-mark of the plaintiff herein.

Some of the labels exhibited in evidence to me were much closer imitations of plaintiff's label than the one complained of in this cause. Was such use of another bottle by plaintiff an abandonment of the champagne bottle as long as plaintiff still adhered to it? I was at first inclined to think that it was, but I am of opinion that it was not. The fact is, ideas are so quickly formed into methods, and methods into rights of property, that it does not require a long series of years to acquire a right from the use of a particular method, and when that method or right is once established it requires an abandonment before it is lost. In this case plaintiff first adopted and used the champagne bottle. It contemplated a change. It did use another bottle, but it never abandoned the champagne bottle, and, upon suggestion that its rights to the champagne bottle might be impaired, it abandoned the other bottle, and used and claimed the use of the champagne bottle. Had it created confusion in the mind of the public, or deceived the defendants herein as to the character of bottle used by it, it would have to be treated as an abandonment. The trade-mark was registered September 8, 1885, while the plaintiff company, for the manufacture of Moxie nerve food, was only organized but a few months anterior thereto, to-wit, July 22, 1885. It seems that the company was organized before the trade-mark was registered by Thompson, and this suit was filed February 5, 1887; so that it would seem that all these rights asserted and injuries complained of have accrued or arisen within a period of less than 19 months anterior to the filing of this suit. The contemporaneous use of the blown bottle must have been brief and limited, and, on mature reflection, I do not feel at liberty to regard the champagne bottle as having been abandoned by plaintiff, nor am I able to find either that confusion has been created in the public mind by the contemporaneous use of the blown bottle, or that these defendants were deceived thereby.

The trade-mark of complainants is simply the word "Moxie,"—that was the trade-mark registered,—to be used with the words "Nerve Food," and other words and descriptive matter. But "Moxie" was the trade-mark word. Had plaintiff, anterior to the alleged aggressions of defendants, acquired by use a right in the application of his label to champagne bottles, and their use in bottling his preparation, and the wrapper with the inscription "Moxie Nerve Food" thereon? Or, in other words, had the public come to understand that, if they desired to buy plaintiff's preparation, they would always find it in connection with trade-mark in a particular kind of package, except when the use of a different package was explained? I think this was the case, and that it was so understood by defendant Baumbach and the Star Bottling Works. And, again, I would inquire when particular words, or things of common use, or theretofore known and used by the public, are used.

and appropriated by a party, in connection with his trade-mark upon a manufacture of an article of commerce, whether the use of such common terms or articles for similar packages by another party can be enjoined from use upon like or simulated preparations manufactured by such other party, bearing in part a similar but different name, but put up in such a manner as to delude an unwary consumer of the article? While it is clear that words or articles of common use could not be enjoined if used upon other preparations, yet, if used upon like or simulated preparations of same flavor, taste, and appearance, it seems to me that they can; and particularly when the first party using the same, in connection with his trade-mark and style of package, has established such a use of the same, and an intimacy between himself, it, and the public, as to become a matter of value by way of preventing deceit.

A champagne bottle, for instance, is a thing long and well-known by the public, and any person, under ordinary circumstances, may lawfully use the same in putting up any preparation therein. But when a manufacturer of a hitherto unknown fluid or beverage, as an article of commerce, has a trade-mark therefor, and introduces such article of commerce to the public in a champagne bottle, with a particular kind of label or trade-mark affixed thereto, and the public becomes acquainted with it, and recognizes it in that form and style, and thereafter another party or manufacturer, finding such article to be in great demand, introduces an article of like taste, color, and appearance, claiming to be for similar use or purpose, and with a label sufficiently like the former, and of a character calculated to mislead the public, why, then, and in such case, I think that he might be and ought to be enjoined from embarrassing his neighbor and misleading the public by using a champagne bottle in putting up his preparation similar in taste, flavor, and appearance, and with similar designation of use or quality of article.

A man has a right to burn down his own house, or destroy his own property, or do with it as he pleases; but only so long as he does not burn or use it to the prejudice of his neighbor. A man cannot set his own house on fire, either to recover insurance or to burn down or endanger the house of his neighbor. There is room enough in the world for all, and so there are bottles and styles of packages enough for all; and if a man has an article which, either by accident or design, happens to have the same quality, and be entitled to the same descriptive class of goods, and of the same taste, flavor, and color, as another's, and, when used, is used in the same way, or is in imitation of another's article, and he finds that his neighbor is making money by vending such article of his own, why then, and in such case, let him use a different kind of bottle or package in placing his own preparation before the public, to the end that he may neither derive advantage over his neighbor, nor induce the public to buy one thing when they think that they are buying another.

The motion to dissolve the injunction in this case is refused, and an order will be entered to that effect.

AMERICAN BELL TELEPHONE Co. and others *v.* MOLECULAR TELEPHONE Co. and others.

(*Circuit Court, S. D. New York.* June 24, 1885.)

1. PATENTS FOR INVENTIONS—BELL TELEPHONE—ANTICIPATION.
In the apparatus made by Reis, of Germany, in 1860, with its several modifications, as described by Legat, Pisco, Vanderwyde, and others, an intermittent or pulsatory current of electricity was employed, the transmitter, when actuated by the sound waves, making and breaking the circuit at each vibration. *Held*, that the apparatus was from its very nature unable to send and receive articulate speech, and was not an anticipation of letters patent No. 174,465, of March 7, 1876, to Alexander Graham Bell for improvements in telegraphy, the essential elements of which are the employment of the undulatory, as contradistinguished from the pulsatory, current of electricity, to transmit and copy air vibrations corresponding exactly in amplitude, rate, and form to those produced by the human voice, and the apparatus therefor.

2. SAME.
One Holcomb, who in May, 1860, obtained a patent for an extremely sensitive polarized electro-magnet, constructed in the fall of that year an apparatus which he claimed was capable of sending and receiving articulate sounds. The only witness besides himself who testified that it did such work was his wife. Others testified that he then made no such claim. He filed no application for a patent until January, 1878, and the only parts of the instrument produced were a permanent steel magnet, a sounding box, a steel bow with a brass attachment, a brass clamp, and some broken pieces of the diaphragm. *Held*, that the evidence was insufficient to overthrow the presumption of priority and validity arising from the grant of the telephone patent to Bell.

3. SAME.
Holcomb got one Beardslee interested in his apparatus who made several organizations to test for his own satisfaction the correctness of Holcomb's claims. He became satisfied that the apparatus would not operate at great distances, and abandoned it. *Held*, not an anticipation of the Bell telephone patent.

4. SAME.
The fifth claim of letters patent No. 186,787, of January 30, 1877, to Alexander Graham Bell, for improvements in electric telephony is as follows: "The formation, in an electric telephone, such as herein shown and described, of a magnet with a coil upon the end or ends of the magnet nearest the plate." *Held*, the claim not being for the combination of which the magnet is a constituent, that that part of the patent was void, being anticipated by the magnet in Hughes' printing telegraph as described in Schellen's work.

5. SAME—BELL TELEPHONE—EXTENT OF CLAIM.
The fifth claim of letters patent No. 174,465, of March 7, 1876, to Alexander Graham Bell for improvements in telegraphy, is for "the method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds substantially as set forth." *Held*, that the claim and method were not confined to an apparatus in which a magneto-transmitter is used and that the use of a telephone apparatus consisting of a speaking microphone transmitter and a magneto-receiver was an infringement.

6. SAME—INFRINGEMENT.
Such an apparatus is also an infringement of the sixth, seventh, and eighth claims of letters patent No. 186,787, of January 30, 1877, to Alexander Graham Bell for improvements in telephony.

In Equity.

Edward N. Dickerson and *Chauncy Smith*, for plaintiffs.
Wheeler H. Peckham, for defendants.

WALLACE, J. Infringement is alleged of the fifth claim of the patent granted to Alexander Graham Bell, No. 174,465, bearing date March 7, 1876, for improvements in telegraphy, and of the fifth, sixth, seventh, and eighth claims of the patent granted to Bell, No. 186,787, bearing date January 30, 1877, for improvements in electric telephony. The fifth claim of the first patent is for "the method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth." The scope of the invention thus claimed, and the construction which the claim should receive, were considered and decided in the cases of *Telephone Co.* v. *Spencer*, 8 Fed. Rep. 509, and *Telephone Co.* v. *Dolbear*, 15 Fed. Rep. 448, by the circuit court for the District of Massachusetts. In the *Spencer Case* it was held by LOWELL, J., that Bell "discovered a new art, that of transmitting speech by electricity, and has a right to hold the broadest claim for it which can be permitted in any case; not to the abstract right of sending sounds by telegraph, without any regard to means, but to all means and processes which he has both invented and claimed." It was also held that the essential elements of the method are the production of what the patent calls "undulatory vibrations of electricity," to correspond with those of the air, and transmitting them to a receiving instrument, capable of echoing them; and that an apparatus in which the transmitter was made on the principle of the microphone was an infringement of the fifth claim of the patent. In *Dolbear's Case*, it was held by GRAY, J., that the invention claimed is not merely the apparatus described, but also the general process or method by which the human voice produces, in a current of electricity, a succession of electrical disturbances, not sudden and intermittent or pulsatory, but gradual, oscillatory, vibratory, or undulatory, so as to give out at the further end of the conducting wire sounds exactly corresponding in loudness, in pitch, and in tone, character or quality, to the sounds committed to it at the nearer end.

The defendants use a telephone apparatus consisting of a speaking microphone transmitter and a magneto-receiver. The defense upon which they principally rely is that their apparatus is substantially such as was made by Reis, of Germany, in 1860, and described in numerous publications before the date of Bell's invention; and they insist that, if the fifth claim of the patent is not void for want of novelty, in view of its anticipation by Reis, its scope is restricted, and that the claim and method of Bell is confined to apparatus in which a magneto-transmitter is used; and upon this construction, as they use a microphone transmitter, they insist that they do not infringe.

In the *Spencer Case* the Reis instrument was relied upon to defeat the patent, or limit the construction of the fifth claim. It was said of his apparatus, in that case, by Judge LOWELL, that "the regret of all its admirers was that articulate speech could not be sent and received by it.

The deficiency was inherent in the principle of the machine. * * * A century of Reis would never have produced a speaking telephone, by mere improvement in construction." Unless the evidence, so far as it relates to this branch of the defense, materially distinguishes the case from the *Spencer Case*, the decision there should be controlling, and it would be unseemly, when the parties can resort to an appellate tribunal for review, to disregard the rule of comity which should prevail between courts of co-ordinate jurisdiction.

Additional testimony has been introduced by the defendants to show that the Reis apparatus is a speaking telephone, although the inventor never supposed it to be capable of transmitting articulate speech, and although it has always been conceded, by the most eminent authorities, to be incapable of doing so, until some of the experts in the present case have brought themselves to a different opinion. Reis himself undoubtedly believed that the transmitter in his apparatus acted by making and breaking the electric circuit; and it is conceded that an apparatus operating upon this principle is not capable of the transmission of musical sounds.

Bell's method consisted in employing an undulatory current of electricity, in contradistinction to an intermittent or pulsatory one. He was not the first to employ the so-called undulatory current of electricity, but he was the first to utilize it for copying and transmitting air vibrations exactly corresponding, in amplitude, rate, and form, to those produced by the human voice. His discovery was that these vibrations could be transmitted and copied by the use of such a current, and his invention consisted in devising suitable apparatus for producing the undulations upon a line-wire, and communicating the vibrations to this current at one end of the wire, and reproducing them at the other end. It is essential that such apparatus should not operate to interrupt or break the electric current, but shall operate by means of a practically continuous electric current or circuit. Bell pointed out different ways of generating the undulatory current, as by a vibrating armature in front of an electro-magnet, or by varying the resistance in the electric current, but these were not of the essence of his invention.

The microphone, according to Prof. Hughes, "introduces into an electric circuit an electrical resistance which varies in exact accord with sonorous vibrations, so as to produce an undulatory current of electricity from a constant source, whose wave-length, height, and form is an exact representation of the sonorous waves."

As early as in 1854, Bourseul described essentially the apparatus made by Reis in 1861. He said:

"Could there now be invented a metallic plate which should be so movable and pliable that it reproduces all the vibrations of tones like the air, and should this plate be so connected with an electric current that it should alternately make and break the electric current according to the air vibrations by which it is affected, it would thereby be possible also to arrange electrically a second similarly constructed metal plate, so that it would repeat simultaneously exactly the same vibrations as the first plate, and it would then be exactly the same as if one had spoken in the immediate vicinity against the second plate,

or the ear would be affected precisely as if it had received the tones directly through the first metallic wall."

Several modifications of the apparatus devised by Reis are described by Legat, Pisco, Vanderwyde, and others, and all agree that the diaphragms of the transmitters were intended to operate so as to sever or break the electric circuit at each vibration, when actuated by sound waves, and, as constructed, did operate in this way. The first transmitter made by Reis, a model of which is among exhibits in the case, was a block of wood having a conical perforation, with a membrane diaphragm covering the smaller end. A strip of platina was fastened to the center of the diaphragm, upon which rested a platina point, located upon a thin strip of metal. This point with the platina strip upon the diaphragm were the terminals of the circuit. In another form, the diaphragm was fastened to the smaller end of a metal cone, a pivoted lever was held by a light spring in contact with the center of the diaphragm, and the other end of the lever was in contact with an adjustable spring. In both of these forms, as well as in the other modifications, which it is not necessary to describe, the contact point is so arranged that it does not follow the retreating membrane responding to the air vibration, but an interval occurs which intercepts the next outward movement of the diaphragm. During part of a vibration the two electrodes approach each other, move together, separate, and then move in the same direction but not together. In 1869, Mr. Vanderwyde exhibited and made public experiments with the Reis apparatus in the city of New York, and shortly after published a description of the instrument used by him. In his description he distinctly states that it is entirely clear that no quality of tone can be transmitted. "Much less," he says, "can articulate words be sent, notwithstanding the enthusiastic prediction of some persons, who, when they first beheld this apparatus in operation, exclaimed that now we would talk directly through the wires. It is from its nature, able to transmit only pitch and rhythm, consequently, melody, and nothing more."

The theory now is that the Reis apparatus really embodied the method of microphone transmission, and that its mechanism will operate to vary the resistance in the electric circuit. Mr. Vanderwyde is produced, and testifies that he considered, at the time of these experiments, that the mechanical action of the adjustment was an alternate make and break of the current, but now he has learned to understand it better, and is convinced that the vibration of the diaphragm supporting the platinum foil produces a more or less intimate contact between that foil and the platinum point and thereby produces a variation in the resistance to the battery current resulting in a corresponding variation in the amount of current transmitted.

It is asserted in argument, by the defendant's counsel, that the Reis apparatus needs "but the mechanical improvement of the apparatus, such as a slight weight on the top of the platinum rod, or a substitution of carbon for the electrodes, to make that apparatus a better speaking telephone than can be made of the Bell apparatus, as described in his first

patent." The testimony of Mr. Yeates may be referred to as illustrating the character of the mechanical modifications which are practicable. After describing some improvements made by him in the receiver, he says he turned his attention next to the Reis transmitter, and discovered "that the chief defect in it was the too freely tossing of the little contact pin from the platinum plate on which it rested;" and the first plan which occurred to him to obviate this defect was to make the pin dip into a conducting fluid, and he made the experiment by simply wetting the pin with his tongue. He states that this greatly improved the sounds transmitted, and shortly after, when experimenting with the instrument, songs sung into the transmitter were distinctly heard, and some of the words were clearly recognized by the receiver in another part of the building. What modifications were made by him intermediate his first and latter experiments are not described. As the experiments of Mr. Yeates were made in England, the evidence is only important for the purpose of showing the capacity of the Reis apparatus, with mechanical modifications, to anticipate the invention of the speaking telephone. After Bell has pointed out the way, it may now seem to be a simple thing to introduce his method into the Reis apparatus. Some of the experts have doubtless convinced themselves that these modifications of the Reis apparatus do not involve any difference in the principle of the apparatus. It is too late to accept this theory, after the lapse of so many years of fruitless experiment with the method of Reis, as originally suggested by Bourseul, and with the apparatus of Reis as modified by various experimentalists, down to the time of the promulgation of Bell's method. It seems impossible to escape the conviction, that, had the speaking telephone been left where it was left by Reis, and by those who endeavored to develop and perfect its theory, it would only have realized the speculations of Bourseul. The testimony which has been introduced by the defendants only serves to confirm the opinion of Judge LOWELL, that "a century of Reis would never have produced a speaking telephone, by mere improvement in construction."

The answer alleges the invention and public use of the speaking telephone by various persons named therein, prior to the invention of Bell. The argument of counsel has been addressed to the question of priority as between Bell and one Holcomb, and as between Bell and one Beardslee, who is not named in the answer as a prior inventor. Holcomb asserts that he made his invention in 1860. His theory is, that in the winter of 1859–60 he invented a polarized electro-magnet, which was an extremely sensitive one, and was capable of receiving articulate speech, and was patented by him in May, 1860; that, about the time of procuring that patent, he conceived the idea of converting the force of the human voice into electricity; that, early in the fall of 1860, he constructed a telephone consisting of one of his polarized magnets, a wooden diaphragm mounted on a box or mouth-piece, and a u-shaped soft iron armature attached to the diaphragm, extending towards and in proximity to the ends of the polar extension of the magnet, but not touching them, the diaphragm-box and magnet being secured to and held in their rel-

ative positions by a base common to both. He states that soon after completing this instrument, he made a duplicate of it, and connected the helices of both the magnets in a complete or closed electrical circuit; that, while listening at one of the instruments, he was able to hear and recognize articulate words spoken into the mouth-piece of the other instrument by other persons, and that he used those instruments on several occasions and showed them to several persons. He states that his telephone then embodied all the essential features of the present telephone. He did not file an application for a patent until January, 1878. The instruments which he says he constructed are not produced, but all the parts are lost except a permanent steel magnet, a sounding-box, a steel bow with a brass attachment, a brass clamp, and some broken pieces of the diaphragm. No witness is produced in corroboration of Holcomb, who heard the instrument used, except Holcomb's wife, or who were present when they were used. Several witnesses are produced, however, men of intelligence, who were interested in Holcomb's electrical mechanism, and were more or less familiar with what he had accomplished, but none of them seemed to be aware that he had claimed to have succeeded in transmitting speech by the apparatus which he had made. In June, 1861, he obtained a patent for other electrical mechanisms. From 1862 or 1863 to 1875 he does not seem to have made any efforts to perfect his telephone mechanism, and it was not until Bell's invention had attracted general public interest that he resumed his efforts to perfect it. During this period he was so indifferent to the importance of what he had accomplished that he suffered the instruments which he had made to be lost. He was not in indigent circumstances, and it appears that he bought a farm in Maryland in 1862. He was fully competent to appreciate the great merit and value of his invention, if he had actually succeeded in transmitting speech with his mechanism. He does not vouchsafe any explanation why, for a period of fifteen years, he permitted his invention to lie dormant. The presumption of priority and validity arising from the grant of letters patent cannot be overthrown by a case like this; it suggests too many improbabilities to merit serious consideration.

In August, 1878, a suit was brought by the present complainants against the Western Union Telegraph Company, for infringement of the patent in suit. Mr. Pope was then the electrician of that company, and was aware that Holcomb had made an application for a patent. The company set up the priority of Holcomb, among other defenses, in that suit. Mr. Pope investigated Holcomb's pretensions, and had an interview with him in reference to the defense of the suit. He questioned Holcomb, to ascertain whether he could produce any witnesses to substantiate his statement that he had transmitted articulate speech by means of his apparatus. Holcomb could tell him of no living witnesses. As a result of this interview, Mr. Pope concluded that it was not advisable for the Western Union Telegraph Company to purchase Holcomb's rights, and Holcomb was not called as a witness to substantiate the defense. The impression produced upon Mr. Pope was such as would be

derived by any sensible man by an investigation of the facts and circumstances.

For the purpose of corroborating Holcomb, the defense produced Mr. Beardslee as a witness. He testified that Dr. Bradley, an acquaintance of his, brought Holcomb to see him, and he described an instrument which Holcomb exhibited to him on that occasion, which he thinks was some time in 1861 or 1862. He testified that Holcomb claimed that, by the use of such instruments, he could communicate sounds and words at a distance, through an electric current. Upon the cross-examination of this witness, he testified that he himself made, immediately after that interview, several organizations, to test for his own satisfaction the correctness of Holcomb's assertions about his instrument. He said the instruments thus made demonstrated that the human voice could be conveyed by the means pointed out by Holcomb, but he saw nothing to indicate that they would operate at great distances, and he never took any further interest in them, but regarded them as a mere toy. Upon this testimony, it is urged, for the defendants, that the Beardslee instruments defeat the novelty of the patent. It suffices, without further remark, to say of this defense, that the instruments are not produced, and were never publicly used, and that the witness, who is a mechanical engineer, fully qualified to appreciate their merits, never regarded them as of any practical value.

The questions respecting the novelty and infringements by the defendants of the several claims of the second patent in controversy have not been discussed by counsel. The fifth claim of that patent is, "the formation, in an electric telephone, such as herein shown and described, of a magnet with a coil upon the end or ends of the magnet nearest the plate." The novelty of the magnet described in the specification is controverted by defendants' expert, Mr. Young, and he relies upon a reference to the magnet in Hughes' printing telegraph, as described in Schellen's work. This reference apparently describes the magnet of the patent. The claim is not for the combination of which the magnet is a constituent; and, in the absence of any explanation upon the part of the complainants, of the description in Schellen, the novelty of the claim seems to be negatived. Infringement of all the claims of this patent is established by the testimony of Mr. Cross.

There should be a decree for the complainants upon the fifth claim of the first patent, and upon the sixth, seventh, and eighth claims of the second patent.

EXCELSIOR NEEDLE CO. v. UNION NEEDLE CO.

(*Circuit Court, S. D. New York.* February 23, 1885.)

PATENTS FOR INVENTIONS—NEEDLE-MACHINE—SUBSEQUENT PATENT OF NEEDLE VOID.

The patentee of a machine, capable of producing needles of a superior quality, subsequently obtained a patent upon the product of such machine. *Held*, that the latter patent was void, as an attempt to patent the function of the machine, and thus extend the monopoly of the invention beyond the time allowed by law, and that an action could not be maintained against one manufacturing the same kind of needles by the use of the machine after the expiration of the patent thereon, when the right to use it had become vested in the public.

In Equity.

Solomon J. Gordon, for plaintiff.

James E. Maynadier, for defendant.

WALLACE, J. Hopson and Brooks were the inventors of a machine for compressing articles of metal in dies, and letters patent therefor were granted to them August 9, 1864, and reissued December 12, 1865. The specification, among other things, states:

"Our invention has for its object the compressing of metal to a smooth, round form, corresponding to the shape of the dies, and consists in a divided die, that is forced together two or more times during each revolution around the article to be formed, and, by a series of compressions upon the sides of such article, reduces the same to the size and shape of the opening or cavity of the dies, and gives to the article great density, as well as a smooth, round, and uniform shape, and there is no loss of material like there is in the turning, milling, and grinding operations heretofore pursued, and which do not harden or render the metal dense and strong, and there are no burrs, angles, projections, or roughness on the surface, as heretofore usual with articles struck up in dies."

The specification then describes a shaft, a longitudinal jaw, cams, and dies, and screws, and proceeds:

"The mode of operating this machine is as follows: The end of the piece of metal to be pointed or otherwise shaped is entered between the dies, *i*, *i*, and pressed into them, which slightly opens said dies. The revolution of the shaft, B, brings the projection, O, of the jaw, D, into contact with the end of one of the cams, K, which cam is adjusted so that it will close the dies, *i*, *i*, and, in so doing, compress the wire or metal, and these operations are repeated; the end of the wire or piece of metal being pressed in a little further each time the jaw is relieved and allowed to slightly open, until the same is perfectly formed or given the shape of the opening in the die, and the metal is compressed and extended without any burr or projection being formed on the same; and the metal is rendered much more dense by this compressing action than it would be if the metal was filed or ground away to the required shape. The screw, G, regulating the extent to which the metal can open the die each time, prevents injury to the machinery by too great reduction at once. The mechanism herein set forth may be employed for shaping, in a circular form, the point of a pin, or any other article to which it may be adapted. It will be evident that there is no waste of material, as the metal is compressed and

elongated, thus effecting a saving of stock over the methods heretofore pursued, and making a much better article."

The first claim is as follows:

"A divided die, fitted and actuated substantially as specified, and operating, by a series of compressions upon the article to be formed, to give to such article a smooth, round shape, corresponding to the shape of the dies, as set forth."

There are two other claims, covering various parts of the machine in combination.

In using this machine, Hopson and Brooks employed dies of various kinds, including those of proper form for swaging pins, buckle tongues, and similar articles, and also for swaging needles for sewing-machines. In December, 1864, they employed Mr. Mandeville to assist them in improving the surface of the wearing parts, and in increasing the power of the machine, and on February 6, 1866, a patent was granted to Hopson and Brooks, assignees of Hopson and Brooks and Mandeville, for these improvements. In the specification of this patent the form of dies for forming sewing-machine needles is pointed out as being "of the shape of the needle or other article to be formed," but is not made in any way a constituent of the claims. On August 11, 1866, Hopson and Brooks made application for another patent, which was granted to them July 4, 1871, for "an improvement in sewing-machine needles." The present suit is brought upon this patent. The specification is as follows:

"The needles for sewing-machines are formed with a shank that is of larger diameter than the needle itself. This enables the needles to be secured into the machine. In order to reduce the needle itself from the size of wire required for the shank, various devices have been employed, such as milling-tools, or grinding-wheels, and also turning-tools, that reduce the wire to the size which the parts may be adjusted to produce; but, in consequence of the wear upon the tools, there is no reliability in the sizes of the needle blanks. Besides this, it is well known that a steel bar or wire is not entirely homogeneous; that the compression in drawing the wire makes the surface more dense than the core; hence the turning or milling removes the best portion of the metal, leaving the needle of an inferior quality. In order to manufacture our improved needles we make use of a compressing die, closed or pressed together rapidly around the steel wire as said wire or the dies are revolved. Thereby there is a series of compressions and a gradual extension of the steel, which brings the same down to the proper size for the needle. The machines which we prefer to use for this purpose are similar to those patented by us August 9, 1864, reissued December 12, 1865, and by us, as assignees, February 6, 1866. Needles made by our machine or method possess properties not heretofore found in sewing-machine needles, and are hence new and much more useful and durable than others heretofore made. The peculiar properties of our needles may be set forth as follows: The needles are of a uniform density and size. They are free from flaws, hard specks, and inequalities, always existing in steel that is turned or ground down from a drawn wire. They are very tough, and cannot be easily broken. They have a surface that is very dense and perfectly smooth, requiring no polishing by hand. They can be grooved with uniformity, being themselves of a regular size, and the steel, by the compression, is more uniform, and the grooving-tools will wear much longer than in grooving ordinary needles. The needles are not injured in

the hardening and tempering, as less heat is required to bring the needles to the required spring, hardness, or temper."

The claim is as follows:

"A sewing-machine needle possessing the peculiarities specified, and forming a new article of manufacture."

After the expiration of the two patents for the machines, the defendants used such machines, or machines substantially like them, for manufacturing swaged sewing-machine needles.

Upon these facts, the patent for the needles, now owned by the complainant, must be held to be void. The real invention of Hopson and Brooks was a machine for swaging metal, and any novelty which exists in the articles made by that machine is the result of the functions of the machine. It is explicitly stated in the specification of the patent that the "needles made by our machine or method possess properties not heretofore found in sewing-machine needles, and are hence new and much more useful and durable than others heretofore made." The patent is an attempt to appropriate a function of the machine, and thus to extend the monopoly of the invention beyond the term allowed by law. If successful, it would result in charging as infringers the defendants and all others who, at the expiration of the machine patent, were entitled to avail themselves of the invention, which had become public property. There was no invention in applying the means provided by the machine to the making of the needles or other articles for which the machine was adapted. Any mechanic skilled in the art could do this as well as the inventors of the machine. The patent of 1866 is not deemed of any importance in this view. The first covers the whole invention, so far as it relates to the product patent, and any change in the form of the dies, introduced after the first patent was obtained, was merely a matter of mechanical adaptation, and not substantive invention.

It does not aid the complainant's case to concede that Hopson and Brooks might have claimed in their first patent both the apparatus and the product or article made by it. If they were the inventors of a new manufacture,—a needle which was not only commercially new, but new in the sense of the patent law,—they might have claimed both the machine and the product, according to the language of Mr. Justice SWAYNE in *Rubber Co.* v. *Goodyear*, 9 Wall. 788. It is to be remarked, however, that in that case the product of a process was the subject of the patent, and not the product of a machine. The distinction between a patent for the product of a process and one for the product of a machine is pointed out in *Corning* v. *Burden*, 15 How. 252, 268, by Mr. Justice GRIER, as follows:

"But the term 'process' is often used in a more vague sense, in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed; grain, of being ground; iron, of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated upon, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine as distinguished from a process. In this use of the term it represents the function of

a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it."

If the patentees might have claimed the product originally, they did not do so; and, if the failure to do so was owing to mistake or inadvertence, they should have resorted in due season to a reissue. to correct the patent. The decisions which adjudge that an inventor may have a patent for an invention described in the prior patent, but not claimed, when he has not lost his rights by unreasonable delay, have no application to a case like this. Here the real invention was claimed in the prior patent, but the patentees now seek, by claiming another invention, to deprive the public of that which became theirs when the patent expired. The improvements in the needles themselves all fall within the category of degree, and the invention was not the manufacture but the machine. *Smith* v. *Nichols*, 21 Wall. 112; *Wooster* v. *Calhoun*, 11 Blatchf. 215.

The bill is dismissed.

WOODRUFF *v.* CARR.

(*Circuit Court, D. Minnesota.* October 3, 1887.)

PATENTS FOR INVENTIONS—BUCKLES—LETTERS PATENT No. 8,541—ANTICIPATION.

The second, third, and fourth claims of reissued letters patent No. 8,541, of January 14, 1879, to Henry S. Woodruff for an "improvement in buckles" call for a buckle frame provided with a loose loop and having a rigid tongue projecting outward on the outer face of its forward cross-bar, and the combination of the frame, loop, and tongue. The improvement has for its object the relief of the tug at the point where the tongue enters it, and this is accomplished by the loop pinching the tug and holding it firmly to the frame when draught is applied. In the Cole buckle (letters patent No. 69,181, of September 24, 1867, to E. Cole) the plate or cross-bar of the loop is broader than in the Woodruff, and the construction is different, but the service performed by it is substantially the same. In both buckles the loops are loose. *Held*, that the Woodruff patent was anticipated by the Cole patent.

In Equity.

Offield, Towle & Phelps and *John W. Sale*, for complainant.

P. H. Gunckel, for defendant.

NELSON, J. This suit is brought by the complainant against the defendant Carr, charging an infringement of letters patent, reissue No. 8,541, dated January 14, 1879, for "improvement in buckles." The original letters patent are dated January 9, 1872, and the object of the invention as stated by the patentee is "to relieve a trace, strap, or belt from the strain at the point where it is perforated for a buckle tongue." The defendant is manufacturing a buckle which is constructed upon the same principle as the complainant's buckle, and operates substantially

in the same manner and is arranged for the same purpose, viz., to prevent the trace or belt from giving way at the point where it is perforated for a tongue, so that if complainant's patent is sustained he would infringe.

The defendant relies for his defense chiefly on the alleged fact that the device of the complainant is exhibited in many prior patents, and especially in a patent issued to E. Cole; and he also further claims that the reissued letters patent are void, by reason of not being for the same invention as that described and claimed in the original. Other defenses are set up in the answer, but they are not pressed, and the two above mentioned are relied upon to defeat the complainant's suit.

It will only be necessary for me to consider the first defense; for in my opinion the device of the complainant's patent is found in many prior inventions, and particularly in letters patent No. 69,181, dated September 24, 1867, and issued to E. Cole, of Michigan, for an "improved buckle." The original "Woodruff patent" has to some extent engaged the attention of courts, which appears to have escaped the notice of counsel. The particular "Cole patent," now urged by the defendant, to show want of novelty in the "Woodruff device," has not to my knowledge been considered. The Woodruff reissue contains four claims, (the first is dismissed from the case by complainant, so that I must look at the second, third, and fourth:)

Woodruff claims—

(2) A buckle frame provided with a loose loop as shown, and having a rigid tongue on the outer face of its forward cross bar, all substantially as shown and described.

(3) In a buckle the combination of the frame, A, having a rigid tongue projecting outward with the loose loop, B, all substantially as shown and described.

(4) The combination of the loop, B, with the frame, A, and tongue, D, when the whole is constructed as described and for the purposes hereinbefore set forth.

Cole's improved buckle patent No. 69,181, is constructed to secure not only relief from strain upon the trace or belt at the point where it is perforated for a tongue, but other results, which are not important for consideration now. Cole says his buckle is made to secure "a drawing, both by the tongue and by the frame of the buckle, in so pinching the tug that the hole therein cannot bulge and tear out." That is, he seeks to relieve the strain on the belt or trace at the point of perforation. To accomplish this, he constructs his buckle with a curved frame broad at one end and having openings and with a tongue on the forward end projecting upward and outward, and a loop which consists of a cross-bar at one end, to which, in case of a trace, the hame tug is fastened, and side-bars running to a broad cross-bar or plate at the other end, with a tongue on the under side projecting downward towards the broad part of the frame. This broad plate and side-bars are made in one piece. The trace passes between the broad part of the buckle frame and under the loop plate and between the side-bars with the tongues fitting two of the

holes. When draught is applied, the plate pinches the trace and holds it down upon the broad part of the frame, and tends to relieve it at the weak points where the tongues enter it and to prevent the strain upon the tongues, so that they will not tear out. The same thing is accomplished by the use of the loop in the complainant's device. He says: "The greater the strain [draught] applied, the more firmly the trace is held to the frame, thereby relieving the strain upon the trace at the tongue." The plate or cross-bar of the loop which pinches the trace or belt when the loop is drawn down, is broader in Cole's buckle than in complainant's device, but it performs the same service in the same or substantially the same way. One tongue in Cole's buckle is on the under side of that part called the plate, and another tongue is on the forward part of the frame, and in complainant's buckle the tongue is on the outer face of the forward end-bar of the buckle frame only; but this is not material. The function of the draught loop of complainant's buckle, and the plate or draught loop of Cole's buckle, is the same. The construction of the loops differ, but they are both loose loops. Cole's device has an extra tongue on the under side of the broad plate or loop, but this does not affect the principal function, which is to pinch or firmly hold the trace or belt when draught is applied. So I find in Cole's patent No. 69,181 all the features embraced in the second, third, and fourth claims of complainant's patent, and operating substantially to accomplish the same result.

The bill of complaint is dismissed, and decree accordingly for the defendant.

CANFIELD RUBBER CO. *v.* GROSS and another.

(Circuit Court, D. Massachusetts. September 12, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Complainant was the owner of letters patent for an improved dress shield for the under part of the armhole of a dress. The shield was made of "stockinet," and coated on one side with a thin layer of India rubber. After being stretched upon a proper form, it was vulcanized by heat, to hold it in shape. The shield was of a crescent form, and without seam. Defendant's shield was similar, except that it had stockinet upon both sides of the rubber. It appeared that the idea of a seamless shield was not new with complainant, nor was there any patentable novelty in vulcanizing or heating the shield so that it should permanently hold its shape. *Held*, that the validity of complainant's patent was not sufficiently apparent to sustain a motion for a preliminary injunction against defendant for infringement.

In Equity.

M. B. Philipp and *J. L. S. Roberts*, for complainant.

F. H. Betts, for defendants.

COLT, J. This is a motion for a preliminary injunction. The complainant is the owner of letters patent dated June 18, 1878, granted to G. W. Wood, for an improved dress shield for the under part of the armhole of a dress. The shield is made of thin elastic webbing known

as "stockinet," and coated on one side with a thin layer of India rubber. It is then cut into pieces of the proper size, preferably square, and stretched upon a form of the shape required in making the complete shield. This form is of sheet metal with an upper concave edge, and with catch pins or points around its convex edge. This piece of stockinet coated with India rubber is applied to this form in such manner that it passes over the concave edge, and extends down on both sides of the form, and is held in position by the pins. In this condition it is vulcanized by heat, in consequence of which it thereafter holds its shape. After unhooking the edges of the fabric from the pins, the shield is trimmed, and it is then ready for use. The first claim is for "a shield for garments, made of one piece of stockinet coated with rubber, of a crescent form, and without seam, as a new article of manufacture." The defendants' shield is similar, except that it has stockinet on both sides of the rubber, which is undoubtedly an improvement.

The main ground of defense to this motion is the want of patentability of the Wood shield, in view of the prior state of the art. Shields made of two pieces of India rubber, covered by a textile fabric, and united by a crescent-shaped seam or joint, are found described in the Hotchkiss patent, dated November 1, 1870. The advantages of the Wood shield are that it is seamless, and that its shape is set by a process of vulcanization. But Wood was not the first to make a seamless shield, for we find such a shield described in the Beames patent of October 22, 1872. The Beames shield was made of an oval piece of linen or muslin; and by the aid of a form made for the purpose, and a hot iron, there was produced a crescent-shaped seamless shield. It cannot, therefore, be said that the invention of a seamless shield of a crescent shape originated with Wood. The attempt to carry the invention of Wood back more than five years from the date of his application, and so prior to the date of the Beames patent, is not made out with sufficient certainty upon the papers before me. But it is said that the Beames shield would not retain its shape, and that Wood, by vulcanizing or heating, set the shield so that it permanently retains its form. If this last idea was new with Wood, it is clear that his patent should be sustained. The difficulty, however, is that the idea of setting India rubber articles permanently into different forms, by making the articles upon forms or moulds, and exposing them to the vulcanizing process, is very old in the art of India rubber manufacture. In the English patent granted to Thomas Hancock, September 17, 1846, for improvements in the manufacturing and treating articles made of caoutchouc, either alone or in combination with other substances, the specification says: "When I manufacture these compounds into articles requiring to be of a permanent shape or form, I make such articles in or upon forms, moulds, plates, or engraved surfaces or patterns, by pressing, fitting, placing, or moulding such compounds, previously prepared, in sheets or otherwise in or upon such moulds or forms, and allowing the articles to remain there while exposed to the vulcanizing process, which effectually sets them permanently to the respective forms."

Without pursuing this inquiry further, it is sufficient to say that I am not entirely free from doubt, upon the evidence before me, as to the validity of the Wood patent; and therefore, bearing in mind the rules which govern the courts in motions of this character, whatever may be the ultimate conclusion of the court upon final hearing, it is clearly my duty to deny the present motion. Motion denied.

REED and others, Copartners, *v.* LAWRENCE and others.

SAME *v.* CHASE and others.

(*Circuit Court, S. D. Michigan, W. D.* September 19, 1887.)

REHEARING—NEWLY-DISCOVERED EVIDENCE—ADJUDICATION DE NOVO.

Upon a rehearing, for the purpose of considering the effect of newly-discovered evidence as to the validity of reissue No. 9,148, of the Garver patent, dated April 13, 1880, when such evidence is not sufficient to disturb the decree, the circuit court will not make the rehearing the pretext for adjudicating upon the controversy *de novo*, it having twice been heard before a justice of the supreme court, although the circuit court has serious doubt of the correctness of the superior decision.

On Rehearing. For opinion on former decision and rehearing, see 25 Fed. Rep. 94, and 29 Fed. Rep. 915.

W. G. Howard and *J. W. Osborn*, for complainants.

Edwards & Stewart and *John R. Bennett*, for defendants.

SEVERENS, J. The newly-discovered evidence in these causes having been brought in, they have been reargued before the circuit and district judges, and upon consideration thereof the court holds that, although there are marks of suspicion upon it which fairly provoke criticism, the evidence must be regarded as establishing the fact that Willett did in fact for many years use a harrow, with teeth constructed as claimed by the defendants; that the use was sufficient to make it public within the meaning of that term; that the use had been discontinued and gone out of sight when the Garver patent was issued; but we do not hold that the recollection of it was so far obliterated as to prevent its being an anticipation of that patent, if intrinsically sufficient. We are of the opinion, however, that the Willett harrow cannot be regarded as a sufficient development of the features of the Garver patent, sustained by the former decree in this case as to constitute it such an anticipation as would invalidate the patent; it was a casual but vague and inchoate conception of the principles developed in Garver's invention. If, as has been settled in this litigation, until the supreme court shall have expressed its opinion upon the subject otherwise, the hay rakes and teeth in evidence in these causes, having the same conformation and attachments, or substantially so, with their adaptation to some parts of the work of a

harrow pointed out in the specifications on which patents had issued, so that all that remained for the inventor to do was to widen and stiffen the teeth, did not anticipate Garver's invention, it is impossible to hold that the Willett harrow anticipated it.

The argument on the present hearing covered (and almost necessarily so) the whole range of the cases upon their merits, and it was stoutly claimed on behalf of the defendants that we should now adjudicate upon the controversy *de novo*. Although, if we were at liberty to go over the ground already passed by the court at former hearings, we would have great difficulty in reaching the results already attained by adjudication thereon, and especially in regard to the validity of the second reissue of the Garver patent, still the fact is to be remembered that these adjudications have been made by a judge whose great abilities ought to insure respect, and (what we are constrained to think would be obligatory upon us,) whose superior rank in the judicial order should restrain us from annulling his decisions. The cases have been twice heard, before the justice of the supreme court allotted to this circuit.

It would be doing violence to the rightful and decorous course of judicial practice, if upon the pretext of a rehearing, had for the purpose of considering the effect of newly-discovered evidence, which it is found cannot disturb the decree, we should proceed to overhaul the result hitherto declared by superior authority, however widely we might differ, if the matter were fairly open to us.

The result is that the decree made on the rehearing in 1885, and which was vacated for the purpose of letting in the newly-discovered evidence, must be restored.

JACKSON, J., concurs in this opinion.

TORRENT *v.* DULUTH LUMBER CO.

(Circuit Court, D. Minnesota. October 15, 1887.)

APPEAL—REHEARING—MISQUOTATION OF TESTIMONY.

A rehearing will not be granted because the court in its opinion misquoted the testimony, where such misquotation does not change the opinion.

Parker & Burton and *P. H. Gunckel*, for complainant.
West & Bond, for defendant.

NELSON, J. This is a petition for a rehearing and reargument of the case. In the opinion of the court heretofore delivered in this case (30 Fed. Rep. 830) the court (page 835) misquotes the testimony, viz.: "It has to have it on," quoted from Robert Orm's testimony, should read: "They all have to have something to hold the tooth-bar up to the log;" but such misquotation does not change the opinion of the court.

The petition for rehearing and reargument is denied; final decree ordered; accounting waived; appeal taken and allowed; bond on appeal fixed at $500.

THE TANGIER.[1]

SOCIETA ANONIMA AGRUMARIA DI NAVIGAZIONE *v.* ANGIER and others.

(*District Court, S. D. New York.* June 24, 1887.)

1. FREIGHT—DAMAGE TO CARGO—DISPUTE AS TO ALLOWANCE FOR DAMAGE.
   Where a vessel delivers a consignment of fruit, a portion of which is damaged, it is incumbent upon her to ascertain the amount of damage before retaining a part of the consignment for balance of freight, in order that she may not, by retaining an unreasonable amount, become liable for the storage and selling charges.
2. SAME.
   When a ship is, by her charter-party, entitled to her whole freight, "upon a true delivery" of the cargo, and she delivers a portion in a damaged condition, she is entitled only to the specified freight less the damages for the loss on the cargo.
3. SAME—TENDER BY CONSIGNEE—WAIVER OF.
   When the cargo is partly damaged, the refusal of the ship's agents to deliver cargo, except on the payment of a precise sum by consignee, which is in excess of the amount due, dispenses with the necessity of a tender by the consignee.
4. SAME—STATEMENT OF CASE.
   The steam-ship T. brought a consignment of fruit to the libelant, of which 54 boxes were missing, and others were damaged by theft of portions of the contents. Libelant refused, therefore, to pay the freight thereon without an allowance by the ship for the damage, and the ship, insisting upon payment of the "lump sum" for which the vessel had been chartered, retained 735 boxes of fruit pending payment of the balance of freight. This suit was brought against the agents of the ship for damages for refusal to deliver the balance of the consignment, and, after the filing of the libel herein, the 735 boxes were sold, under a stipulation between the parties that they should be so sold for account of whom it might concern, without prejudice to the claim in suit. The charter-party provided that the lump freight was to become due "on a true delivery of the cargo." Each party made an offer of settlement, which was not accepted. Neither party made efforts for an actual adjustment of the loss. The evidence before the court was not sufficient to determine the exact loss to the consignment. *Held* that, if the amount demanded by the ship in its offer of settlement was in excess of the amount actually payable by libelant for balance of freight, the ship should account to the libelant for the value of the packages retained by her, less the amount first due the ship. If the ship's demand was not in excess of what was justly due her, the expenses of the subsequent detention and sale were a charge against the libelant, and it would be entitled only to what might remain of the proceeds of the sale after payment of the freight due, and the expenses of storage and sale. A reference was ordered to ascertain the exact amount due.

The libel in the above case was filed to recover damages for refusal to deliver certain boxes of fruit forming part of the cargo of the steam-ship Tangier from Palermo to New York. The libelants on the thirteenth of March, 1884, chartered the steamer from the owners to take a cargo of

[1]Reported by Edward G. Benedict, Esq., of the New York bar.

fruit at the lump sum of £1,550, or about $7,500, the balance, after certain specified payments, to be paid "on the true delivery of the cargo," at New York. A cargo was afterwards shipped on board, for which on April 2, 1884, a bill of lading was signed by the master, reciting the delivery of 23,731 packages. Upon arrival at New York, April 26, 1884, the cargo was discharged upon the wharf. All the cargo was delivered to the libelant's agents or consignees, except 54 boxes, which, upon count, were found missing, and 735 other boxes, which on the morning of May 3d were lying upon the wharf, and which Messrs. Bowing and Archibald, the ship's agents, held in their custody until the balance of the charter money should be paid. The libelants, in the course of the delivery of the cargo, had already paid the steamer's agent upwards of $7,000 on account of freight. Against the balance of the freight they claimed that, in addition to certain allowances provided for in the charter, a credit and set-off should be allowed on account of the 54 missing boxes, as well as for the loss on 60 additional "robbed boxes," from which some fruit had been taken. Irrespective of this set-off, the difference between the amount of freight paid and that due upon the whole cargo, under the charter, would be from $300 to $400. At an interview between the agents of the ship and the libelants' agent and counsel on the morning of May 3d, the latter demanded the delivery of the remaining goods, and offered to give a bond, with security, for what might be due upon account of freight, or to deposit with third persons $600 for the same purpose. The agents of the ship refused to accept either of these offers, but offered to deliver the 735 boxes on a deposit with themselves of the whole balance of freight without any offset, and refused to deliver the remaining goods otherwise, except upon the payment of 40 cents per box for the remaining boxes as delivered, which they offered to deliver on such payment. No agreement being reached, the 735 boxes were stored by the ship, and, after the filing of this libel, were sold under a stipulation between the parties that the goods should be sold for account of whom it might concern, without prejudice to the claim in suit.

Ullo, Reubsamen & Hubbe, for libelants.

Butler, Stillman & Hubbard, for respondents.

BROWN, J. The pleadings and the evidence sufficiently establish a shortage of 54 boxes of fruit. Upon a count of the boxes remaining on the wharf on May 3d, in addition to those already delivered, there were 54 less than the number called for by the bill of lading. The bill of lading, indeed, contained the stipulation that "no claim should be made for any loss arising from difference in marks, numbers, or contents," and excepted the acts of "robbers, thieves," etc. Under the latter clause, the burden of proof would fall, in the first instance, on the libelant to show some *prima facie* evidence of neglect or fault in the ship, whereby the loss in the "robbed" boxes occurred. No such evidence, however, was offered, and the loss on these boxes proved to be too small to be worth further mention. If the exception of loss through "difference in numbers" could be construed as equivalent to a declara-

tion that the ship was not to be held responsible for the precise number of packages specified in the bill of lading as taken on board, upon which I express no opinion, the burden of proof would rest upon the libelant to show the actual number shipped. *Matthiessen* v. *Gusi*, 29 Fed. Rep. 794. But the libel in the third article specifically alleges the shipment of 23,731 packages, and the answer admits that the steamer "did load cargo at Palermo as specified in the third article," without any denial anywhere of the number alleged. This admission dispenses with any further proof by the libelant of the number shipped, and casts upon the ship the presumption of negligence in the loss of the missing 54 packages, and the duty of showing that the loss arose either without her fault, or from some other specific cause excepted in the bill of lading. This has not been done, and the ship must be deemed answerable, therefore, for the 54 cases.

As the ship's right to her whole freight was conditioned "upon the true delivery" of the whole cargo, the demand by her agents that the entire freight should be paid was not legally justifiable. She was only entitled to her specified freight, less the damages for the loss of the missing packages, for which she was presumptively liable. Her lien, and the right to hold the remaining 735 packages, were limited to the balance remaining after deducting the offset. The libelants, on the other hand, had no right to the delivery of the 735 packages, except on the payment of this balance. They could not legally require the ship's agents to accept, in lieu of cash, for this balance, either a bond with security, or a deposit with third persons. Prudence would doubtless recommend that each should agree upon some amicable arrangement for the due security of both. *Brittan* v. *Barnaby*, 21 How. 527, 534. But the law cannot compel a new agreement, nor fix its terms. If the parties came to no satisfactory arrangement, each was equally bound, at its peril, if it would avoid further responsibility, and the liability of further loss, to ascertain at once the true amount of the offset, so as not to exceed its legal rights in any demands upon the other. *The Eddy*, 5 Wall. 481; *Twelve Hundred and Sixty-Five Vitrified Pipes*, 14 Blatchf. 274.

The libelant, upon tendering a sum sufficient to cover what was really due, if delivery was refused, could immediately libel the vessel, and hold her for the value of the goods retained. If the libelant refused to pay the proper sum demanded for the balance of freight, not only could the goods be rightly retained in custody, but they could be stored, and subsequently sold by the respondents at the libelants' risk and charge. It was the duty, as I have said, of the ship to aid in ascertaining the deduction to be made from the specified freight, because the deduction itself was an allowance to be made on account of the ship's own fault in not making a "true delivery" of the whole cargo; and because the mode of adjustment by offset, for the loss of a part of the goods, is an equitable release of the ship from the strict conditions of the charter and bill of lading, by which the payment of the entire freight as a lump sum was conditioned upon a delivery of the entire cargo, which the ship had by her negligence become unable to perform.

Neither of the parties in this case apparently took any immediate steps to ascertain what the exact offset would be; and, so far as I can see, no excuse is shown by either for not doing so; nor was there any effort made at the time by either for an actual adjustment of the loss. The evidence shows that there is always a somewhat similar loss in fruit cargoes, usually a smaller amount only; and that from $50 to $100 of the freight is customarily left unpaid upon a delivery of the whole cargo until the precise loss is ascertained. The libelants' agent testified that missing boxes are accounted for at the average price per box of the whole cargo, which in this case was not much above one dollar a box.

The offer of the ship's agents to deliver the 735 boxes upon payment of 40 cents per box would have required the payment of $294, which would seem to be, in any event, not much above what would be payable to them upon a fair accounting for the missing boxes, as well as for the loss upon the "robbed" boxes. The difference was so small as to furnish no reasonable ground for the litigation and expense which both sides have incurred in standing upon their supposed legal rights.

Upon the defendants' plea of the stipulation made between the parties, and the sale thereunder, I think the settlement of the whole matter is drawn into this cause. The evidence before me is not sufficient to enable me to determine satisfactorily the precise amount which would be due to the ship under all the terms of the charter and the drawback provided for, or the precise offset to which the libelants are entitled for the "robbed" and the missing boxes. If the demand by the ship's agents of 40 cents per box upon the 735 boxes was in excess of the amount actually payable by the libelants for balance of freight, deducting all proper offsets, the respondents must account to the libelants for the value of the packages retained by them, less the amount due to the ship. The final refusal of the ship's agents to deliver, except on the payment of a precise sum per box, if that sum proves to be excessive, dispenses with the need of any tender by the libelant of the precise amount due; and the subsequent sale of the goods would then be at the respondent's risk, both as respects the prices realized and all the expenses of sale. If the demand of 40 cents was not in excess of what was justly due to the respondents, the proper expenses of the subsequent detention and sale of the goods was a charge against the libelants, and under the stipulation they will be held to the prices brought; and they will be entitled only to what, if anything, may remain of the proceeds of the sale after payment of the freight due, and all the expenses of storage and sale. A reference may be taken to ascertain these amounts.

HART *v.* PROCEEDS OF THE OAKLAND and another.

(*District Court, N. D. Ohio, E. D.* April Term, 1887.)

SEAMEN—LIEN FOR WAGES—REMNANTS SAVED FROM FOUNDERED VESSEL.

During a storm, a propeller, which was in a foundering condition, was abandoned by her captain and crew, who saved certain articles belonging to the vessel. These articles were sold, and the creditors of the propeller entered into an agreement to apply the proceeds *pro rata* upon their respective claims. The sailors did not sign the agreement. *Held*, that the latter had a lien upon the proceeds of the articles sold, the same as they would have had against the vessel, for the full amount of their wages.

This was a libel by a seaman on the propeller Oakland. On the seventeenth day of September, A. D. 1883, by the order of her captain, the crew of the propeller, including the libelant, left the propeller, then water-logged and in a foundering condition, in a storm on Lake Erie. They saved the yawl-boat, compass, barometer, clock, and marine glasses. The propeller was still afloat when left, and it was uncertain whether she would continue to float or go to pieces. Under these circumstances the propeller and articles saved were sold for the sum of $500, which was placed in the hands of H. D. Goulder, for the purpose of paying the debts of the propeller. As a preliminary thereto, the principal creditors of the propeller signed a paper by which they approved of said sale at said price, and further agreeing, in consideration of the purchase by Corrigan, as an inducement to said purchase, and with the full understanding that such purchase would not be made but for this agreement on their part, as follows:

"That the said sum of $500 may be paid to H. D. Goulder, and shall be applied *pro rata* upon the debts of said propeller. And if in settling the said debts any debts due to seamen shall have to be paid in full, or any greater than a *pro rata* dividend shall have to be paid such seamen, or any of them, then the balance remaining shall be applied *pro rata* on our claims. And we further agree that upon such payment we, each stipulating for himself, shall and hereby do release said propeller, her boats, engines, tackle, and appurtenances, from all claims and liens on account of any debt or claim against said vessel, etc., which we have or ought to have therein."

None of the sailors signed this agreement. No other part of the vessel or cargo was ever saved or found. Libelant demanded payment in full from Mr. Goulder, who refused to pay him anything, unless he accepted a *pro rata* payment under this agreement. Thereupon, on the eighth day of October, A. D. 1883, this suit was commenced against the proceeds and Harvey D. Goulder. Shortly after, under the thirty-eighth rule in admiralty, libelant filed a petition for an order on Goulder to show cause why he should not bring the money into court, to answer the exigency of the case. The order was made, and Goulder filed an answer, in substance averring that the money in his hands was not, legally speaking, the proceeds of the vessel, and therefore libelant had no lien upon it, and that libelant had refused to accept the money as the proceeds of the vessel, and insisted upon maintaining his lien upon the vessel.

Mix & White, for **libelant.**

In this case it cannot be seriously claimed that, had not the remnants been sold, the libelant would not have had a lien upon them which he could have enforced in this court. Both the libel and the petition to show cause set forth all the facts, and it is immaterial in this cause whether they be treated as proceeding for wages or for salvage. The libelant asks for no greater sum than his wages. No less sum than the wages is ever allowed as salvage to the sailor, if the value of the remnants saved be so great. *The Two Catherines*, 2 Mason, 319, 338-341; citing *Taylor* v. *The Cato*, 1 Pet. Adm. 48, 58; *Giles* v. *The Cynthia*, Id. 203, 204; *Weeks* v. *The Catharina Maria*, 2 Pet. Adm. 424; *Frothingham* v. *Prince*, 3 Mass. 563; *The Saratoga*, 2 Gall. 164, 183; *Coffin* v. *Storer*, 5 Mass. 252. Judge STORY shows that this is also the law of continental Europe. Laws Oleron, art. 3; Laws Wisbuy, arts. 15, 16; Ord. Philip II. 1563, tit. "Average," art. 12; Hanseatic Ord. 1614, tit. 9, art. 5; Ord. Rotterdam, art. 219; Ord. de France, liv. 3, tit. 4, art. 9. Of these, the French, Spanish, Holland, and Danish (Jacobsen, Sea Laws) give the lien for wages, and such was the ruling of Lord STOWELL in *The Neptune*, 1 Hagg. Adm. 227, 239; and see Weskett, Ins. tit. "Wages," art. 17. The supreme court seems to consider it a claim for wages. See *Sheppard* v. *Taylor*, 5 Pet. 675, 710, 711, and *Flaherty* v. *Doane*, 1 Low. Dec. 148.

The libelant having this lien on the remnants, can he proceed against the proceeds of the remnants? In considering this question, the proceeds of the vessel may be treated in the same way as the proceeds of the articles saved. Under the circumstances, the vessel being water-logged, and in a foundering condition when last seen, and actually foundering, the owner, lienholders, and sailors agreeing to treat the proceeds of the sale as standing for the vessel, the proceeds may be considered as representing the vessel in the same way as would the proceeds of a sale of the vessel by the master in case of necessity, (*The Amelie*, 6 Wall. 30,) or on legal process, or in case of restitution in money instead of *in specie*. All parties have treated this money as representing the vessel; no injustice will be done if the court treats it the same way, nor is there any difficulty on admiralty principles.

In one case the ship and freight were wholly lost by wreck, and abandoned to the underwriters. The cargo was saved. A large part of it was sold, and the proceeds were in the hands of the agents of the owners of the cargo. Under these circumstances, a libel *in rem* was filed against the cargo and proceeds to compel contribution in average. It was held that the lien existed, and the action might be maintained against the proceeds in whosesoever hands those proceeds might be found, or against whatsoever represented the property liable. *Insurance Co.* v. *The George*, Olcott, 97.

In another case a vessel was wrecked. None of the cargo was saved. The sailors saved the masts, spars, rigging, anchors, cables, some of the sails, and part of the hull. These were sold. The sailors filed a summary petition in admiralty for wages against these proceeds. Lord STOWELL, after a thorough discussion, held the action well brought. *The Neptune*, 1 Hagg. Adm. 227, 239.

Where a vessel had been seized and sold by a foreign government, the owners had sold their claim, and then the foreign government paid for the vessel, the supreme court held that the lien for wages attached to the money so paid, saying: "This lien is so sacred and indelible that it has on more than one occasion been expressively said that it adheres to the last plank of the ship. *Relf* v. *The Maria*, 1 Pet. Adm. note, 186, 195; [*The Sydney Cove*,] 2 Dod. Adm. 13; *The Neptune*, 1 Hagg. Adm. 227, 239. And, in our opinion, there is no difference between the case of a restitution *in specie* of the ship itself and a restitution in value. The lien reattaches to the thing, and to

whatever is substituted for it. This is no peculiar principle of the admiralty. It is found incorporated into the doctrines of courts of common law and equity. The owner and the lien-holder, whose claims have been wrongfully displaced, may follow the proceeds wherever they can distinctly trace them. In respect, therefore, to the proceeds of the ship, we have no difficulty in affirming that the lien in this case attaches to them." *Sheppard* v. *Taylor*, 5 Pet. 675, 710, 711; *Brown* v. *Lull*, 2 Sum. 443, 447, 452.

In a late case a fishing vessel was lost, but parts of her tackle, rigging, etc., were saved by the sailors, and sold, the proceeds going into the hands of the owners. The sailors filed a libel for wages against the owners to reach the proceeds. The court declined to treat it as a libel *in personam*, but determined it as a suit to reach the proceeds, and say: "There being then a lien on the ship, and of course on her remnants, and the wreck having been sold before the libelants had an opportunity to enforce their remedy, they may follow the proceeds into the hands of the owners, and maintain their libel to the extent of what I may call the assets. Proceedings *in rem* may be maintained, not only when there is a vessel or other thing which can be arrested by the marshal, but also when there is a fund in the possession of persons within the jurisdiction. In England, actions *in personam*, strictly so called, fell into disuse, (*The Clara*, Swab. 3;) but an efficient substitute was found in the process *in rem*, which was served by a monition to the owners to show cause; and this was issued even though the vessel were on a voyage, or belonged to the crown, and therefore was not liable to seizure, or even, in some cases, though the vessel had been totally lost. Coote, Adm. 131 *et seq.*; *The Trelawney*, 3 C. Rob. Adm. 216*n*; *The Meg Merrilies*, 3 Hagg. Adm. 346; *The Stephen Wright*, 12 Jur. 732." In this country the same practice prevails. So in prize, salvage, and bottomry causes, the suit *in rem* is not defeated by a conversion of the property into money. *Flaherty* v. *Doane*, 1 Low. 148, 150, 151. This case seems fully to sustain the case at bar.

So the thirty-eighth rule in admiralty of the supreme court prescribes that "in cases of mariners' wages, or bottomry or salvage, or other proceedings *in rem*, where freight *or other proceeds of property* are attached to or bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and, if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and, upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto."

It seems clear, therefore, that there is a lien for wages enforceable in admiralty against the proceeds of a ship, or remnants of a ship, in whosesoever hands such proceeds may be found, as long as the proceeds can be distinctly traced. How is this lien to be enforced? The case above cited of *Flaherty* v. *Doane*, 1 Low. Dec. 148, asserts that it may be by a libel against the person in whose hands are the proceeds. To the same effect the supreme court in the above-cited case of *Sheppard* v. *Taylor*, 5 Pet. 675, 711, say: "Over the subject of seamen's wages, the admiralty has an undisputed jurisdiction *in rem*, as well as *in personam;* and, wherever the lien for the wages exists and attaches upon proceeds, it is the familiar practice of that court to exert its jurisdiction over them, by way of monition to the parties holding the proceeds. This is familiarly known in the cases of prize and bottomry and salvage, and is equally applicable to the case of wages." In the case above cited of *Insurance Co.* v. *The George*, Olcott, 89, the libel was *in rem* against the cargo and proceeds, and *in personam* against the respondents as holders of the part of the cargo unsold, and of the proceeds of the part of the cargo sold. Lastly,

we have rule 38 in admiralty of the supreme court. The result of these seems to be that the libel may be *in rem*, in form against the proceeds, with a petition under rule 38 to bring the proceeds into court; or it may be *in personam*, in form against the holder of the proceeds; but that in either case it is, in reality, an action *in rem*. In this case the libel is in form against the proceeds, and the holder of the proceeds, with a petition under rule 38. It may be concluded, therefore, that the court has obtained jurisdiction of the proceeds.

No sufficient cause having been shown why the proceeds, or so much thereof as are necessary to satisfy libelant's claim and the costs herein, should not be ordered paid into court, that order should be made. There is no dispute but that, if libelant has a lien on the proceeds enforceable in this court in this proceeding, he should have a decree, and there is no dispute as to the amount. There is therefore no necessity to refer the case for computation.

H. D. Goulder, for respondent.

Upon the questions whether this money was the proceeds of the vessel, and whether libelant had a lien thereon, WELKER, J., found that the money in the hands of Goulder was the proceeds of the sale of the remnants of the vessel; and that the libelant had a lien upon the said proceeds in the hands of Goulder, the same as he would have had against the vessel for his unpaid wages, and was not bound to receive the *pro rata* amount thereof; and decreed that Goulder should pay to him the amount of his wages.

THE C. H. SEUFF.[1]

NEW YORK, L. E. & W. R. Co. *v.* THE C. H. SEUFF.

(*District Court, S. D. New York.* June 21, 1887.)

1. COLLISION—TOW AND FERRY BOAT—RULE OF THE STARBOARD HAND—SPECIAL RULE—DUTY TO STOP AND BACK—RULE 21.

As the tug S. was coming down the North river, she saw, according to her witnesses, the green light of the ferry-boat P., some two points on her starboard bow. She whistled twice, and the P. once, whereupon the S. stopped and backed. The witnesses for the ferry-boat testified that they saw ahead the green light of the S., a little off the port bow; that one whistle was given her, and then a second single blast, to which the S. replied with two; that at the last signal the P. had commenced to round into her slip, and she continued on at full speed, until struck by a railroad float which the S. was towing. The rounding course of the ferry-boat was known to the pilot of the S. *Held* that, as the ferry-boat and her course were recognized by the S., the latter was bound to have avoided her, not only under the general rule of the starboard hand, but also under the special rule relating to ferry-boats approaching their slips; and, for attempting to cross ahead of the P., the S. was in fault. *Held, also*, that the continued view of the green light of the S. on about the same bearing should have indicated to the P. that the S. was swinging across her course, and was such evidence of "risk of collision" as made it obligatory upon the P. to stop and back, under rules 21 and 24; that for failure to do so she was also in fault.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

2. SAME—RIGHT OF WAY.

Though a boat having the right of way may keep her course, she is not absolved from stopping and backing, when there is risk of collision.

Wilcox, Adams & Macklin, for libelant.
Hill, Wing & Shoudy, for claimant.

BROWN, J. At a few minutes past 7 P. M., in the evening of October 12, 1885, as the large steam ferry-boat Pavonia, bound from Pavonia ferry, Jersey City to New York, was rounding to make her slip at Twenty-Third street, North river, she was struck near her wheel-house by the starboard bow of a large railroad float, coming down river in tow and alongside of the steam-tug Charles H. Seuff. Both boats sustained some damage. The testimony is quite irreconcilable as to the general bearing of the boats from each other, and the lights that were visible by each. The conflict, however, can be partly explained by the different positions of the boats at different times, and the probably imperfect statement in regard to the lights that were visible during the entire time they ought to have been seen. There is considerable difference in the estimate of the distance of the place of collision from the New York shore. It was probably from 600 to 800 feet, and abreast of Twentieth or Twenty-First street. The witnesses all agree that the current was ebb, except near the New York shore.

Numerous witnesses for the Pavonia testify that after leaving Pavonia ferry, which is one and three-quarters miles further down the river than Twenty-Third street ferry, the ferry-boat worked gradually up and across the river, until, when abreast of Thirteenth street, she was within about 400 or 500 feet of the New York shore; that there her wheel was starboarded somewhat, so as to haul off a little further from the shore, preparatory to rounding into the slip at Twenty-Third street; that, when opposite about Sixteenth street, the green and white lights of the Seuff were seen about two points off the port bow, to the westward of the middle of the river, and from a quarter to half a mile distant; that a signal of one whistle was given her, but, not receiving any answer, a second similar whistle was given soon afterwards, to which a reply of two blasts from the Seuff was received; that no other signals were given or heard; that the Pavonia, at the last signal, had commenced to round to make her slip, and continued on at full speed, or about 10 or 11 knots, until the collision, all the time seeing the green-colored light only of the Seuff, which seemed to be following them up to the eastward.

The witnesses on the part of the Seuff state that, coming out from Thirty-Third street pier, after passing to the westward of a man of war anchored nearly in mid-river off Twenty-Sixth street, she headed nearly down river, and only a little to the eastward, and, when off Twenty-Third street, saw the green light of the Pavonia a couple of points on her starboard bow; that she gave the Pavonia a signal of two whistles, and got an answer of one blast, whereupon she slowed and stopped, and backed until the collision, when as she claimed her headway was stopped.

The pilot of the Seuff was familiar with the route of the Pavonia ferry-boats; he recognized the Pavonia, and knew her destination, and the general ordinary course of such boats in rounding into the slip.

It is probable that the green light only of the Pavonia may have been visible to the Seuff for a few minutes, while she was under a starboard helm in going above Thirteenth street; but before that her red light only, or possibly both colored lights, must have been visible to the Seuff as she came from Twenty-Sixth street downward. But whatever may have been the light seen at that moment, as the Pavonia and her destination were recognized, her *course* was the turn necessary for her to take in entering her slip as usually practiced. The Seuff, according to her own testimony, had her on the starboard hand, and was bound to avoid her under the general rule, as well also as under the special rule applicable to ferry-boats approaching their slips. *The John S. Darcy*, 29 Fed. Rep. 644, 647, and cases there cited.

The Seuff, being at a safe distance, near the middle of the river, in starboarding her wheel, as she manifestly did in order to come nearer to the New York shore, voluntarily, and without justifiable cause, undertook to cross the known and necessary path of the Pavonia in making her slip. The pilot probably thought the Pavonia was sufficiently distant to enable him to do this safely. He was mistaken, though he starboarded so much as to bring the tug and tow considerably out of her course to the eastward at the time of the collision. There was plenty of room to the westward unobstructed, and he had no reason to suppose that the Pavonia would continue so far out in the stream as to make any difficulty in his passing her port to port. If she was at any time two or three points on the Seuff's starboard bow, I am satisfied it was only because the Seuff was headed considerably more than her witnesses admit towards the New York shore. I must hold the Seuff, therefore, to blame for undertaking to cross the known course of the ferry-boat, instead of keeping out of her way, as she should have done. *The John S. Darcy*, *supra*.

While the principal fault is, doubtless, chargeable upon the Seuff, for the reason above stated, I find it impossible to hold the Pavonia free from blame, keeping in view the stringent obligations to avoid collisions and other perils to life and property which this court can never relax. For a considerable time before the collision the green light of the Seuff was seen from the ferry-boat to continue upon about the same bearing. This was evidence to the Pavonia for a considerable time that the Seuff was swinging to the eastward, since otherwise the Seuff must have broadened off the Pavonia's bow. The courses of the two boats were therefore clearly crossing, and the continued absence of the Seuff's red light from sight, when the boats had approached within a quarter of a mile of each other, it seems to me, was such clear evidence of a "risk of collision" as made it obligatory upon the ferry-boat to stop and back, under the twenty-first rule of navigation. Though the Pavonia might "keep her course," she was not absolved from backing, as required by that rule and by rule 24, when that became necessary in order to avoid collision.

The Galileo, 28 Fed. Rep. 469, 473; *The J. S. Darcy*, *supra*; *The Aurania*, 29 Fed. Rep. 98, 124.

A vessel cannot be held blameless in disregarding a statutory rule, except where it is entirely clear that a timely obedience of the rule would not have avoided the collision, and that the only chance of escaping collision, or of lessening the damage, was a departure from the statutory requirement. This is by no means clear in this case. It must, moreover, be inferred from the testimony that the inspector's rule requiring an exchange of whistles when vessels come within half a mile of each other was not promptly observed; nor could there have been a seasonable repetition of signals by the Pavonia, as was required, on the Seuff's failure to reply, before the two blasts from the Seuff, when the collision was so near. The damages and costs must therefore be divided.

THE ALFREDO.[1]

SPRAKER and others *v.* THE ALFREDO.

(*Circuit Court, E. D. New York.* August 18, 1887.)

COLLISION—SAILING VESSEL—HOVE TO—FOG SIGNALS.

A sailing vessel, when hove to in a fog, should ring a bell, and not blow a horn

Goodrich, Deady & Goodrich, for libelants and appellants.
Butler, Stillman & Hubbard, for claimants and appellees.

The opinion of the district court in this case (30 Fed. Rep. 842) affirmed without opinion.

THE KANAWHA.[1]

HIGGINS and others *v.* THE KANAWHA.

(*Circuit Court, E. D. New York.* August 17, 1887.)

COLLISION—STEAMER AND SCHOONER—CHANGE OF COURSE—EVIDENCE.

As a schooner was approaching New York harbor, she was run into and sunk by the steamer K. The schooner's witnesses testified that from the time the steamer's lights were sighted, the schooner's course was never altered until the collision, and that her red light was continually exhibited to the steamer. The evidence for the K. showed that the green light of the schooner was first seen a little on the steamer's port bow, whereupon the latter ported; that, when the schooner's light had come to bear over the starboard bow of the steamer, the schooner ported, and this change of helm brought her under the bows of the K. *Held*, that the schooner was alone responsible for the collision.

Frederick Dodge, for libelants and appellants.
R. D. Benedict, for claimants and appellees.

The opinion of the district court in this case (28 Fed. Rep. 329) affirmed without opinion.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

In the Matter of the APPLICATION OF THE PACIFIC RAILWAY COMMISSION, etc.

(*Circuit Court, N. D. California.* August 29, 1887.)

1. CONSTITUTIONAL LAW—JUDICIAL POWERS—PACIFIC RAILWAY COMMISSION.
The Pacific Railway Commission is not a judicial body, and possesses no judicial powers under the act of congress of March 3, 1887, creating it, and can determine no rights of the government, or of the corporations whose affairs it is appointed to investigate.

2. SAME—POWER OF CONGRESS—PRODUCTION OF PRIVATE PAPERS.
Congress cannot compel the production of private books and papers of citizens for its inspection, except in the course of judicial proceedings, or in suits instituted for that purpose, and then only upon averments that its rights in some way depend upon evidence therein contained.

3. UNITED STATES—POWER TO SUE—COURTS.
The courts are open to the United States as to private parties to secure protection for their legal rights and interests, by regular proceedings.

4. CONSTITUTIONAL LAW—POWER OF CONGRESS—INVESTIGATION BY COMMISSION.
Congress cannot empower a commission to investigate the private affairs, books, and papers of the officers and employes of corporations indebted to the government, as to their relations to other companies with which such corporations have had dealings, except so far as such officers and employes are willing to submit the same for inspection; and the investigation of the Pacific Railway Commission into the affairs of officers and employes of the Pacific Railway Companies under the act of March 3, 1887, is limited to that extent.

5. SAME—EXPENDITURES OF CENTRAL PACIFIC RAILROAD COMPANY.
The United States have no interest in expenditures of the Central Pacific Railroad Company under vouchers which have not been charged against the government in the accounts between them; and the Pacific Railway Commission under the act of congress of March 3, 1887, has no power to investigate such expenditures against the will of the company and its officers.

6. SAME—JUDICIAL POWERS.
The judicial power of the United States is limited to "cases" and "controversies" enumerated in article 3, § 1, Const., as modified by the eleventh amendment, and to petitions on *habeas corpus*, and cannot be extended by congress; and by such "cases" and "controversies" are meant the claims of litigants brought for determination by regular judicial proceedings established by law or custom.

7. SAME—LEGISLATIVE POWER—INVESTIGATIONS—COURTS.
The judicial department is independent of the legislative, in the federal government, and congress cannot make the courts its instruments in conducting mere legislative investigations.

8. SAME.
The power of the United States courts to authorize the taking of depositions on letters rogatory from courts of foreign jurisdictions exists by international comity; but no comity of any kind can be invoked by a mere investigating committee appointed by congress.

9. CENTRAL PACIFIC RAILROAD COMPANY—STATE CORPORATION—FEDERAL CONTROL.
The Central Pacific Railroad Company is a state corporation, not subject to federal control, any further than a natural person similarly situated would be. Per SAWYER, J.

SAME—LAND GRANTS—BONDS FROM GOVERNMENT.
The Central Pacific Railroad Company is absolute owner of the lands and bonds granted to it by the government, having complied with the act making

the grant, subject to the lien of the government to secure its advances, in the same way and to the same extent as a natural person in like situation. Per SAWYER, J.

11. SAME—RELATION TO UNITED STATES—DEBTOR AND CREDITOR.
The relation of creditor and debtor exists between the United States and the Central Pacific Railroad Company, under the act granting aid to the latter, with like force and effect as if both were natural persons, the relation being private, and having nothing to do with the power of the government as sovereign. Per SAWYER, J.

12. SAME—INVESTIGATION BY UNITED STATES.
The United States, as creditor, cannot institute a compulsory investigation into the private affairs of the Central Pacific Railroad Company, or require it to exhibit its books and papers for inspection in any other way, or to any greater extent, than would be lawful in the case of private creditors and debtors. Per SAWYER, J.

13. SAME—JUDICIAL PROCEDURE—LEGISLATIVE COMMISSION.
The United States, as creditor, have the same remedy as a private creditor, and no other, to compel payment of any moneys due them from the Central Pacific Railroad Company, as their debtor, or to prevent the latter from wasting its assets before the debt matures, and that remedy, if any, must be by a regular judicial proceeding in due course of law, and congress has no power to institute a roving, legislative inquisition into the affairs of the company to ascertain what it has done or is doing with its money. Per SAWYER, J.

(*Syllabus by the Court.*)

This is an application of the Pacific Railway Commission, created under the act of congress of March 3, 1887, "Authorizing an investigation of the books, accounts, and methods of railroads which have received aid from the United States, and for other purposes," for an order requiring a witness before it to answer certain interrogatories propounded to him. That act authorizes the president to appoint three commissioners to examine the books, papers, and methods of all railroad companies which have received aid in bonds from the government, and in terms invests them with power to make a searching investigation into the working and financial management, business, and affairs of the aided companies; and also to ascertain and report "whether any of the directors, officers, or employes of said companies, respectively, have been, or are now, directly or indirectly, interested, and to what amount or extent, in any other railroad, steam-ship, telegraph, express, mining, construction, or other business company or corporation, and with which any agreements, undertakings, or leases have been made or entered into; what amounts of money or credit have been loaned by any of said companies to any person or corporation; what amounts of money or credit have been or are now borrowed by any of said companies, giving names of lenders and the purposes for which said sums have been or are now required; what amounts of money or other valuable consideration, such as stocks, bonds, passes, and so forth, have been expended or paid out by said companies, whether for lawful or unlawful purposes, but for which sufficient and detailed vouchers have not been given or filed with the records of said company; and, further, to inquire and report whether said companies, or either of them, or their officers or agents, have paid any money or other valuable consideration, or done any other act or thing, for the purpose of influencing legislation."

It is difficult to express in general terms the extent to which the commissioners are required to go in their inquisition into the business and affairs of the aided companies; or the extent to which they may not go into other business and affairs of its directors, officers, and employes. The act itself must be read to form any conception of the all-pervading character of the scrutiny it exacts of them. And it provides that the commissioners, or either of them, shall have the power "to require the attendance and testimony of witnesses, and the production of all books, papers, contracts, agreements, and documents relating to the matter under investigation, and to administer oaths; and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of books, papers, and documents." And it declares that "any of the circuit or district courts of the United States within the jurisdiction of which such inquiry is carried on, may, in case of contumacy or refusal to obey a subpœna issued to any person, issue an order requiring any such person to appear before said commissioners, or either of them, as the case may be, and produce books and papers, if so ordered, and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof." And also that "the claim that any such testimony or evidence may tend to criminate the person giving such evidence, shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

In the discharge of the duties imposed upon them, the commissioners have attended at San Francisco, and called before them as a witness Leland Stanford, who is now, and has been from its organization, president of the Central Pacific Railroad Company, one of the companies which received aid in bonds from the government; and on the tenth of August, while he was under examination respecting the affairs of that company, a number of vouchers purporting to represent the expenditure of moneys belonging to it were produced and verified. These vouchers, as stated by the commissioners, represented the aggregate sum of $733,725.68, which had been expended by Mr. Stanford between November 9, 1870, and December 21, 1880, and by him charged to the company, and by the company subsequently reimbursed to him. The persons to whom the moneys were paid, and the objects to which they had been applied, do not appear upon the face of the vouchers, except that the objects are stated to have been for "general expense account," or for "legal services," and except, also, that in a few instances the initials of persons to whom the money is purported to have been paid are given. One of the vouchers (No. 2,569½) represented the expenditure of $171,781.89. It reads as follows:

C. P. R. R. Co. to Leland Stanford, *Dr.*

To cash paid on account of general expenses to December 31, 1875,	$137,365 50
To cash paid on account of general expenses to December 31, 1875,	34,416 39
	$171,781 89

This was indorsed, in addition to its number amount, and a statement of its general character, as follows:

"Allowed February 7, 1876, by board of directors, folio 153.
"I certify that the within account, amounting to $171,781.89, is correct.
"LELAND STANFORD."

When under examination Mr. Stanford was asked to explain in detail the character of the expenditures covered by this voucher, he replied that he had no recollection of its contents, but presumed it was made up of many items. He then proceeded to explain at great length the manner in which he did business for the company in negotiating loans and incurring expenditures, which was briefly this: The loans were generally negotiated in San Francisco, and the payment of expenses incurred by him was frequently made there, though for many years the office of the company was at Sacramento. His payments were usually in checks drawn in his own name. The check-books, with loose *memoranda* kept by him, were handed from time to time to some one connected with the office, by whom a general voucher was made up embracing the several expenditures incurred, and the voucher was then presented by the witness to the directors of the company, and by them approved. The witness kept no accounts of his several expenditures, except loose *memoranda* and his check-books, from which the vouchers were made up; and he supposed the voucher in question was thus made up. He could not, at that date, state the items which made up the several accounts, but he had no doubt that he explained the matter to the company when the voucher was presented. To the question, "What explanation did you give the company?" the witness answered as follows: "Well, as I do not remember the items of it, I cannot remember, of course, what explanation I may have given to the company. I don't think I went into details of these things to the company, further than to say I found it necessary to expend for the general interest of the company so much; and I do not think that they ever questioned me particularly as to the wisdom of the expenditure."

The commission then asked the witness this question: "Was any part of the $171,000 (the sum named in this bill that I have handed to you, and that you have) paid for the purpose of influencing legislation?" The counsel present acting for the railroad company objected to the question, for the reason that the witness had said that he did not remember what constituted the items composing the voucher; and stated that upon that point (of influencing legislation) any question the commission has asked, or might be disposed to ask, the witness would be advised not to answer, upon the ground that the company is willing to account to the government for its proportion of any voucher that is produced, or of any entry upon the books of the company that is unexplained, and therefore it will not make any difference what is done with the money,—whether it was thrown into the sea, or wasted in any manner or form. The chairman of the commission repeated the question in a modified form as follows: "Was any part of the sum named in the voucher submitted to you

paid to any agent or individual for the purpose of influencing legislation?" To this the witness answered as follows: "I told you I did not know anything about this, but then I shall act upon the advice of my counsel. I don't suppose it can make any possible difference as long as we account for the money. If the government is not satisfied with the vouchers which we present, whether the money was expended or wasted, or anything of the kind, it can make no possible difference, because, if it went into the sea, if I had used this money improperly or thrown it away, I might be accountable to the stockholders for my trust; but the government cannot have any more than the money, and the company is willing to account for that if you are not satisfied with the action." The witness, therefore, under advice of counsel, declined to give any further answer.

The chairman also asked this question: "Are you able to state to the commission that any of the money was paid for illegitimate or corrupt purposes; that is, to corrupt the legislature of the state of California, or any other state legislature, or the congress of the United States?" and to which the witness answered as follows: "I have told you what I know, that I do not remember about that account; but I can say this: that I never corrupted a member of the legislature in my life, and I do not know that any of my agents ever did. So far as congress is concerned, I saw a statement that the board of directors allowed my account for expenditures made in Washington or in various places. I do not know that I ever had any occasion to pay out any money at Washington except for my own private expenses."

The witness, upon further examination, testified that his check-books in which he drew his checks for the expenditures were destroyed; that it had always been his habit about once a year to have a "clean up;" and when he wanted to go away he would overhaul his papers, and what he did not want he would destroy; that he had been to Europe three times within the last few years, and each time he had "cleaned up," leaving only such papers as, in case he might not return, he was willing that other people might see.

Notwithstanding the answer of the witness that he could not state the items of the voucher, and had no recollection of any of them, he was repeatedly asked substantially the same question, as though by its repetition a different answer might be obtained. The answer was, however, substantially the same in every instance. Other vouchers of a similar kind presented by the witness to the company were produced and verified, and with respect to them the witness said as follows: "I suggest to the commission that there is not in all that class of bills to-day a single item that I positively remember. I could not tell the amount, nor when these bills were credited, excepting I went to the books. I cannot tell of a single item that went to make up the amounts. Let my answer as to this and to the other vouchers of that class be the same as I have made to the other (the first) voucher; and I will take that position generally." Yet the commissioners felt it their duty to ask specifically as to each voucher substantially the same question, at which some feeling ap-

pears to have been excited, as the following passage from the examination upon one of the vouchers discloses:

"*Chairman of the Commission.* Was any part of the sum expended through any agent or individual for the purpose of influencing legislation? *Answer.* Not to my knowledge. I have told you already. I do not know the object of your examining me in this way. I have told you that I do not know anything about it, and I have told you that, I think, three or four times. *The Chairman.* I want you to distinctly understand that I am going to ask you as to each of these vouchers, and I will put it on the record. *The Witness.* And I want you to distinctly understand that I shall exercise my discretion about it. *The Chairman.* That is your right, and it is my right and duty, sworn to, to ask you. *The Witness.* It is your right and your duty to be a gentleman in asking questions. *The Chairman.* Well, if I have not been, I will apologize. *The Witness.* Well, I think you have occasion to apologize for asking such questions as that over and over again. *The Chairman.* I will repeat my question, and you can decline just as you have done. I am going through all of these vouchers just in this way, so that there will be no mistake in the future."

The commissioners now ask in their petition that the witness be summoned to show cause why he should not be required to answer the interrogatories whether any part of the sums named in the several vouchers was paid for the purpose of influencing legislation, which he has declined to do except in the manner stated.

Subsequently, interrogatories were propounded to Mr. Stanford inquiring whether any portion of the moneys covered by the several vouchers produced, following the first one, was paid to certain parties, who were named, for the purpose of using the same in connection with measures pending in the legislature. The witness declined to answer these interrogatories, and the commissioners also ask in their petition that he be summoned to show cause why he should not be required to answer them.

It was also in evidence before the commission that in December, 1875, the legislature of California was in session in the city of Sacramento, and that it was the custom of the railroad company to be represented before its committees. The commission thereupon inquired as follows:

"*The Chairman.* How many representatives did you have there? *Answer.* I used to generally go there and spend a good deal of time when there was any very hostile legislation going on or proposed. I was up there, and sometimes had one of our people, and sometimes another,—sometimes one lawyer, and sometimes another. *The Chairman.* Please name the lawyers who were in the habit of attending the legislature with you. *A.* Unless it is really necessary, I do not want to go into the detail of anything of that kind. We often employed agents in a confidential character, and it was not advisable that others should know that they were in our service. I do not want to answer unless I am compelled to answer. I want to give you all the information that it is in our power, by which you may understand under what obligations we are to the government. If we have wrongfully disposed of any of the assets of the Central Pacific Company that could possibly affect its relation with the government, I want you to know it; but where it is a matter merely between myself and my stockholders and directors, and it cannot make any difference in our relations to the government, or what the government may want

to claim because of the lack of proper vouchers upon which to base their five or twenty-five per cent., I do not want to do it. I cannot conceive that the questions you are asking me can possibly affect our account with the government as long as we are willing to pay. If you are not satisfied with these vouchers, we say to you, say so, and we will account for them as money on hand."

To the question subsequently repeated the witness declined to answer, and the commissioners pray in their petition that the witness also be required by order of the court to show cause why he shall not be required to answer this interrogatory. Upon the filing of the petition, which was signed and verified by the oath of the commissioners, an order was entered as prayed that the witness show cause before the court, on a day designated, why he should not be required to appear before them and answer the interrogatories propounded.

The witness appeared in response to the order, and filed his answer to the petition, in which he gives at some length the history of the construction of the road of the company, and of the difficulties its projectors had to encounter, and mentions the aid in bonds and lands received from the government, and the annual reports made to the secretary of the treasury of its condition and management. He states that since its organization in June, 1861, he has been its president, and, after describing the manner of doing business, adds:

"In this way I have taken part in transacting the business of the company for a period now extending over (25) twenty-five years, and in point of value aggregating upwards of four hundred millions of dollars. As the business took place I was cognizant of it; but owing to its multiplicity, and the pressure of matters more important than mere detail, as well as the lapse of time, I am now no longer able to recall many of the matters with which I was personally so familiar."

He also states that by the decision of the supreme court the relation between the United States and the railroad company is that of creditor and debtor, and that the rights of both are those springing from that relation; that the examination made by the commission has not only extended to the affairs of the Central Pacific Railroad Company, but has extended to a searching investigation of the affairs of all the consolidated and allied companies connected with that corporation; and that their affairs have been examined into, not only by the experts of the commission, but the commissioners themselves, and their business relations have been exposed to the public and the prying curiosity of rival business competitors; and that the commission insists upon investigating matters with which the government has and can have no possible concern; that the disposition the company may have made of such portion of its assets or earnings as the government has not and never had any interest in is of this character; and yet the commission insists upon answers to questions respecting such disposition which can have no possible effect upon the relations between the company and the government, and can only tend to cast suspicion upon parties whose names may be mentioned; and as the subjects in respect to which these questions

are propounded are of an exclusively private character, in no way affecting the interests of the government, neither the company nor its officers feel called upon to answer.

The respondent also makes the extraordinary statement that he is constrained to this course "as the gentlemen of the commission have distinctly and repeatedly avowed, in the course of their examination, that they do not regard themselves bound in such examination by the ordinary rules of evidence; that they would receive hearsay and *ex parte* statements, surmises, suspicions, and all character of information that might be called to their attention;" and that, during the course of his examination, it had more than once transpired that he was examined upon charges made in pleadings and proceedings instituted against the company based upon suspicion and surmises, and in many cases without actual foundation; that questions had been propounded, and a line of examination pursued manifestly prompted by disaffected and hostile parties, whose aim was more the pursuit of personal enmity of a private character than the interests of the public at large or the ends of justice; that to answer any of the objectionable questions would necessarily give rise to the implication that all persons whose names may be mentioned in the questions to which answers are declined are guilty of the acts of commission which is implied in the bare asking of the questions; that in his testimony he had said in substance, and now repeats it, that he never corrupted, or attempted to corrupt, any member of the legislature, or any member of congress, or any public official, and never authorized any agent to do so; that all the claims covered by the vouchers referred to have received, not only the approval of the board of directors of the Central Pacific Railroad Company, but likewise the approval of the stockholders of that company; that all parties who could in anywise legally or equitably be affected by the disbursements embraced in them were fully satisfied therewith, and have ratified and approved of the same.

And in addition the respondent states that in the conduct and management of a business of the magnitude of the Central Pacific Railroad Company, and the various corporations consolidated and allied therewith, it is impossible not from time to time to have to do business involving disbursements which every dictate of business prudence will not admit of being made public; that arrangements of a private character, names of parties not publicly known, and the disclosures of which could only result in defeating the ends in view, and exposing the persons so named to suspicion and obloquy, would forbid making the same public, either upon the archives of the company, or before a public commission; that this course of policy is not only sanctioned by ordinary experience in business life, but the government of the United States and the government of the state of California, as well as the government of the city and county of San Francisco, severally, allow to their chief magistrates money, the investment of which is committed exclusively to their judgment and discretion, and for which detailed vouchers are never required.

The respondent further adds that the commission deemed it its duty to propound questions involving criminality on his part, and on the part of the persons whose names were mentioned in such questions, answers to which, for the reasons stated, he has felt constrained to decline to make; that, acting not only on his own behalf, but on behalf of those whose interests as stockholders of the Central Pacific Railroad Company are committed to his charge, he feels bound to decline to answer them unless by the court he is otherwise directed.

The purport of the answer of the respondent is that the government has no legal interest in the matters in relation to which the interrogatories are propounded; that he has answered the interrogatories so far as it was in his power to do so, not having any recollection of the items for which the vouchers were made up, at this distant day from the transactions to which they relate; and that he is shielded by the constitution from answering questions implying criminality in his conduct, and calculated to cast aspersions upon others.

The district attorney of the United States, acting for the commissioners, moves for a peremptory order upon the witness to compel him to answer the interrogatories, notwithstanding his answer to the order to show cause.

T. I. Bergin and *L. D. McKisick*, for Leland Stanford.

John T. Carey, U. S. Dist. Atty., and *Henry C. McPike*, Asst. U. S. Dist. Atty., for the Railway Commission.

FIELD, Circuit Justice, after filing the above statement of facts, delivered the opinion of the court, as follows:

The motion for a peremptory order upon the witness to answer the interrogatories propounded by the railway commission has been fully argued; and everything which could be said in its favor has been ably presented by the United States attorney, either in oral or printed arguments. In resisting the motion, counsel of the respondent have not confined themselves to a discussion of the propriety and necessity of the interrogatories, and the sufficiency of the answers given by him; but they have assailed the validity of the act creating the commission, so far as it authorizes an examination into the private affairs of the directors, officers, and employes of the Central Pacific Railroad Company, and confers the right to invoke the power of the federal courts in aid of the general investigation directed. Impressed with the gravity of the questions presented, we have given to them all the consideration in our power.

The Pacific Railway Commission, created under the act of congress of March 3, 1887, is not a judicial body; it possesses no judicial powers; it can determine no rights of the government, or of the companies whose affairs it investigates. Those rights will remain the subject of judicial inquiry and determination as fully as though the commission had never been created; and in such inquiry its report to the president of its action will not be even admissible as evidence of any of the matters investigated. It is a mere board of inquiry, directed to obtain information upon certain matters, and report the result of its investigations to the president, who is to lay the same before congress. In the progress of its

investigations, and in the furtherance of them, it is in terms authorized to invoke the aid of the courts of the United States in requiring the attendance and testimony of witnesses, and the production of books, papers, and documents. And the act provides that the circuit or district court of the United States, within the jurisdiction of which the inquiry of the commission is had, in case of contumacy or refusal of any person to obey a subpœna to him, may issue an order requiring such person to appear before the commissioners, and produce books and papers, and give evidence touching the matters in question.

The investigation directed is to be distinguished from the inquiries authorized upon taking the census. The constitution provides for an enumeration of the inhabitants of the states at regular periods, in order to furnish a basis for the apportionment of representatives, and, in connection with the ascertainment of the number of inhabitants, the act of congress provides for certain inquiries as to their age, birth, marriage, occupation, and respecting some other matters of general interest, and for a refusal of any one to answer them a small penalty is imposed. Rev. St. § 2171. There is no attempt in such inquiries to pry into the private affairs and papers of any one, nor are the courts called upon to enforce answers to them. Similar inquiries usually accompany the taking of a census of every country, and are not deemed to encroach upon the rights of the citizen. And in addition to the inquiries usually accompanying the taking of a census, there is no doubt that congress may authorize a commission to obtain information upon any subject which, in its judgment, it may be important to possess. It may inquire into the extent of the productions of the country of every kind, natural and artificial, and seek information as to the habits, business, and even amusements of the people. But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters. In the pursuit of knowledge it cannot compel the production of the private books and papers of the citizen for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases only upon averments that its rights are in some way dependent for enforcement upon the evidence those books and papers contain.

Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value. The law provides for the compulsory production, in the progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and also, in certain cases, for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained, and their contents made known, against the will of the owners.

In the recent case of *Boyd* v. *U. S.*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, the supreme court held that a provision of a law of congress, which

authorized a court of the United States in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or that the allegations of the attorney respecting them should be taken as confessed, was unconstitutional and void as applied to suits for penalties or to establish a forfeiture of the party's goods. The court, speaking by Mr. Justice BRADLEY, said:

"Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

The language thus used had reference, it is true, to the compulsory production of papers as a foundation for criminal proceedings, but it is applicable to any such production of the private books and papers of a party otherwise than in the course of judicial proceedings, or a direct suit for that purpose. It is the forcible intrusion into, and compulsory exposure of, one's private affairs and papers, without judicial process, or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans.

In his opinion in the celebrated case of *Entick* v. *Carrington*, reported at length in 19 How. State Tr. 1029, Lord CAMDEN said:

"Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot, by the laws of England, be guilty of a trespass, yet, where papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society."

Compulsory process to produce such papers, not in a judicial proceeding, but before a commissioner of inquiry, is as subversive of "all the comforts of society" as their seizure under the general warrant condemned in that case. The principles laid down in the opinion of Lord CAMDEN, said the supreme court of the United States, "affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court with its adventitious circumstances; they apply to all invasions on the part of the government, and its employes, of the sanctity of man's home and the privacies of life."

In *Kilbourn* v. *Thompson*, 103 U. S. 168, we have a decision of the supreme court of the United States that neither house of congress has the power to make inquiries into the private affairs of the citizen; that is, to compel exposure of such affairs. That case was this: The firm of Jay Cooke & Co. were debtors of the United States, and it was alleged that they were interested in a "real-estate pool" in the city of Washington, and that the trustee of their estate and effects had made a settlement of their interests with the associates of the firm to the disadvan-

tage and loss of numerous creditors, including the government of the United States. The house of representatives, by a resolution reciting these facts, authorized the speaker to appoint a committee of five to inquire into the matter and history of said "real-estate pool," and the character of the settlement, with the amount of the property involved, in which Jay Cooke & Co. were interested, and the amount paid, or to be paid, in said settlement, with power to send for persons and papers, and report to the house. The committee was appointed and organized, and proceeded to make the inquiry directed. A subpœna was issued to one Kilbourn, commanding him to appear before the committee to testify and be examined touching the matters to be inquired into, and to bring with him certain designated records, papers, and maps relating to the inquiry. Kilbourn appeared before the committee, and was asked to state the names of the five members of the real-estate pool, and where each resided, and he refused to answer the question, or to produce the books which had been required. The committee reported the matter to the house, and it ordered the speaker to issue his warrant directed to the sergeant-at-arms to arrest Kilbourn, and bring him before the bar of the house to answer why he should not be punished for contempt. On being brought before the house, Kilbourn persisted in his refusal to answer the question, and to produce the books and papers required. He was thereupon held to be in contempt, and committed to the custody of the sergeant-at-arms until he should signify his willingness to appear before the committee and answer the question and obey the *subpœna duces tecum;* and it was ordered that in the mean time the sergeant-at-arms should cause him to be confined in the common jail of the District of Columbia. He was accordingly confined in that jail for 45 days, when he was released on *habeas corpus* by the chief justice of the supreme court of the District of Columbia. Upon his release he sued the speaker of the house, the members of the committee, and the sergeant-at-arms for his forcible arrest and confinement. The defendants pleaded the facts recited, to which plea the plaintiff demurred. The demurrer was overruled, and judgment ordered for the defendants. On a writ of error to the supreme court the judgment was affirmed as to all the defendants except the sergeant-at-arms. They, being members of the house, were held to be protected from prosecution for their action. But, as to Thompson, the judgment was reversed, and the cause remanded for further proceedings. In the supreme court the questions involved received great consideration; and it was held that the subject-matter of the investigation was judicial, and not legislative, and that there was no power in congress, or in either house, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, to investigate the affairs of that partnership, and, consequently, no authority to compel a witness to testify on the subject.

"The house of representatives," said the court, "has the sole right to impeach officers of the government, and the senate to try them. Were the question of such impeachment before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to

compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases. Whether the power of punishment in either house by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either house, unless his testimony is required in a matter into which that house has jurisdiction to inquire, *and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.*" And again: "If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could he had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the constitution to the judicial, and not to the legislative, department of the government. *We think it equally clear that the power asserted is judicial, and not legislative.*" And again: "The resolution adopted as a sequence of the preamble contains no hint of any intention of final action by congress on the subject. In all the argument on the case no suggestion has been made of what the house of representatives or the congress could have done in the way of remedying the wrong, or securing the creditors of Jay Cooke & Co., or even the United States. Was it to be simply a fruitless investigation into the personal affairs of individuals? *If so, the house of representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country.* By fruitless, we mean that it could result in no valid legislation on the subject to which the inquiry referred."

When the case went back to the supreme court of the District of Columbia, and was tried, the plaintiff recovered a verdict for $60,000 against the sergeant-at-arms. A new trial having been granted for excessive damages, the plaintiff recovered on the second trial a verdict for $37,500. This amount was subsequently reduced to $20,000, which was paid by order of congress, with interest and costs of suit. 23 St. at Large, 467; MacArthur & Mackey, 416, 432.

This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee. The courts are open to the United States as they are to the private citizen, and both can there secure, by regular proceedings, ample protection of all rights and interests which are entitled to protection under a government of a written constitution and laws.

The act of congress not only authorizes a searching investigation into the methods, affairs, and business of the Central Pacific Railroad Company, but it makes it the duty of the railway commission to inquire into, ascertain, and report whether any of the directors, officers, or employes of that company have been, or are now, directly or indirectly, interested, and to what extent, in any railroad, steam-ship, telegraph, express, mining, construction, *or other business company or corporation*, and with which any

agreements, undertakings, or leases have been made or entered into. There are over 100 officers, principal and minor, of the Central Pacific Railroad Company, and nearly 5,000 employes. It is not unreasonable to suppose that a large portion of these have some interest, as stockholders or otherwise, in some other company or corporation with which the railway company may have an agreement of some kind, and it would be difficult to state the extent to which the explorations of the commission into the private affairs of these persons may not go if the mandate of the act could be fully carried out. But in accordance with the principles declared in the case of *Kilbourn* v. *Thompson*, and the equally important doctrines announced in *Boyd* v. *U. S.*, the commission is limited in its inquiries as to the interest of these directors, officers, and employes in any other business, company, or corporation to such matters as these persons may choose to disclose. They cannot be compelled to open their books, and expose such other business to the inspection and examination of the commission. They were not prohibited from engaging in any other lawful business because of their interest in and connection with the Central Pacific Railroad Company, and that other business might as well be the construction and management of other railroads as the planting of vines, or the raising of fruit, in which some of those directors and officers and employes have been in fact engaged. And they are entitled to the same protection and exemption from inquisitorial investigation into such business as any other citizens engaged in like business.

With reference to the vouchers respecting which the principal interrogatories are propounded, and to which we are asked to compel answers from the witness, it is conceded by the commission on this motion that the moneys covered by them were not charged against the United States in ascertaining the net earnings of the company. If such were the case, it is difficult to see what interest the United States can have in the disposition of those moneys. Be that as it may, the federal courts cannot, upon that concession, aid the commission in ascertaining how the moneys were expended. Those courts cannot become the instruments of the commission in furthering its investigation. Their power, its nature and extent, is defined by the constitution. The government established by that instrument is one of delegated powers, supreme in its prescribed sphere, but without authority beyond it. No department of it can exercise any powers not specifically enumerated or necessarily implied in those enumerated. Such is the teaching of all of our great jurists, and the tenth amendment declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Any legislation of congress beyond the limits of the powers delegated is an invasion of the rights reserved to the states or to the people, and is necessarily void. The first section of the third article of the constitution declares that "the judicial power of the United States shall be vested in one supreme court, and such inferior courts as congress may, from time to time, ordain and establish." The second section of the same article declares that "the ju-

dicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

This section was modified by the eleventh amendment, declaring that "the judicial power 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, or by citizens or subjects of any foreign state." As thus modified, the section states all the cases and controversies in which the judicial power of the United States can be exercised, except those arising on a petition for a writ of *habeas corpus*, which is regarded as a suit for one's personal freedom.[1] The judicial power of the United States is therefore vested in the courts, and can only be exercised by them in the cases and controversies enumerated, and in petitions for writs of *habeas corpus*. In no other proceedings can that power be invoked, and it is not competent for congress to require its exercise in any other way. Any act providing for such exercise would be a direct invasion of the rights reserved to the states or to the people; and it would be the duty of the court to declare it null and void. Story says, in his Commentaries on the Constitution, that "the functions of the judges of the courts of the United States are strictly and exclusively judicial. They cannot, therefore, be called upon to advise the president in any executive measures, or to give extrajudicial interpretations of law, or to act as commissioners in cases of pensions or other like proceedings." Section 1777.

The judicial article of the constitution mentions cases and controversies. The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive that the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall. 431, 432; 1 Tuck. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.

[1] NOTE BY THE COURT. Probably the supposed exception stated is not really one; and that cases arising on a petition for a writ of *habeas corpus* are included in those mentioned in the judiciary article. See Louisiana v. U. S., 8 Sup. Ct. Rep. —, decided by the supreme court since this opinion was rendered.

In *Osborn* v. *U. S.*, 9 Wheat. 819, the supreme court, speaking by Chief Justice MARSHALL, after quoting the third article of the constitution declaring the extent of the judicial power of the United States, said:

"This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. *That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.* It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States."

In his Commentaries on the Constitution, Mr. Justice Story says:

"It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the constitution, laws, and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. *When it has assumed such a form, it then becomes a case; and then, and not till then, the judicial power attaches to it.* A case, then, in the sense of this clause of the constitution, arises when some subject touching the constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law."

And Mr. Justice Story refers in a note to the speech of Marshall on the case of Robbins, in the house of representatives, before he became chief justice, which contains a clear statement of the conditions upon which the judicial power of the United States can be exercised. His language was:

"By extending the judicial power to all cases in law and equity, the constitution has never been understood to confer on that department any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit."

The proceedings to obtain testimony upon letters rogatory to be used in the courts of foreign countries is not, as suggested by counsel, an exception to this doctrine. There are certain powers inherent in all courts. The power to preserve order in their proceedings, and to punish for contempt of their authority, are instances of this kind. And by jurists and text writers the power of the courts of record of one country, as a matter of comity, to furnish assistance, so far as is consistent with their own jurisdiction, to the courts of another country, by taking the testimony of witnesses to be used in the foreign country, or by ordering it to be taken before a magistrate or commissioner, has also been classed among their inherent powers. "For by the law of nations," says Greenleaf, "courts of justice of different countries are bound mutually to aid and assist each other, for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the court before which the action is pending may send to the court within whose jurisdiction the witness resides a writ, either patent or close, usually termed a letter rogatory, or a commission *sub mutuæ vicissitudinis obtentu ac in juris subsidium*,

from those words contained in it. By this instrument the court abroad is informed of the pendency of the cause, and the names of the foreign witnesses, and is requested to cause their depositions to be taken in due course of law, for the furtherance of justice, *with an offer on the part of the tribunal making the request to do the like for the other in a similar case.*" Treatise on Evidence, vol. 1, § 320. The comity in behalf of which this power is exercised cannot, of course, be invoked by any mere investigating commission. And it would seem that, by act of congress, the power of the federal courts in this respect has been restricted to cases in which a foreign government is a party or has an interest. Rev. St. § 4071.[1]

The act of congress creating the railway commission in terms provides, as already stated, that it may invoke the aid of any circuit or district court to require the attendance of witnesses, and the production of books, papers, and documents relating to the subject of inquiry; and empowers the court, in case of contumacy or refusal of persons to obey subpœnas to them, to issue orders requiring them to appear before the commissioners, or either of them, and produce the books and papers ordered, and give evidence touching the matters in question, and to punish disobedience to its orders; and does not appear to leave any discretion in the matter with the court. It would seem as though congress intended that the court should make the orders sought upon the mere request of the commissioners, without regard to the nature of the inquiry. It is difficult to believe that it could have intended that the court should thus be the mere executor of the commissioners' will. And yet, if the commissioners are not bound, as they have asserted, by any rules of evidence in their investigations, and may receive hearsay, *ex parte* statements, and information of every character that may be brought to their attention, and the court is to aid them in this manner of investigation, there can be no room for the exercise of judgment as to the propriety of the questions asked, and the court is left merely to direct that the pleasure of the commissioners in the line of their inquiries be carried out. But if

[1] NOTE BY THE COURT. Nor is there anything in the jurisdiction exercised by the United States courts over proceedings of grand juries, or in aid of their deliberations, or in aid of proceedings to perpetuate testimony, which militates against the view taken in the opinion. The judicial power of the courts of the United States extending to the cases and controversies enumerated in the constitution, their jurisdiction necessarily covers all proceedings taken from the formal commencement of such cases and controversies to the execution of the judgments rendered therein. A certain class of offenders can only be prosecuted in the federal courts through the indictment or presentment of a grand jury. Article 5 of Amendments. Over, therefore, the proceedings of such bodies those courts can exercise jurisdiction, and in aid of their deliberations can issue process, and compel the attendance of witnesses, and require them to answer any proper questions propounded to them, and in case of refusal may punish them as for a contempt.

Proceedings to perpetuate testimony, where litigation is expected or apprehended, are within the ordinary jurisdiction of courts of equity, and come under the designation of "cases in equity" in the constitution. The nature and requisites of a bill filed for that purpose are fully described in Story, Eq. Pl. c. 7. It must state the subject in relation to which the plaintiff desires to preserve testimony, in what way he is interested in that subject, the names of the contemplated or apprehended litigants who are named as defendants, and the interests they have in the subject, or claim to have; and a subpœna must be issued thereon and served as in other cases in equity.

it was expected that the court, when its aid is invoked, should examine the subject of the inquiries to see their character, so as to be able to determine the propriety and pertinency of the questions, and the propriety and necessity of producing the books, papers, and documents asked for before the commission, then it would be called upon to exercise advisory functions in an administrative or political proceeding, or to exercise judicial power. If the former, they cannot be invested in the court; if the latter, the power can only be exercised in the cases or controversies enumerated in the constitution, or in cases of *habeas corpus*.

The provision of the act authorizing the courts to aid in the investigation in the manner indicated must therefore be adjudged void. The federal courts, under the constitution, cannot be made the aids to any investigation by a commission or a committee into the affairs of any one. If rights are to be protected or wrongs redressed by any investigation, it must be conducted by regular proceedings in the courts of justice in cases authorized by the constitution.

The inability of the courts of the United States to exercise power in any other than regular judicial proceedings was decided in *Hayburn's Case* as early as 1792. 2 Dall. 409. In March of that year, congress passed an act providing that invalid officers, soldiers, and seamen of the Revolution should be entitled to certain pensions proportionate to the extent of their disability, and devolved upon the circuit court of the United States of the district, where the invalids resided, the duty of examining the proofs presented of the nature and extent of the disability, and of determining what amount of their monthly pay would be equivalent to the disability ascertained, and to certify the same to the secretary of war, who was to place the names of the applicants returned on the pension list of the United States in conformity thereto, unless where he had cause to suspect imposition or mistake, in which case he was authorized to withhold the name of the applicant from the list, and report the same to congress at its next session. 1 St. at Large, 244, §§ 2, 4. Every circuit judge, except one who did not have the question before him, was of opinion that the law was unconstitutional and void. From a statement of Mr. Justice CURTIS, in a note appended to the report of the case, it would seem that the judges were of opinion that the power devolved upon them by the act was not judicial in the sense of the constitution, and, if judicial, that their decisions could not be subject to the revision of the secretary of war, or of the congress of the United States. Plainly, the power exercised by them in determining the extent to which the invalids were entitled to the pensions provided upon the proof produced was in its nature judicial, for it required examination of evidence and judgment thereon; but it was not judicial in the sense of the constitution, under which judicial power can be exercised only in the cases enumerated in that instrument. The judges forwarded their conclusions to President Washington, and the act was subsequently repealed.

A suit being afterwards brought against one Yale Todd to recover back the amount of a pension paid to him, the question of the validity of the act came before the supreme court, and judgment was rendered in favor

of the United States for the money. This case will be found stated at length by Chief Justice TANEY in a note to the report of *U. S.* v. *Ferreira*, 13 How. 52. "This decision," said that great chief justice, "has ever since been regarded as constitutional law, and followed by every department of the government; by the legislative and executive branches, as well as the judiciary." *Gordon* v. *U. S.*, 117 U. S. 697, 703.

The conclusion we have thus reached disposes of the petition of the railway commissioners, and renders it unnecessary to consider whether the interrogatories propounded were proper in themselves, or were sufficiently met by the answers given by Mr. Stanford, or whether any of them were open to objection for the assumptions they made, or the imputations they implied. It is enough that the federal courts cannot be made the instruments to aid the commissioners in their investigations. It also renders it unnecessary to make any comment upon the extraordinary position taken by them according to the statement of the respondent, to which we have referred, that they did not regard themselves bound in their examination by the ordinary rules of evidence, but would receive hearsay and *ex parte* statements, surmises, and information of every character that might be called to their attention. It cannot be that the courts of the United States can be used in furtherance of investigations in which all rules of evidence may be thus disregarded.

The motion of the district attorney for a peremptory order upon the witness to answer the interrogatories as set forth in the petition of the railway commission is therefore denied, and the order to show cause is discharged.

SAWYER, Circuit Judge, (*concurring.*) I fully concur in the reasoning of the circuit justice, and the conclusions reached, but I deem it proper to present some further views in support of our decision.

It is necessary to understand the exact legal relation of the Central Pacific Railroad Company to the United States, in order to, correctly, appreciate the constitutional powers of congress, and of the commission acting under its authority, over it. The Central Pacific Railroad Company is a private corporation, created, and existing under the laws of the state of California. It derived none of its *corporate* faculties, or franchises, from the United States. It is in no way subject to the control, or laws, of the United States, except so far as it is subject to regulation, as an instrument of foreign, or interstate commerce, or their authority to establish post-roads, or their war powers, in pursuance of the constitutional provisions on the subject, or such regulation, as is authorized by the terms of the contract found in the acts of congress of 1862 and 1864, accepted by the railroad company as a contract. The Central Pacific Railroad Company is, simply, an artificial person, created with certain faculties by the state of California, and, it stands in relation to the United States, within the scope of its faculties, in precisely the same situation, as a natural person under like circumstances. The United States have no more, and no less, power over it, than they would have over a natural person in the same situation. The contract might as well have

been made with a natural person, as with a corporation. Had the grantee under the acts of congress been a natural person, instead of the Central Pacific Railroad Company, accepting the terms of the contract tendered by the act, and constructing the road, and performing the conditions of the contract, the rights of the United States would have been precisely such as they are, now, with respect to the Central Pacific Railroad Company,—no more, and no less. Since all the conditions of the contract on the part of the Central Pacific Railroad Company have been fully performed, in all respects, so far as they are required to be performed for that purpose, the title to the lands granted has fully vested, and the government bonds, having been delivered, the Central Pacific Railroad Company has become the absolute owner of the road, and all its appurtenances, together with the lands granted, and bonds issued, subject, only, to the mortgage to secure the payment of the bonds, issued by itself, and the lien of the government to secure its advances, in all respects in the same manner, and to the same extent, as if it were a natural person, similarly situated. The United States have no further control over, or interest in, said lands, or bonds. The United States, in sections 5 and 6 of the act of 1862, and section 5 of the act of 1864, tendered the railroad companies a contract, and, when accepted, there was a contract between the parties upon the terms specified, obligatory upon both, and which could not be changed by either, without the consent of the other. Says the supreme court, in *U. S.* v. *Railroad Co.*, 118 U. S. 238, 6 Sup. Ct. Rep. 1038, after quoting these provisions:

"These sections, taken together, constitute the contract between the United States and the appellee. *U. S.* v. *Railroad Co.*, 91 U. S. 72; *Sinking Fund Cases*, 99 U. S. 700–718; *Railroad Co.* v. *U. S.*, 104 U. S. 662. *This contract is binding on the United States*, and they *cannot*, without the consent *of the company, change its terms* by any subsequent legislation. *Sinking Fund Cases, supra.*"

Being the owner, with the title fully vested in it, the company could dispose of the lands and bonds, at its own will, and pleasure, in the same manner, and to the same extent, and with the same effect, as if the contract had been between two natural persons, without being liable to render any other account to the United States, than it could be called upon to render, had the United States been an association of an equal number of natural persons.

It is, consequently, a matter of no legal concern to the United States, what disposition the company made of the lands, or bonds, and they have no right to inquire into the matter of their disposition, in any other mode, or under any other circumstances, than they could have been inquired into had the corporation and the United States been two natural persons.

The relation of the Central Pacific Railroad Company to the United States, therefore, under the contract, as a contract, is now, simply, that of debtor, and creditor, with certain covenants for services on its completed road, still to be performed by the latter, with the debt, and performance of those covenants secured by certain specific liens upon portions of the prop-

erty of the debtor. They stand upon an equal footing as contractors, and upon the same footing, as debtor and creditor, as if the indebtedness, obligations, and securities existed between two natural persons. This is, clearly, the result, as established by the supreme court in the *Sinking Fund Cases*, which has, by a divided court, extended the power of congress further in that direction than any other case, and, as it seems to us, to the utmost admissible limit. In those cases the chief justice, who announced the opinion of the majority of the court, in speaking of the Union Pacific Company, which is a corporation created by congress itself, said:

"The United States occupy towards this corporation a twofold relation,—that of sovereign, and that of creditor. *U. S.* v. *Railroad Co.*, 98 U. S. 569. Their rights as a sovereign are not crippled because they *are creditors, and their privileges as creditors are not enlarged by the charter because of their sovereignty. They cannot, as creditors, demand payment of what is due them before the time limited by the contract. Neither can they, as sovereign, or creditors, require the company to pay the other debts it owes, before they mature.*" 99 U. S. 724.

As to the Central Pacific Railroad Company, the United States do not even occupy the relation of sovereign, except so far as its road extends through the territories, and, then, only, as to that part of the road within a territory, which is now, only, that part in the territory of Utah; and so far as its authority to regulate commerce with foreign nations, and between the states, is concerned, and these powers are merely police powers. The organization of the Central Pacific Railroad Company is under, and by virtue of, the laws of another sovereignty, and its *habitat* is in the state of California, beyond the jurisdiction of the United States, except so far as it is subject to the power of congress under some special grant of power, or its control is necessary to carry out some power specially granted. We look, in vain, for any power to deal with it, except the power to regulate its acts, as an instrument of interstate, or foreign commerce, or such power as congress may have over it under its authority to establish post-roads, or under its war powers. The relation of debtor and creditor arising under a contract is but a private relation. It is not a sovereign, or governmental, relation. And the power reserved in the acts of congress to repeal, or amend the act as to the Central Pacific Railroad Company could, only, extend to amendment, so far as it operated *as a law*, and not as a contract, and, then, not to affect the terms of the contract after it had become executed, and rights had vested under it.

If, as said by the supreme court, the "privileges" of the United States, "*as creditors*, are not enlarged by the charter, because of their sovereignty," then no greater powers can be conferred upon the commission appointed by congress in this case, than congress could have conferred upon them for the investigation of matters between debtors and creditors, who are natural persons, citizens of, and residing *within states*. Could a private creditor authorize, or lawfully make, a compulsory examination of the character provided for in this act, into the private affairs of

his debtor? Or could congress, *within a state*, under its limited sovereign powers in a state, authorize a private creditor to make such an examination of his debtor's affairs, and call upon the courts, in like manner, to compel answers? Can the government do for itself, *as creditor within a state*, what it cannot do for private creditors? If not, and "*the privileges of the United States as creditors are not enlarged by the charter because of their sovereignty*," upon what principle can the compulsory examination attempted to be authorized by this act, be sustained? I can find none. This investigation, so far as the questions under consideration are concerned, is not for a sovereign, governmental purpose, but for the purpose of further securing a private debt, not yet matured, already secured by a contract, acceptable to, and accepted by, the creditor at the time it was made. And—

"The United States cannot any more than a state interfere with private rights, except for legitimate *governmental* purposes. They are not included within the constitutional prohibition which prevents states from passing laws, impairing the obligation of contracts, but equally with the states they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they, by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state, or a municipality or a citizen. *No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.*" The Chief Justice in the *Sinking Fund Cases*, 99 U. S. 718, 719.

Having ascertained the relation of the parties to each other to be, that of contractors,—that of debtor and creditor by contract, simply, in the same sense, as if both were natural persons, and private citizens,—the question arises, as to what authority congress has, *within a state*, through commissioners appointed by it, to investigate the private affairs of a mere contract debtor, and ascertain what he has done with his own money, or what he proposes to do with it,—whether he is making judicious investment of his money or not,—as bearing upon his probable ability to pay his debt, some years in the future, when it shall have matured?

Mr. Justice FIELD well said in the *Sinking Fund Cases:*

"When, therefore, the government of the United States entered into the contract with the Central Pacific Railroad Company, it could no more than a private corporation, or a private individual, finally construe and determine the extent of the company's rights and liabilities. If it had cause of complaint against the company, it could not undertake itself, by legislative decree, to redress the grievances; but was compelled to seek redress, as all other civil corporations are compelled, through the judicial tribunals. If the company was wasting its property, of which no allegation is made, or impairing the security of the government, the remedy by suit was ample. To declare that one of two contracting parties is entitled, under the contract be-

tween them, to the payment of a greater sum than is admitted to be payable, or to other or greater security than that given, is not a legislative function. It is judicial action; it is the exercise of judicial power, and all such power, with respect to any transaction arising under the laws of the United States, is vested by the constitution in the courts of the country." 99 U. S. 759, 760.

See, also, authorities cited.

I do not understand, that this doctrine is questioned by the majority of the court. They only differed as to its applicability in that particular case. I do not understand, that the Central Pacific Railroad Company is charged with a violation of any of the terms of its contract, unless it be claimed, that it has failed to pay over the full amount of percentage required by the contract of the net earnings of the road. If it has failed in this matter, it is not a matter of any legal concern to the government, what the company has done with its own. If it has failed in this particular, and there is reason for sustaining an action, the proper mode of procedure for ascertaining the truth, and enforcing the obligation, if violated, is to institute a suit, alleging the facts, and have an investigation in due course of judicial inquiry, and obtain a judgment for any amount improperly withheld. If the full amount has not been paid over, it matters not to the government, how the balance has been expended. The company is liable like any other debtor upon a contract, and not otherwise. But if it be desirable to trace it, and subject the specific fund to the uses contemplated, and there be sufficient ground for so doing, the courts are the proper tribunals in which to effect that object. So, also, if there be a commission of waste upon the property upon which the debt is secured, the courts afford the proper remedy by a suit in equity to restrain the waste. These are the means afforded by the constitution, and laws to private parties for redressing their wrongs. And there is no different remedy provided for the government on its contracts. In such proceedings, there would be allegations, which would inform the defendant what it is called upon to meet. In the language cited by Mr. Justice FIELD, from a case in the supreme court of Massachusetts, "like all other matters involving a controversy concerning public duty and private rights," it would in such proceedings "be adjusted and settled in the regular tribunals where questions of law and fact are adjudicated on fixed, established principles, and according to the forms and usages best adapted to secure the impartial administration of justice." *Sinking Fund Cases*, 99 U. S. 761 / A bill in equity, that seeks a discovery upon general, loose, and vague allegations, is styled a "fishing bill," and such a bill would be, at once, dismissed on that ground. Story, Eq. Pl. § 325, and cases cited. general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end.

These principles, it appears to me, are established beyond further

controversy in the case of *Kilbourn* v. *Thompson*, 103 U. S. 168. At the time of the failure of the bankers, Jay Cooke & Co., they were largely indebted to the United States for moneys deposited by the secretary of the navy with a branch of the house in London. It was claimed, that Jay Cooke & Co. were largely interested in a company dealing in real estate at Washington, known as the "Real-Estate Pool," and that a considerable amount of their funds was invested in that speculation. It seems to have been claimed, also, that there was something in the nature of a trust in favor of the government in the moneys of Cooke & Co., that had gone into the pool. A committee was appointed to investigate the matter, and trace the money, with power to send for persons and papers. Kilbourn, supposed to be one of the managers of the pool, was summoned for examination. He refused to testify, on the ground that the house had no authority, in this manner, to inquire into the private affairs of the debtors of the government, and others connected with them. He was thereupon, upon proceedings for that purpose, committed by the house for contempt, and held in custody 45 days. After his release, he sued the sergeant-at-arms of the house, and the investigating committee, for false imprisonment, and recovered, on the first trial, a judgment of $60,000, and on a second trial $37,500, afterwards reduced to $20,000, on the ground that the house had no authority to make a compulsory investigation, or to commit him for contempt, for the reason, that these functions were judicial in their nature, over which the courts alone can have jurisdiction. When the case was before the supreme court it said in the course of its decision:

"If the United States *is a creditor of any citizen*, or of any one else, on whom process can be served, the usual, *the only legal mode of enforcing payment of the debt, is by a resort to a court of justice.* For this purpose, among others, congress has created courts of the United States, and officers have been appointed to prosecute the pleas of the government in these courts." 103 U. S. 193.

Again:

"What was this committee charged to do? To inquire into the nature and history of this real-estate pool. How indefinite. What was the real-estate pool? Is it charged with any crime or offense? *If so, the courts alone can punish the members of it.* Is it charged with fraud against the government? *Here, again, the courts, and they alone, can afford a remedy.* Was it a *corporation whose powers congress* could repeal? There is no suggestion of the kind." Id. 195.

Again:

"In looking to the preamble and resolutions under which the committee acted, before which Kilbourn refused to testify, we are of opinion that the house of representatives *not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government because it was in its nature clearly judicial.*" Id. 192.

And again, after stating some particulars to which the powers of the house to punish extends, the court added:

"Whether the power of punishment in either house, by fine or imprisonment, goes beyond this or not, *we are sure that no person can be punished for contumacy as a witness before either house unless his testimony is re-*

quired in a matter into which the house has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen." Id. 190.

After a thorough discussion of the case and an elaborate examination of the authorities, the court announced its unanimous conclusion in the following terms:

"We are of opinion, for these reasons, that the resolution of the house of representatives, authorizing the investigation, *was in excess of the power conferred on that body by the constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the house and the warrant of the speaker, under which Kilbourn was imprisoned, are, in like manner, void, for want of jurisdiction in that body, and that his imprisonment is without any lawful authority.*" Id. 196.

In my judgment the principle established here covers fully the case under consideration. It establishes the position, that the house of representatives has no authority, or jurisdiction, to make a compulsory inquiry into the disposition of the funds of a conventional debtor of the United States; to inquire what this debtor, upon a contract, has done with his money, or to inquire into the private affairs of their debtors upon contract, and those dealing with such debtors.

It is urged that the decision only goes to the point, that private parties dealing with the debtor cannot be examined by the house; that the principle does not extend to the debtor himself, and, especially, to the Central Pacific Company, which is but a corporation, and that the present investigation only extends to what disposition it has made of the bonds, and proceeds of lands received from the government, and the money arising from operating its road. But there is no such limitation in the ruling. Says the court:

"Can the rights of the pool or of its members, *or the rights of the debtor, and of the creditor of the debtor*, be determined by the report of a committee, *or by an act of congress?* If they cannot, *what authority has the house to enter upon this investigation into the private affairs of individuals who hold no office under the government?*" Id. 195.

That the Central Pacific Railroad is a corporation in no way beholden to the United States for its corporate faculties, and franchises, and not a natural person, cannot affect the question. It is but an aggregation of natural persons, and is as much a private party, as if its constituents were united in a mere partnership, instead of a corporation. This principle was maintained in the *Railroad Tax Cases*, 9 Sawy. 166, and recognized by the supreme court at the argument of the same cases on appeal. The bonds issued, and the lands granted, as we have before seen, under the authorities cited, upon the completion of the road, and the specific earnings of the road, thereafter arising, were the absolute property of the Central Pacific Railroad Company, in which the United States had no legal concern, whatever, except so far as their lien by contract covers them. There is no element of a trust, public, or otherwise, in the case, as sometimes claimed, except in such sense, as any common carrier, whether by ox team, mule team, horse team, railway or steam-ship,

exercises a public trust, which is only subject to regulation under the police powers of the government, state, or national, as the case may require. That there is no element of trust in the case is ably shown by Mr. Justice HUNT, in *U. S.* v. *Railroad Co.*, 11 Blatchf. 403, and his ruling on this point was affirmed on appeal in 98 U. S. 570. But if there was a trust, as claimed, the administration of the laws relating to trusts is the peculiar province of courts of equity. It is no part of the functions of congress under the constitution.

It is further urged, that the judgment of imprisonment, only, was held to be beyond the jurisdiction of the house,—that the house, or congress, may investigate, and call upon the courts when so authorized, as in the present act, to perform the judicial part of the work, by enforcing the requirement of the commissioners. But there is no such limitation in the language of the court, as will be seen by re-examining the passages quoted. On the contrary, the want of power in the house to punish is grounded on the want of power to investigate at all. It is directly said, in the case cited, that the house may punish for contempt, in certain specified cases, wherein the power is conferred by the constitution, or when necessary to the proper execution of powers expressly conferred. And the court with reference to those instances, as we have seen, says, in terms:

"Whether the power of punishment in either house by fine and imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either house *unless his testimony is required in a matter into which that house has jurisdiction to inquire, and we feel equally sure that neither of those bodies possesses the general power of making inquiry into the private affairs of the citizen.*" *Kilbourn* v. *Thompson*, 103 U. S. 190.

That was a case, like this, wherein the house was seeking to inquire into the private affairs of the debtor,—seeking to ascertain what that debtor had done with his money, some of which he held as a depositary of the United States. The decision was not put upon the ground, that the house could not in any case punish for contempt, but, on the ground, that the house in cases like this, had no authority to make the inquiry at all, and, consequently, there could be no punishment for contempt, either by the house, or any other body or tribunal.

Under the act now in question, congress has undertaken to authorize a commission to make inquiry into the private affairs of its creditor,—into the purpose, for which the debtor appropriated its own funds,—which the supreme court, in the case cited, says it has no power to do, and the commission is authorized to call upon the courts to aid it in its unlawful inquiry. The court is not called upon to act in any judicial proceeding, or investigation pending before it, or before any other court, in the discharge of its judicial functions, or any matter ancillary to the exercise of its judicial functions. There is no case or controversy, at all, pending before it of which the proceeding attempted to be authorized is a part, or to which it is ancillary or in any way pertinent. It does not appear to us, that it is contemplated by the act, that the court, in the investigation provided for, when called upon to aid the commission,

shall inquire beyond the point whether the question asked is within the scope of the broad field of inquiry prescribed. And so the commissioners claim, for they have conducted their investigation on that theory; and they insist, that they are not bound by any rules of evidence, or, other principles of law observed by courts of justice, and by which the latter are guided, and controlled, in the ascertainment of facts in the course of ordinary judicial proceedings. If this be the correct view, the court is expected to compel an answer irrespective of any other considerations. Even questions criminating the witness, are to be answered, the only protection to the party being that his answer shall not be used against him in a criminal prosecution,—a protection of little avail to any party, who should disclose criminal acts upon which an indictment could be found, and should upon compulsion indicate other sources of evidence, by means of which, the acts disclosed can be proved; and such acts may also constitute offenses under the laws of the state, against which congress can afford no immunity.

As bearing upon the power of congress to compel an answer to criminating questions, or compel the production of private papers, see *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. Rep. 524. The principles therein established are equally applicable to the matter now under consideration. The court seems, therefore, to be called upon to compel, under process for contempt, an answer to any question which the commission sees fit to ask within the scope of the inquiry attempted to be authorized by the act. If this be so, the court is, simply, made an instrument by this act, in the hands of the commission, to execute its unregulated and unrestricted will. The court is made the ministerial agent of the commission to perform its behests, whenever a witness refuses to respond to a question, or produce papers within the range of the authority attempted to be given by the statute. The judicial department of the government is, simply, made, by this act, an adjunct to the legislative department in the exercise of its political and legislative functions, and powers, to execute its commands,—and that, too, in a matter into which congress, under the decision cited, has no jurisdiction whatever to inquire. I know of no power in congress, to thus render the judicial department subordinate, or ancillary to the legislative and executive departments of the government, or to either of them. If there is any one proposition immutably established, I had supposed it to be, that the judiciary department is absolutely independent of the other departments of the government,—that it cannot be called upon to act a part subordinate to any other department of the government, or to a commission armed with exasperating inquisitorial powers over private affairs, unlimited by any consideration other than its own unregulated discretion. And so I understand the authorities to be. "The functions of the judges of the courts of the United States are strictly and exclusively judicial. They cannot, therefore, be called upon to advise the president in any interpretation of law, or to act as commissioners in cases of pensions or other like proceedings." 2 Story, Const. § 1777, and cases cited.

The courts, in this instance, are called upon not to exercise their ordinary powers in the administration of justice, but to assist congress in the exercise of its deliberative, legislative, and political powers,—to aid it by irregular, and extraordinary, not to say unprecedented means,—to act as its agent in matters wholly foreign to the functions of the judiciary. In my judgment, therefore, reason and the authorities cited establish, beyond reasonable ground for controversy, the proposition, that there is no lawful authority in the commissioners to compel answers to the various questions propounded and set out in the petition, or any of them, which the respondent refused to answer, nor can the courts be lawfully required to compel answers thereto.

I concur in the order made, discharging the order to show cause.

SABIN, J., (*concurring.*) In announcing my concurrence in the opinions of the circuit justice and the circuit judge in this matter, I do not deem it necessary to review at any length the questions by them so ably and satisfactorily discussed and decided. In this application to the court to issue its subpœna, and compel answers to be made to the various questions propounded, the court is called upon to exercise no judicial function or power, unless it be the very slight duty of determining whether or not the questions propounded are within the scope of the inquiry authorized by the act of congress creating the commission. The act itself is most broad and comprehensive in its terms, and imposes little, if any, restraint upon the commission in the field of its inquiry. It scarcely needs the ruling of a court to determine whether the questions propounded, or any questions which may be propounded, by this commission, are within the scope and purview of the act creating the commission. But, aside from this most simple and limited duty, if duty it may be, the court has no judicial function to perform in this matter. It is simply called upon by the commission to execute its will; to compel the attendance and obedience of witnesses,—a purely ministerial duty,—to serve as a convenient adjunct to the commission. I cannot think that the courts were organized for any such purpose, or that they can be called upon to perform any such duty.

I need not advert to the nature and character of many of the questions propounded by the commission, as appears from the record of this proceeding, answers to which the court is asked to compel. They seem to be quite in keeping with some of the extraordinary powers claimed and exercised by the commission, and to fully confirm their assumed right to disregard the usual and established rules of evidence and principles of law in conducting their investigations. And this court is seriously asked to lend its aid in furtherance of such purpose. Many of the questions propounded would seem, from the record, to have been answered as fully as it was possible for the witness to answer them. I do not, however, press this consideration, as I think this decision should rest, not upon the simple fact as to whether or not the questions have been fully answered, but upon the broader and more important principles which underlie this whole subject, to-wit: Has this commission

lawful right to hold this investigation; to propound these questions, and compel answers thereto; to inquire into the private affairs of this respondent, or of the Central Pacific Railroad Company, or of any individual, and invoke the powers of this court to carry out such purpose? These questions are so fully and ably discussed in the opinions rendered that further comment thereon seems unnecessary.

It is not claimed that this is a "case" or a "controversy" between any parties to which the judicial power extends, and over which it has proper jurisdiction. Neither the United States nor any other person is making complaint against this respondent, or against said railroad company, in any form or manner known to judicial proceedings. No charges are made against the one or the other, by any one, of duties neglected or obligations unfulfilled. In regard to the very account immediately under consideration by the commission, and in reference to which many of the questions were propounded, to which we are asked to compel answers, it is shown that this account was fully settled and adjusted by and between the United States and said company long ago. Upon page 21 of the argument of the United States attorney, submitted in support of this motion, it is stated:

"Some question was made as to whether, as a matter of fact, the moneys covered by Mr. Stanford's vouchers had been included in the account rendered to the government for the purpose of ascertaining the net earnings of the company. The commissioners do not desire a decision based upon this question, and therefore concede, for the purpose of this motion, that the amounts in question have not been charged as against the United States, to the end that this matter may be disposed of entirely on its merits."

If this be true, what interest, then, is it to the United States, even if it had a right so to do, to inquire how, or in what manner, this account accrued or was paid? It concerns the United States in no manner,—affects no pecuniary right or interest claimed by it, due or not matured. What interest, then, has the United States in this inquiry beyond that of any third party whose curiosity might prompt him to inquire into that concerning which he has no right or interest? Is not this, then, a mere idle inquiry, not made in the interest of, or to preserve or establish the rights of, the government or any person? Has not any third person, to gratify an idle curiosity, the same right to institute these inquiries, and invoke the aid of the courts in support thereof? Courts do not entertain such investigations or inquiries, or lend their aid thereto. If this power of unlimited, inquisitorial investigation into the affairs of private corporations or companies, or of individuals,—and it concerns all alike,—shall be once established, who can say where it will end, or what will be its limit of injustice at all times, but more especially when called into exercise in times of political excitement, or under the influence of partisan zeal or passion? In the close adherence to well-settled principles of law, founded upon the just observance of the rights of all parties, will we not find the greatest safety alike to public and private rights?

Without further discussion of the subject, I fully concur in the opinions read, and in the order made.

LORIE *v.* NORTH CHICAGO CITY RY. Co. and others.

(Circuit Court, N. D. Illinois. May 18, 1887.)

1. STREETS—RIGHTS OF ABUTTING PROPERTY OWNERS—EASEMENT—OWNERSHIP OF FEE.
   An abutting property owner has no other interest in the streets of Chicago than an easement in common with the public. The city owns the streets in fee.
2. EMINENT DOMAIN—APPROPRIATION OF PROPERTY—DAMAGES.
   Under Const. Ill. art. 2, § 13, providing that "private property shall not be taken or damaged for public use without just compensation," only damages for injuries caused by an actual appropriation of private property need be paid in advance.
3. STREET RAILROADS—DAMAGES—REMEDY—AT LAW—INJUNCTION.
   Special injury to property, resulting from the construction and maintenance of a street railway in front thereof, must be remedied by an action at law for the special damage, and not by an injunction. For an injury sustained in common with the public at large there is no remedy.
4. PRINCIPAL AND AGENT—REPUDIATING UNAUTHORIZED ACTS—SILENCE—RATIFICATION.
   Silence in not repudiating the unauthorized act of an agent, when such act is brought home to the knowledge of the principal, amounts to a ratification on the part of the principal.

Allan C. Story, Geo. W. Kretzinger, and *James K. Edsall*, for complainant.
Goudy & Green, for defendants.

GRESHAM, J. This suit was commenced by Nathan Lorie against the North Chicago Street-Railroad Company, the North Chicago City Railway Company, and other corporations and certain individuals, to enjoin the defendants from constructing and operating a cable railway on Illinois street, between Wells and Clark streets, on Clark street north of Illinois street; and in and through the La Salle street tunnel, in the city of Chicago. The questions which are now before the court arise upon the complainant's motion for a provisional injunction. The complainant owns a lot, and the buildings thereon, at the north-west corner of Clark and Illinois streets; his frontage being 50 feet on Clark street, and 80 feet on Illinois street. It is at this point that the railway passes from one street into the other.

The court should not thus reach out its strong arm unless the facts clearly call for such action. Even if the right to construct and operate the railway is not clear, the complainant is not entitled to the relief prayed for unless he has been, or will be, disturbed in the enjoyment of his property, for which he has no adequate remedy at law. The complainant has no other interest or right in the streets, including the tunnel, than an easement in common with the public. His proprietary right does not extend to the middle of the street. The city owns the streets in fee. The complainant's property has not, therefore, been appropriated; nor is it proposed to appropriate any part of it for the use of the North Chicago Street-Railroad Company. No direct or physical injury can result to the complainant from the construction and operation of the railway

in front of his premises. The constitution of Illinois declares that "private property shall not be taken or damaged for public use without compensation." The damage, however, which the plaintiff will sustain, if any, by the construction and operation of the tracks over the streets in front of his property, will not be a damage, within the meaning of the constitution, for which compensation must be made in advance. The damage contemplated by the constitution is an injury resulting to the owner from an actual appropriation of his private property, and it may be that the taking of part only of a lot or parcel of land will entitle the owner to compensation in advance for the injury resulting thereby to the unappropriated part. *Stetson* v. *Railroad Co.*, 75 Ill. 74.

If the complainant can show that the construction and maintenance of the tracks in front of his premises will result in special injury to him, —not a mere injury which he will sustain in common with the public at large,—his remedy will be at law for the special damage, and not by injunction. *Osborne* v. *Railroad Co.*, 5 Blatchf. 366; *Currier* v. *Railway Co.*, 6 Blatchf. 487; *Railroad Co.* v. *Prudden*, 20 N. J. Eq. 530; *Zabriskie* v. *Railroad Co.*, 13 N. J. Eq. 314; *Hinchman* v. *Railroad Co.*, 17 N. J. Eq. 75; *Chicago* v. *Building Ass'n*, 102 Ill. 379. The evidence fails to show, however, that the complainant's property will be materially injured by the construction and operation of the railway in front of it, or that he will sustain any special damage from the use which it is proposed to make of the tunnel. After it was definitely determined that the tracks should turn from North Clark street into Illinois street, the complainant by his agent, Samuel Glickauf, leased his rooms on the ground floor, and the basement thereunder, to T. T. Conklin & Co. for five years, at an annual rental of $4,200 a year. The lessees desired to occupy this property—so one of the firm swears—because of the supposed advantage it would derive as a business point from the construction and maintenance of the tracks in front of it. It is in evidence in behalf of the defendants, and not denied by the complainant, that this is a better rental than the complainant ever before received for the property. In brief, instead of the evidence showing that the complainant's property will be injured by the maintenance of the tracks in front of it, it shows that its rental value has been increased.

A petition was presented to the common council in June, 1886, praying that the North Chicago Street-Railroad Company be allowed to construct its tracks over and upon Illinois street. With the complainant's name, the petition contained the signatures of the requisite number of property holders, and without his name it did not. So far as the evidence shows, he never, until April 28, 1887, claimed that Glickauf signed his name without authority. In his affidavit made on that day, the complainant stated that he never authorized any one to sign the petition for him; and that he "never heard or knew until quite recently that it was contemplated to construct and maintain, at the corner of Illinois and Clark streets in said city, 36 wheels, 36 inches in diameter, in rows 18 inches beneath the surface of the street." He does not swear in this affidavit that he never knew or heard until recently that his name

had been signed to the petition; and it is fair to infer that he knew what Glickauf had done, and that his objection was not to the construction of the road, but to the wheels being placed under the surface of the street in front of his building. It is doing the complainant no injustice to say that, if he did not actually authorize his agent to sign his name to the petition, he knew it had been so signed, long before this suit was brought, and by his silence acquiesced in it. It is significant in this connection that, while Glickauf swears he signed the complainant's name to the petition without authority, he does not swear that he never informed the complainant what he had done.

The evidence does not fairly justify the charge in the bill that the excavations which have been or will be made for the wheels in front of the complainant's building will weaken the foundations, and thereby impair the value of his property.

The motion for a preliminary injunction is denied.

POTTS, Assignee, etc., *v.* WALLACE.

(*Circuit Court, E. D. New York.* October 3, 1887.)

CORPORATIONS—SUBSCRIPTION—TENDER OF FULL AMOUNT—REFUSAL—FAILURE OF CORPORATION—SUBSEQUENT LIABILITY OF SUBSCRIBER.

A tender, during the solvency of a corporation, by a subscriber to its stock, of the full amount of his subscription, and demand for issue of certificate, which tender is, without legal cause, declined, and the issue of certificate refused, extinguishes the obligation to pay the subscription, as against the assignee of the corporation, when it has become insolvent.

On Motion for New Trial.

Sidney Ward, for plaintiff.

Tracy, Catlin & Hudson, for defendant.

BENEDICT, J. At the trial of this cause a verdict for the plaintiff was directed, under the impression that recent decisions of the supreme court of the United States compelled such a determination. A more careful examination of those decisions, in the light of the argument addressed to me on the motion for a new trial, has shown that none of the decisions of the supreme court upon which the plaintiff relies has gone so far as to hold that a subscriber to the stock of a corporation is liable to the assignee of the corporation after the insolvency of the corporation for the amount of his subscription, when he shows, as in this case, that during the solvency of the corporation he duly and in good faith tendered the corporation the full amount of his subscription, and demanded a certificate of stock to the amount; and that the corporation, being still solvent, without legal cause refused to receive the subscription, and issue the certificate.

Upon such a state of facts, in my opinion it should be held that the obligation to pay the subscription had been extinguished, and I find no case that compels a different decision. As the verdict was directed upon this point alone, the result is that the verdict must be set aside, and a new trial had.

WALL v. EQUITABLE LIFE ASSUR. SOC.

(Circuit Court, W. D. Missouri, W. D. 1887.)

1. LIFE INSURANCE—POLICY ISSUED IN NEW YORK—DELIVERY IN MISSOURI.
   A policy of insurance issued by a New York company to a citizen of Missouri, upon an application made in Missouri, and forwarded to the company in New York, where it is accepted, the policy drawn and signed, and returned to Missouri to be delivered to the insured, by the terms of which policy the premiums are to be paid to the company in New York, and the sum insured, when due, to be payable at the office in New York, is subject to the Missouri statutes governing policies of life insurance delivered in that state.
2. SAME—TEMPORARY INSURANCE—PAYMENT OF TWO PREMIUMS—FORFEITURE.
   Rev. St. Mo. § 5983, provides that no policy of insurance on life hereafter issued by a company authorized to do business in this state shall, after payment of two full annual premiums, be forfeited or become void by reason of non-payment of premiums, and also provides for temporary insurance. Section 5985 provides that, upon death of the insured during the term of temporary insurance, as provided in section 5983, and where no condition of the policy is violated except non-payment of premiums, the company shall be liable for the full amount insured, as if there had been no default in payment. *Held*, that a provision in a policy which required the payment of three full annual premiums before the insured was entitled to temporary insurance is void.

Action upon a life insurance policy issued by defendant upon the life of plaintiff's husband.

Plaintiff alleges in the second count of the amended petition that the defendant is a corporation created and existing under the laws of the state of New York, and is doing business as a life insurance company in the state of Missouri, and is subject to the laws of said state; that the policy sued on was executed on the twenty-third day of December, 1880, by the defendant, and delivered to the insured, who was then and remained a resident of the state of Missouri, by the terms of which policy defendant agreed to pay this plaintiff, within 60 days after proof of death, to be furnished defendant at its office in New York, $5,000; that the insured paid the annual premiums for the years 1881 and 1882, when due, in addition to the premium paid at the time of issuing the policy, making three full annual payments of premiums; that by virtue of these payments the said policy, on the fifteenth day of December, 1883, had acquired a net value and was worth the sum of $161.05, computed upon the American table of mortality; that neither the insured nor the plaintiff was indebted to defendant at that time for unpaid premiums, or on any other account; that the insured at that time was 39 years old; that three-fourths of such net value of said policy, applied and taken as a net single premium for temporary insurance for the amount written in the

policy, entitled said insured to a temporary insurance for said amount for a term expiring August 30, 1886; and that said policy was, by reason of the premises and the provisions of the statutes of Missouri, kept and continued in full force and effect until said August 30, 1886. The insured died January 21, 1884. Plaintiff asks judgment for said sum of $5,000, and interest.

Defendant, for answer to the second count of the amended petition, alleges that the policy sued on was executed for the defendant at its office in New York; that the premiums were payable there, it being, however, provided in the policy that at the pleasure of defendant suitable persons might be authorized to receive such payments, but only on production of the company's receipts therefor signed by the New York officers; that the loss in case of death was to be paid at the New York office.

And defendant avers (1) that, by reason of the contract being so by it executed, and so by it performed in the state of New York, it was a contract under, and to be construed and governed by, the laws of New York, and not by the laws of any other state, and that defendant's obligation was not within the purview of any law of Missouri touching policies of insurance, nor subject to be modified or affected thereby; (2) that, in the application for insurance, the insured, in consideration of the agreements in the policy, thereby applied for, (being the agreement in said policy providing for paid-up insurance in the event of the surrender of the policy at certain periods and under certain conditions specified,) waived and relinquished all right or claim to any other surrender value than so provided, whether required by a statute of any state or not.

Defendant further states that the said agreement last above mentioned and contained in said policy, and in consideration of which agreement said Samuel E. Wall so waived and relinquished as aforesaid all right or claim to any other surrender value than that so provided, was in the words following, to-wit:

"And further, that if premiums upon this policy, for not less than three complete years of assurance, shall have been duly received by said society, and this policy should thereafter become void in consequence of default in payment of a subsequent premium, said society will issue, in lieu of such policy, a new paid-up policy, without participation in profits, in favor of said Alice L. Wall, if living, and if not living, to the children of said Samuel E. Wall, or their guardian, for their use; or, if there be no children surviving, then to the executors, administrators, or assigns of said Samuel E. Wall, for the entire amount which the full reserve on this policy, according to the present legal standard of the state of New York, will then purchase as a single premium, calculated by the regular table for single premium policies, now published and in use by the society: provided, however, that this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium as mentioned above."

And defendant avers that even if said policy of insurance and this defendant's contract therein or obligation thereunder had otherwise been within the purview of or subject to be modified or affected by any provision of any law of the state of Missouri touching policies of insurance on life, which defendant denies, yet, by reason of the premises, the plain-

tiff is estopped from claiming the benefit of any provision of any law of the state of Missouri, if any such there be, for any other or different surrender value or upon any other or different conditions from those in said policy stipulated for as above set forth; and further avers that said policy of insurance has never been surrendered or offered to be surrendered to this defendant.

The plaintiff moved to strike out so much of the answer to the amended petition as is set out above, on the grounds, viz., that the matter No. 1 is a mere conclusion of law, and incorrect,—as, upon the allegations of the petition and the admissions in the answer, the policy sued on was subject to the provisions of the Missouri statutes; that the alleged waiver set out is void because contrary to public policy and the laws of this state, and declared null and void by the statutes of this state.

Karnes & Kranthoft, for plaintiff.

Hitchcock, Madill & Finkelnburg, for defendant.

BREWER, J. This case is submitted on a motion to strike out parts of the answer. Involved in this motion are two questions: *First*, is the contract sued on governed and to be construed by the laws of the state of New York or by the laws of the state of Missouri? *Second*, if subject to the laws of Missouri, is the stipulation in respect to forfeiture legal and binding as a waiver of the provisions of the Missouri statutes? In respect to the first question, these, I think, must be taken as the accepted facts: The defendant is a New York corporation doing business in the state of Missouri; the insured was a citizen and resident of Missouri, and made his application here, which was forwarded to New York; the application was accepted, the policy fully prepared and signed in that state, and sent to Missouri, and delivered to the applicant here. By the terms of the policy, all premiums are payable at the defendant's office in New York. If the sum insured should become payable, the payment is to be made at its office in New York. None of the terms of the policy can be modified except by one of the four general officers of the society, and no modification is claimed. Under these facts I have little doubt as to the true answer to be made to this first question. In *White* v. *Insurance Co.*, 4 Dill. 177, it was held that the act of the legislature of the state of Missouri of March 23, 1874, in respect to policies of life insurance, extends to all policies delivered in this state after the act went into effect. That was a suit against a foreign insurance company doing business in this state. In *Fletcher* v. *Insurance Co.*, 13 Fed. Rep. 526, it was held that a foreign insurance company cannot withdraw itself from the operation of the statutes of a state in which it does business, by the insertion of clauses in its policies. That was a case in which the defendant company insisted that, by virtue of certain clauses in the application, the contract was to be finally and fully executed in New York. In his opinion, an opinion concurred in by Circuit Judge MCCRARY, Judge TREAT uses this language:

"The defendant corporation, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those

statutes, and could not, by the insertion of any of the many clauses of its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance, therefore, is a Missouri contract, and subject to the local law."

This case was taken to the supreme court of the United States and is reported in 117 U. S. 519, 6 Sup. Ct. Rep. 837. The case was there decided upon a different question, but in the statement of facts, which, as it appears, was prepared by the justice writing the opinion, is this language:

"The company is a corporation under the laws of New York, but it also transacts business in Missouri, through agents residing there, and, *of course*, with reference to the business done in that state, is subject to its laws."

In view of these authorities, and considering the reasoning of Judge TREAT in the opinion above referred to, I deem it unnecessary to discuss this question further, and simply hold that the Missouri statute controls. See, also, *Ehrman* v. *Insurance Co.*, 1 McCrary, 123, 1 Fed. Rep. 471; *In re Insurance Co.*, 22 Fed. Rep. 109; *Paul* v. *Virginia*, 8 Wall. 168.

In respect to the second question, the following are the two sections of the statutes which are applicable:

Section 5983, 2 Rev. St. "No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void, by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation, to-wit:" [Then follows a statement of the mode of computing the amount payable in such case.]

Section 5985. "If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section five thousand nine hundred and eighty-three, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of the premium, anything in the policy to the contrary notwithstanding."

Now, in the policy sued on there is a non-forfeiture clause, but containing a different provision, and it is alleged that in the application the insured waived and relinquished all right or claim to any other surrender value than that provided in the policy, whether required by the statute of the state or not. This is the doubtful question. It is strenuously insisted by the defendant that the statute of Missouri neither forbids, nor declares null, nor makes anywise illegal, such a waiver as the one in question; that it merely gives a right or privilege to the insured which, like any other personal right or privilege, he may for sufficient consideration waive, and that such a waiver, not being forbidden by the statute, is not contrary to public policy in any such sense as that the courts should refuse to enforce it. Back of this argument and strongly supporting it is that liberty of contract which courts are so strenuous to uphold.

While I am constrained to hold adversely to the defendant, it is with grave doubts as to the correctness of my conclusion. In the first place, a technical argument can be made on the language of the statute. It

says the value of the policy *shall* be determined in a certain way, and then that, if the death of the insured occur during the term of temporary insurance covered by the value of the policy thus determined, the company *shall* be bound to pay the amount of the policy, "anything in the policy to the contrary notwithstanding." This language is broad enough to include a waiver, and may be construed as meaning that no stipulation, no waiver, no agreement for a different forfeiture,—in fact nothing that a party can put into a policy,—shall defeat the right to recover the full amount, if death occurs during this time of temporary insurance. Of course, this is a purely technical construction of the statute, and I am disposed to rest my conclusion more upon the matter of public policy. And here the history of insurance must be taken into consideration. It is notorious that many insurance companies were rigorous in insisting upon forfeitures, sometimes under very inequitable circumstances, and there was no little public clamor by reason thereof. Such clamor prompted many legislatures to interfere, and to seek by legislation to protect what they supposed the rights of the insured. Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases,—absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive, in fact no words of negation in any direction, yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce. *Railway Co.* v. *Peavey*, 29 Kan. 169. The legislature has by this language declared a rule in respect to forfeitures in life insurance policies; it has thus established the policy which it believes should obtain in this state, and, though sitting on the federal bench, it is my duty to administer the laws of this state in the spirit in which they were enacted, and to uphold both their letter and their spirit. It is voluntary with any foreign insurance company whether it shall come into this state to transact business; coming in, it should be willing to comply with all the statutes as to all business arising within this state, and no court, least of all a federal court, should hasten to release it from this obligation. From these views and with this feeling, I am constrained, though with grave doubts, to sustain the motion to strike out.

VAN WICKLE *v.* MANHATTAN RY. CO.

(*Circuit Court, S. D. New York.* January 14, 1886.)

MASTER AND SERVANT—FELLOW-SERVANTS—ENGINEER AND TRACK-REPAIRER.

A track-repairer and an engineer of an elevated railroad company are fellow-servants, and for a personal injury resulting to the former, while in the course of his employment, solely from the negligence of the latter in running his train at too high a rate of speed, the company is not liable; such negligence of the engineer being one of the natural and ordinary risks incident to the track-repairer's employment.[1]

At Law. On motion for new trial.

Edward Gebhard, for plaintiff.

Hugh L. Cole, for defendant.

COXE, J. The plaintiff, while engaged as track-repairer upon the structure of the elevated railroad on Sixth avenue, New York, was injured solely by the negligence of an engineer in running his train at too high a rate of speed. Both were employes of the defendant. The court directed a verdict for the defendant, upon the ground that the engineer and the plaintiff were fellow-servants, and for the former's negligence, it being one of the natural and ordinary risks incident to the work in which plaintiff was engaged, no action could be maintained by him against the common master. The plaintiff now moves for a new trial.

It cannot be denied that the rule which exempts the master from liability in such cases is being gradually relaxed, so as to permit recoveries in many cases which would have been promptly dismissed a few years ago. Indeed, it may be said that the tendency of many recent decisions—noticeably, *Garrahy* v. *Kansas R. Co.*, 25 Fed. Rep. 258—is to restrict it to such narrow limits that, practically, it exists in name only. Recognizing the marked lack of unanimity among the decisions, it may still be confidently affirmed that the proposition that persons holding the relation that this plaintiff and the engineer held to each other, are fellow-servants is maintained by a great preponderance of authority. Whether the reasons which brought the rule into being require that it should still be maintained, may well be doubted but it is entirely clear that so far at least as this circuit is concerned the rule is still recognized and enforced. The following authorities, among others, sustain the view taken upon the trial: *Randall* v. *Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Boldt* v. *Railroad Co.*, 18 N. Y. 432; *Coon* v. *Railroad Co.*, 5 N. Y. 492; *Vick* v. *Railroad Co.*, 95 N. Y. 267; *Brick* v. *Railroad Co.*, 98 N. Y. 211; *Quinn* v. *Lighterage Co.*, 23 Blatchf. 209, 23 Fed. Rep. 363.

The motion for a new trial is denied.

[1] Upon the point as to who are fellow-servants within the meaning of the rule exempting the master from liability for injuries resulting to an employe through the negligence of a co-servant, see Reddon v. Railroad Co., (Utah,) 15 Pac. Rep. —, and note.

HALSTED and others v. STRAUS.

(Circuit Court, D. New Jersey. October 5, 1887.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.
   Under the statute of New Jersey (Revision, p. 36,) declaring void all preferences in assignments for the benefit of creditors, an assignment for the benefit of creditors containing preferences, made in New York by a firm doing business there, is not void against a firm of creditors doing business in New York, one of whose members is a resident of New Jersey.[1]
2. SAME—ATTACHMENT IN ANOTHER STATE.
   Where one made an assignment for the benefit of creditors in New York, the subsequent attachment in New Jersey by a New York creditor of a debt owing to the assignor is not of itself a defense to an action by the assignee for the recovery of the debt.
3. SAME.
   The attachment of a debt in New Jersey by a resident of New York, after the execution in New York, by the owner of the debt, of an assignment for the benefit of creditors, will not prevent the federal courts from entertaining a suit by the assignee for the recovery of the debt.

McCarter, Williamson & McCarter, for plaintiffs.
R. Byington and *Edward M. Colie*, for defendant.

BRADLEY, Justice. This is an action of *indebitatus assumpsit*, brought by the plaintiffs for the use of their assignee, Lewis May, all citizens of New York, against Straus, a citizen of New Jersey. The defendant pleaded in abatement that, before the bringing of this suit, the debt sued for was attached by writ of attachment issued out of the supreme court of New Jersey, at the suit of certain persons trading under the firm name of Deering, Milliken & Co., (one of whom was a citizen of New Jersey, the others not,) creditors of Halsted, Haines & Co., the plaintiffs in this suit; and that the attachment had gone to judgment by default against the latter, and a *scire facias* against the defendant, to show cause why he should not pay the debt involved in this suit to the said plaintiffs in attachment. The plaintiffs replied that before the execution of said attachment Halsted, Haines & Co., who were doing business in New York, made a general deed of assignment of all their property and assets, both partnership and personal, including the debt now in dispute, to the said Lewis May, in trust for the creditors of said firm of Halsted, Haines & Co., and of the individual members of said firm, in the manner and proportions set forth in said deed, which is fully set out in the replication; that May accepted said trust, and proceeded to execute the same; that the attachment referred to in the plea was issued to recover a debt incurred by Halsted, Haines & Co. in New York, where said firm of Deering, Milliken & Co. transacted business, and that they have never carried on business in New Jersey. It appeared by the deed of assignment set out in the replication that the assignors made preferences in

[1] A voluntary general assignment for the benefit of creditors, if valid where made, will be valid to transfer personal property wherever situated, except as it conflicts with the rights of resident creditors. Schuler v. Israel, 27 Fed. Rep. 851.

favor of certain of their creditors. The defendant demurred to this replication on the following grounds:

(1) That the assignment was immaterial; the mere existence of the attachment was sufficient to protect the defendant from paying the debt to Halsted, Haines & Co., or their assignee. (2) That the state court having assumed jurisdiction of the subject-matter, and impounded the debt by attachment, the federal court will not entertain a suit for the same debt. (3) That the deed of assignment, not being for the equal benefit of all the creditors, is void in New Jersey as against Deering, Milliken & Co., one of whose partners was a citizen of New Jersey.

Taking up the last point first, it is true that the statute of New Jersey declares that assignments in trust for the benefit of creditors shall be for their equal benefit, in proportion to their several demands, and that all preferences shall be deemed fraudulent and void. But this law applies only to New Jersey assignments, and not to those made in other states, which affect property or creditors in New Jersey. It has been distinctly held by the courts of New Jersey that a voluntary assignment made by a non-resident debtor, which is valid by the law of the place where made, cannot be impeached in New Jersey, with regard to property situated there, by non-resident debtors. *Bentley* v. *Whittemore*, 19 N. J. Eq. 462; *Moore* v. *Bonnell*, 31 N. J. Law, 90. The execution of foreign assignments in New Jersey will be enforced by its courts as a matter of comity, except when it would injure its own citizens; then it will not. If Deering, Milliken & Co. were a New Jersey firm, they could successfully resist the execution of the assignment in this case. But they are not; they are a New York firm. New York is their business residence and domicile. The mere fact that one of the partners resides in New Jersey cannot alter the case. The New Jersey courts, in carrying out the policy of its statute for the protection of its citizens, by refusing to carry into effect a valid foreign assignment, will be governed by reasonable rules of general jurisprudence; and it seems to me that to refuse validity to the assignment in the present case, would be unreasonable and uncalled for.

As to the first point, that the mere existence of an attachment is a sufficient defense against the payment of a debt, it seems to me that the defendant has confounded things that are different. The attachment of the goods of A., or of a debt due to A. by a creditor of A., of course protects the garnishee from delivering the goods or paying the debt to A. But if they are the goods of B., or the debt sought to be attached is due to B., and not to A., the attachment in such case is no excuse to the garnishee for not delivering to B. his goods, or paying to him his debt. The calling of the goods or debt A.'s, does not make them so, and does not bind B. in the slightest degree. It is an incontrovertible rule of law that no man can take my property on the plea that it belongs to him, or to another against whom he has a process, without being liable to me in an action for its recovery. If a sheriff takes it on execution or attachment against another, I may sue him in trespass or trover. Where there can be no actual taking, as the attachment or sequestration of a debt,

my position is not changed by service of the writ. I cannot, indeed, sue the officer, for he has taken nothing belonging to me; but neither can he prevent me from suing my debtor. It is the latter's lookout to see that he does not have to pay the debt twice.

And, as bearing on the second point, such a suit may be brought in a United States court as well as a state court, except when the suit is brought for goods in the hands of a state officer. In such a case, to prevent an unseemly conflict, the federal courts will not entertain jurisdiction; nor, for the same reason, will the state courts entertain jurisdiction of a suit for goods in the hands of a United States officer.

As to an attachment being a proceeding *in rem*, it is only such in a modified sense. A personal judgment cannot be obtained, but only a judgment that will affect the thing attached. Also, when goods are attached, they may be held by the officer to await the result of the litigation; and when debts and credits are attached, the debtor cannot pay them to the person who is defendant in attachment at the time the attachment is levied. In these respects, the proceeding is a proceeding *in rem*. But there is nothing in the nature of an attachment to prevent a man, who has nothing to with it, from recovering his goods or collecting his debts against any person who is liable to him for them.

Judgment will be entered for the plaintiffs.

HICKS v. BEARDSLEY and another.

(*Circuit Court, S. D. New York.* September 21, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

On motion for preliminary injunction to restrain the infringement of letters patent No. 126,347, granted to D. W. Thompson, in 1872, for fire-kindlers, *held*, that in view of the fact that in another action pending in another district of the same circuit, brought by complainant against the manufacturers from whom defendants obtain the article alleged to infringe, a similar motion had been made and denied, with leave to renew, and in view of the fact that defendants vigorously assail the validity of complainant's patent, the motion should be denied, with leave to renew when an injunction is obtained against the manufacturers.

Wm. H. King, for complainant.
M. B. Andrus and *James A. Whitney*, for defendants.

LACOMBE, J. The complainant moves for a preliminary injunction to restrain infringement of a certain patent (No. 126,347) for fire-kindlers. The patent was granted to D. W. Thompson, in 1872, and assigned to complainant in August last, a few days before the bringing of this suit. Defendants do not manufacture the articles which it is claimed infringe the Thompson patent; they obtain them from one George S. Geer, against whom complainant has a suit pending in the Northern district of this

state. No preliminary injunction has been granted in the Geer suit; complainant's motion for that relief having been denied, with leave to renew. The validity of the Thompson patent is vigorously assailed by the defendants, many prior patents for fire-kindlers being submitted with the opposing affidavits.

In view of all the facts, the manufacturer being a resident of the Northern district where he has been regularly served, and has appeared by counsel, the motion for a preliminary injunction is denied, with leave to renew when an injunction, preliminary or final, is obtained against the manufacturer.

MORSS *v.* MANCHESTER and others.

(*Circuit Court, E. D. New York.* September 14, 1887.)

1. PATENTS FOR INVENTIONS—DRESS-FORMS—INFRINGEMENT.
   Letters patent No. 233,240, issued October 12, 1880, to John Hall, for a new and useful dress-form, to be employed to support and extend a lady's dress while in process of construction, the second claim of which is for a combination, one essential element of which is double braces extending in opposite directions, *held* not to be infringed by the dress-forms made by defendants, as the braces employed in making the latter dress-forms are not of the same length, and do not extend in opposite but in the same direction.
2. SAME—LACK OF INVENTION.
   In letters patent No. 236,887, granted January 25, 1881, to John Hall, for a dress-form to be employed to support and extend a lady's dress while in process of construction, the second claim which is for the combination with the adjustable ribs of a dress-form of a non-elastic band or tape, which is provided with a scale and secured to the ribs, involves no invention, and the patent, so far as said claim is concerned, is void.

In Equity.

Peabody, Baker & Peabody, for plaintiff.

Gifford & Brown, for defendants.

BENEDICT, J. This action is founded on two United States patents: one, No. 233,240, granted October 12, 1880; the other, No. 236,887, granted January 25, 1881,—to John Hall. The plaintiff sues as the assignee of Hall. The charge is that the defendants have infringed the second claim of each of the above-mentioned patents by making a dress-form, the description of which is not in dispute. Patent No. 233,240 is for a new and useful dress-form, to be employed to support and extend a lady's dress while in process of construction. The second claim of the patent is as follows: "In combination with the standard, *a*, and ribs, *c*, the double braces, *e*, and sliding blocks, f^1 and f^2, and rests, h^1 and h^2, substantially as and for the purpose set forth." This claim is for a combination, one essential element of which is the double braces, which, as the specifications and drawings clearly show, are intended to extend in opposite directions. In the dress-forms complained of, this element

is wanting. The braces employed by the defendants in the dress-forms are not of the same length, and they do not extend in opposite but in the same direction, whereby a substantial advantage is secured, in that a shorter standard may be used. This difference between the two contrivances appears to me to be substantial, and not colorable, and it is not a mere improvement on the plaintiff's combination. The combination of the plaintiff is not employed by the defendants. They use a different combination, and their dress-form is therefore no infringement upon the Hall patent; assuming that patent to be valid, which may be doubted.

The charge of infringing patent No. 236,887 must also fail. The second claim of the patent is as follows: "The combination with the adjustable ribs of a dress-form of a non-elastic band or tape, which is provided with a scale and secured to the ribs, substantially as set forth." If the addition of a non-elastic tape measure in connection with the ribs of a dress-form be admitted to constitute a combination in the legal sense, which I do not believe, such a use of such a measure described in the second claim of the patent in question involved no invention, and the patent, so far as the second claim is concerned, is void.

WIRT *v.* BROWN.

(*Circuit Court, E. D. New York.* September 19, 1887.)

1. PATENTS FOR INVENTIONS—CLAIMS—ELEMENTS OF COMBINATION.
   In letters patent No. 311,554, granted to Paul E. Wirt, February 3, 1885, for an improvement in fountain pens, the first claim was for "the combination of an ink reservoir with a nozzle fitted thereto, and carrying the pen, and the rubber shaft extending through the nozzle in the space between the inner face of the latter and the upper face of the pen, and held within the nozzle at an intermediate point of its length, one end of the shaft extending beyond the nozzle into the ink reservoir, so as to draw the ink downward from the same, and the other end lies over the pen, so that when the latter is pressed downward in writing, it comes in contact with the shaft to produce capillary attraction, and cause the feeding of the ink downward upon the pen." *Held*, that a shaft having a fulcrum in the nozzle, so that vibration of the lower end of the shaft by the action of the nibs will cause vibration of the upper end, and thus agitate the ink in the reservoir, was not an element in the combination described in the patent.
2. SAME—FOUNTAIN PENS—PATENTABLE DIFFERENCE.
   The only difference in the pens made by plaintiff and those made by defendant was that in plaintiff's pens there was a single shaft, secured at an intermediate point of its length in the nozzle, one end extending up into the ink reservoir, and the other downward over the pen, while in defendant's pens this shaft was divided into two parts, the respective sections having the same functions as the corresponding ends of the shaft in plaintiff's pens. *Held*, that this was not a patentable difference, and that defendant's manufacture was therefore an infringement.
3. SAME—CONSTRUCTION—SPECIFICATIONS AND PATENT—SOLICITOR'S LETTER TO PATENT-OFFICE.
   Where the specifications of the application and of the letters patent are not ambiguous, and are capable of a definite construction, the language of a so-

licitor employed to obtain the patent, used in a communication with the patent-office to express an idea of his own, will not override the language of the patent; especially when there is no evidence to show that the idea was ever adopted by the patent-office.

W. L. Logan, for complainant.
Briesen & Steele, for defendant.

BENEDICT, J. This action is brought for an alleged infringement by the defendant of letters patent No. 311,554, granted to the plaintiff, February 3, 1885, for an improvement in fountain pens. The charge is that certain fountain pens made by the defendant, and known in this record, respectively, as Exhibits B, C, and D, infringe upon the first claim of the plaintiff's patent. The answer of the defendant does not set up an anticipation of the invention described in the plaintiff's patent, and it is conceded that the style of pen known here as Exhibit D, heretofore made by the defendant, does infringe upon the plaintiff's patent. The contest is limited to Exhibits B and C. Upon this issue the defendant has called no witnesses, but he has put in evidence the file-wrapper and the correspondence between the patent-office and the plaintiff's solicitor at the time of obtaining the patent, and also numerous prior patents issued to other parties, as bearing upon the proper construction to put upon the plaintiff's patent. The question to be decided is therefore a question of construction of the language of the plaintiff's patent.

The first claim in the plaintiff's patent is the only claim necessary to be considered. That is as follows:

"In a fountain pen, the combination of an ink reservoir with a nozzle fitted thereto, and carrying the pen, and the rubber shaft extending through the nozzle in the space between the inner face of the latter and the upper face of the pen, and held within the nozzle at an intermediate point of its length, one end of the shaft extending beyond the nozzle into the ink reservoir, so as to draw the ink downward from the same, and the other end lies over the pen, so that when the latter is pressed downward in writing, it comes in contact with the shaft to produce capillary attraction, and cause the feeding of the ink downward upon the pen as set forth."

In order to an understanding of the construction of this claim for which the defendant contends, it will be convenient now to describe the pens made by the defendant, and known here as the defendant's Exhibits B and C. These pens have in combination with the ink reservoir a nozzle fitted thereto, and carrying the pen, similar in all respects to those features as described in the plaintiff's patent. But, instead of a single rubber shaft extending through the nozzle at an intermediate point of its length, the defendant has two shafts, one extending beyond the nozzle at the heel of the pen up into the ink reservoir, the other extending from the nozzle at the heel of the pen downward, and lying over the pen, where it operates in the same way as does the lower end of the shaft in the plaintiff's pen. Between the pens Exhibits B and C, and the pens put in evidence as pens made by the plaintiff, the only difference is this: that in the plaintiff's pens there is a single shaft, secured at an interme-

diate point of its length in the nozzle, one end extending up into the ink reservoir, the other downward and over the pen. In the defendant's pen this shaft is divided into two shafts, the lower having the same functions as the lower end of the shaft in the plaintiff's pen, and the other having the same functions as the upper end of the shaft in the plaintiff's pen. Such a division of the shaft makes no patentable difference between the pens. The pens made by the defendant are identical in principle with the pens made by the plaintiff. But the defendant contends that the pens in evidence as pens made by the plaintiff are not constructed in accordance with his patent; that the patent is for a combination, one element of which is a shaft having a fulcrum in the nozzle on which it turns in such a manner that, when the lower end of the shaft vibrates under the action of the nibs upon it, it will cause the upper end also to vibrate, thereby agitating the ink in the reservoir. Such a shaft is not found either in the pens made by the plaintiff or those made by the defendant. Whether the plaintiff's patent describes such a shaft is the question of this case.

Upon this question my conclusion is that a vibrating shaft is not an element of the combination described in the plaintiff's patent, but, on the contrary, the shaft described there is such a shaft as is found in the pens made by the plaintiff, and that the equivalent of such a shaft is to be found in the defendant's pens, Exhibits B and C. In support of this conclusion, I remark that none of the claims of the patent contain language tending in any way to convey the idea that the end of the shaft in the ink reservoir is to vibrate on a fulcrum in the nozzle under the action of the pen. The same is true of the specifications. Indeed, the specifications contain language inconsistent with such an idea. Thus at folio 20, p. 1, the shaft is described as "securely held or wedged at its widest part within the nozzle of the ink reservoir." Again, at folio 75, p. 1, the shaft is said to be "constructed sufficiently thin to be pliable, and yield under the action of the pen." A shaft intended to be a pliable shaft, yielding readily under the action of the pen, is the opposite of a shaft vibrating on a fulcrum in the nozzle under the action of the pen. Again, at folio 110, p. 2, the shaft is described as "forced through the perforation, D, of the nozzle above the pen, and thereby secured permanently in place;" and at folio 115, p. 2, as "securely held in place;" and at folio 15, p. 3, as "held in place by being driven through the space between the end and the adjacent rim face of the nozzle." Expressions like these in the specifications seem to leave no room to contend that the language of the patent describes as an element of the combination a shaft vibrating on a fulcrum in the nozzle under the action of the pen. But the defendant goes outside of the patent, and lays much stress upon a letter to the commissioner of patents from the solicitor employed to obtain the patent; in which letter the solicitor speaks of the shaft as "held within the nozzle at an intermediate point of its length, so that both ends of the shaft are allowed equal play," and insists that "the applicant is the first to employ a rubber shaft held at an intermediate point of its length to allow each end a sufficient play in attracting the ink.

downward." This letter, it is contended, shows that the contracting parties—the government and the plaintiff—understood the first claim of the patent to be for a combination having a shaft with a fulcrum in the nozzle, and its upper end vibrating in the ink reservoir under the action of the pen upon its lower end.

A careful consideration of the language of the solicitor's letter shows that the solicitor does not assert that the upper end of the shaft is intended to vibrate on a fulcrum by the action of the pen on the lower end of the shaft. All the letter asserts is that both ends of the shaft are allowed play, and so they are. The letter asserts also that "there is no wear on the shaft," which would not be the case if the shaft was intended to vibrate on a fulcrum in the nozzle with every stroke of the pen. The record shows no reply from the patent-office to the letter of the solicitor. No modification of the application was called out by the letter. The patent was issued to correspond with the application as it stood before the solicitor's letter. It is true that the patent was issued after the receipt of the letter, but that does not warrant a decision that the patent was intended to cover an element nowhere alluded to therein. The supposition of such an understanding is not consistent with the action of the patent-office in issuing the patent in its present form. If such an element was understood by the patent-office to be a part of the invention, the intimation in the examiner's prior letter, (paper No. 5,) where it is said to this same solicitor in respect to the defendant's application, "claims which receive favorable consideration should be definite to the construction shown," would have been repeated on receipt of the letter in question, and a modification of the patent insisted upon.

The cases cited by the defendant (*Shepard* v. *Carrigan*, 116 U. S. 593, 6 Sup. Ct. Rep. 493; *Fay* v. *Cordesman*, 109 U. S. 408, 3 Sup. Ct. Rep. 236; *Sargent* v. *Safe & Lock Co.*, 114 U. S. 63, 5 Sup. Ct. Rep. 1021) require no such conclusion to be drawn from the expressions in this letter of the solicitor as the defendant contends for in this case. If the claim of the specifications of the plaintiff's application or of his patent contained ambiguous language, capable of being understood to mean that the shaft was to vibrate on a fulcrum in the nozzle, these cases might be in point. But I take it no case has gone so far as to hold that the language used by a solicitor to convey an idea of his own, not embodied in the patent, is to override the language of the patent; especially when, as here, there is no evidence to show that the idea was ever adopted by the patent-office.

I find nothing in the file-wrapper, or the proceedings before the patent-office, to justify the contention that the plaintiff's patent is for a combination, one element of which is a shaft having a fulcrum in the nozzle, the upper end of which is intended to vibrate in the ink reservoir under the action of the pen upon its lower end. On the contrary, the patent, as I understand it, is for a combination which is employed by the plaintiff, and is also found in the pens, Exhibits B, C, and D.

The complainant is therefore entitled to a decree and an injunction.

AMERICAN BELL TELEPHONE CO. *v.* ALBRIGHT.

(*Circuit Court, D. New Jersey.* September 30, 1887.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—JOINT INFRINGERS.
   Under a lease made by the P. Telephone Company to defendant and G., G. put up several telephone instruments made by the P. Telephone Company which infringe complainant's patent. Defendant became a party to the lease merely for the accommodation of G., who could not, alone, obtain it from the company, and allowed G. to transact all the business and to have all the benefits of the lease. Defendant had acknowledged in the present suit that the lease is binding upon him. *Held*, that the infringement is the joint tort of defendant and G. for which defendant is responsible equally with G.
2. JUDGMENT—SATISFACTION—PROOF OF.
   Defendant and G. were sued separately for the same infringement of complainant's patent, and in the suit against G. complainant obtained a decree for an injunction and account, and waived the account and took a decree for nominal damages of one dollar, and costs to be taxed. The costs were taxed at $293.69. G. testified that he sent one dollar to complainant's attorneys in a registered letter in settlement of the damages and received a return card acknowledging receipt of the registered letter. He did not give a copy or state the contents of the letter, and no answer appeared to have been returned. *Held*, insufficient to show satisfaction for the infringement.
3. SAME—JOINT TRESPASSER—BAR OF RECOVERY.
   A judgment against one joint trespasser or wrong-doer, without satisfaction, is no bar to a recovery against the others.

Henry G. Atwater, for complainant.
J. C. Clayton, for defendant.

BRADLEY, Justice. This is a bill in equity, alleging infringement of Bell's patents for telephone instruments, and praying for an injunction, damages, and profits. A decree for injunction and account was entered March 23, 1883. The master reported that the defendant put in use 48 instruments in the city of Newark, and that the established license fee of the complainant was $10 a piece, and on this basis reported damages at $480. The defendant has filed exceptions, and claims: (1) That he is liable for only four of these instruments; (2) that he has been released from the damages for the use of these, by complainant's obtaining recovery and satisfaction from one John J. Ghegan, who put up the instruments. The facts in proof will explain the pertinency of these exceptions. All the 48 instruments put up were made by the People's Telephone & Telegraph Company of New York, and were furnished to John J. Ghegan, and put up by him for different parties under a contract of lease and license, made April 25, 1882, by said company, to and with said Ghegan and the defendant, Albright, whereby it was recited that the People's Telephone Company (of the first part) owned letters patent, granted to George M. Hopkins August 17, 1880, and sundry other inventions in telephony, and desired to extend their use; and that Ghegan & Albright (of the second part) desired to obtain the use of the same; and it was, among other things, agreed that until the expiration of the patent the People's Company should deliver telephone instruments to Ghegan & Albright, as needed, to be used in the territory of New Jersey,

and would not license to others within said territory; and that the lessees should pay a rental of six dollars per annum for each instrument delivered, until returned or destroyed, and 25 per cent. of all profits realized; and that the lessors should protect the lessees against all suits for infringement of other patents.

It appears that four of the instruments were put up for the use of Albright, on his premises, and the other 44 for the use of other persons. The defendant and Ghegan testify that Albright entered into the arrangement with the People's Telephone Company merely for the accommodation of Ghegan, (whose business was to put up telephones,) as the company would not give the lease to Ghegan alone; and that Albright took no part in the business. The People's Telephone Company, however, looked to both parties, and charged both with the instruments delivered to Ghegan. It also appears that the complainant filed a bill against Ghegan for infringement, shortly before the bill in the present case was filed against Albright, and that Albright applied to the People's Company to take care of the suit against Ghegan, and procured from them a fee for counsel. When the present suit was commenced, Albright again applied to the People's Company to defend this suit in conformity with the contract. And as late as March, 1884, he filed a petition for a rehearing in the present case, verified by his affidavit, in which, among other things, he stated as follows:

"Your petitioner further shows that before and ever since the beginning of this suit he was under a contract with the People's Telephone and Telegraph Company, whereby, among other things, he and one John J. Ghegan were licensees for the state of New Jersey, for the use of telephones made under letters patent controlled by said company, and whereby the said company was to guaranty and defend your petitioner against all suits for infringement. That your petitioner duly notified said last-named company of this suit against him, and called upon said company to defend him, and that they refused to do so."

—And this refusal was one ground on which he sought a rehearing of the case. This is a clear acknowledgment by Albright that the contract with the People's Company was in full force, and binding on him as well as on Ghegan. All the offending machines were put up under this contract, and in pursuance of it, and would not have been put up without it, so that it may be justly said that Albright, as a party to this contract, joined in inducing and bringing about the infringement complained of. Although Albright chose to let Ghegan have all the benefits of the contract, he was equally responsible with him for the consequences of putting up the instruments, equally responsible to the People's Telephone Company, and equally responsible to the complainant, whose patents were infringed. He must be deemed to have joined Ghegan in putting them into use, to have aided and abetted in the act. The infringement of the complainant's patents was, therefore, a joint tort of Ghegan and the defendant.

But the defendant raised another point of defense. The complainants sued Ghegan and Albright separately, (which they had a right to

do,) and it is alleged that a recovery was had against Ghegan, and that the decree was satisfied by him; and it is claimed that this is a bar to any recovery of damages against the defendant Albright. The facts are that a decree was rendered against Ghegan for an injunction and an account. A few days afterwards the complainant waived the account, and took a decree for nominal damages of one dollar against Ghegan, together with costs to be taxed. The costs were taxed at $293.67. Ghegan testifies that on the twenty-fifth of February, 1885, he sent one dollar to the complainant's attorneys, in a registered letter, in settlement of the damages referred to in the decree against himself, and that he received a return card in due course of mails, acknowledging the receipt of the registered letter. He does not give a copy, or state the contents, of the letter sent by himself, and no answer appears to have been returned by the attorneys. This is all the proof contained in the record of satisfaction of the decree against Ghegan. I think it is entirely insufficient. The decree was for damages and costs, and amounted to nearly $300, and the payment of one dollar could not be a satisfaction of $300, even if the attorneys of the complainant accepted it as such, unless a release were given. The proof that the one dollar sent by mail was accepted and received by the attorneys, in full satisfaction of the damages, as distinguished from the costs, if competent at all, should have been clear and explicit, which it is not.

By the English rule a mere judgment against one joint trespasser or wrong-doer is a bar to a recovery against the others. In this country there must be both recovery and satisfaction. Bigelow, Estop. 103–113; Add. Torts, (4th Ed.) 1158. Whether the satisfaction of a judgment taken for mere nominal damages, upon a distinct waiver of actual damages, would be regarded as a full satisfaction for the tort, sufficient to bar a recovery against a joint wrong-doer, is questionable. A waiver of damages against one wrong-doer can hardly be regarded as satisfaction for the wrong done. Suppose the decree taken against Ghegan had been simply for a perpetual injunction, without any mention of damages or profits, would that have been a bar to a recovery against Albright? I hardly think it could be. However, it is unnecessary to decide this point. I do not think that there is sufficient proof of satisfaction in the present case to create an estoppel under the American rule.

My conclusion is that the defendant Albright was jointly liable with Ghegan to the complainant for all the instruments put up for use under the joint lease to him and Ghegan; and that the exceptions to the report must be overruled, and the report confirmed; and that a final decree should be entered for the complainant in conformity with the report, and for a perpetual injunction, etc.

STARLING *v.* ST. PAUL PLOW-WORKS.

(*Circuit Court, D. Minnesota.* October 10, 1887.)

1. PATENTS FOR INVENTIONS—CONTRACT FOR ROYALTY—BREACH.
   By the terms of a contract between the plaintiff and the defendant, the latter was licensed to manufacture and sell a plow, of which the plaintiff was the inventor, upon payment of a royalty for each plow so manufactured and sold. *Held*, that the manufacture by the defendant of plows called by a different name, but substantially the same as defendant's invention, was a breach of the contract, if defendant failed to pay the royalty, and that plaintiff might elect whether to sue for the royalty or for infringement.
2. SAME—ANTICIPATION—PLOWS.
   Patent No. 127,878, for an "improvement in plows," consisted of a sleeve around the axle which is revolved by a lever affixed to it; the sleeve having two arms projecting towards the rear, and pivoted to the plow-beam underneath. By the operation of the lever the elbow is raised, and a trigger pivoted on the lever falls into a notch on a circular plate fastened on the right of the axle, or its connections, with arms running to the tongue. The plow is thus held up while turning or being taken from the field. It can be locked in the ground, or out of it, by inserting a pin in holes made for the purpose in the circular plate, but the plow cannot be regulated while in motion. The plaintiff's invention consisted of a crooked axle, a crank-bar, bent twice at right angles, and a lever so arranged that while in motion the point of the plow could be raised by the operation of the lever, and the horses made to raise it out of the ground; or it could be locked in the ground at any depth, or out at any height. *Held*, that the former invention did not have the same combination as the latter for raising and lowering, and therefore was not an anticipation of the plaintiff's invention.

Action on a Contract whereby defendant agreed to pay a royalty for the sale of certain patented plows.

Frackelton & Careins, for plaintiff.

John B. & W. H. Sanborn, for defendant.

NELSON, J. A motion for a new trial is made by defendant upon the following grounds: "*First*, on account of accident and surprise which ordinary prudence could not have guarded against; *second*, on the ground that the decision is not justified by the evidence, and is contrary to law; *third*, on the ground of newly-discovered evidence, material to the petitioner, which it could not with reasonable diligence have discovered and produced at the trial; *fourth*, on account of error in law occurring at the trial, and excepted to by the petitioner." The trial was before the court without a jury, and was very thorough. Many questions arose, and, if error was committed, it was in allowing the defendant to show want of novelty and patentability of the plaintiff's plow. The action was brought upon a contract in which the defendant became a licensee to manufacture and sell the plaintiff's invention called the "Starling Plow," on payment of a royalty for each and every "Starling Plow" manufactured and sold. A breach of the contract is alleged, and a recovery sought and obtained for the amount of royalties upon plows sold and not accounted for and paid the defendant. If the defendant manufactured plows called by a different name, but substantially the same as defendant's invention, invading his rights under the patent, or using

devices claimed in the plaintiff's patent, it is a breach of the contract if defendant fails to pay the royalty therein provided, and on a repudiation of the contract by the licensee, the licensor and patentee can either sue for royalties unpaid or for infringement. *Cohn* v. *Railroad Co.*, 3 Ban. & A. 572, and cases cited. The election to sue for a breach of the contract is made in this case, and sustained. The court decided the defendant did infringe, and gave judgment.

I dismiss all of the reasons assigned for a new trial with one exception, and will briefly consider that one, viz.: "Newly-discovered evidence, material for the petitioner, which it could not with reasonable diligence have discovered and produced at the trial." This evidence is a patent, No. 127,878, issued June 11, 1872, to William G. Haslup, assignor, for an "improvement in plows." If the newly-discovered evidence which is submitted would not change the result of the verdict and judgment, it is well settled that a new trial should not be granted. The letters patent are attached to the petition for a new trial. I have examined the specifications and claims, and, if it had been offered under the ruling of the court at the trial, it could not have changed the result.

The first claim of the plaintiff's patent is "for a crank-bar, combined with the plow-beam, lever, and axle, as and for the purpose set forth, so that the horses are made to raise the plow out of the ground."

The plaintiff's plow has a crooked axle, and a crank-bar bent twice at right angles, passing through a box bolted to the plow-beam towards the rear end. The forward end of this bar, near the driver's seat or right wheel of the sulky, rides upon the inner end of the journal. The end of a spring lever, which projects upward along a curved bar on the right side of the driver's seat, is connected rigidly with this end of the crank-bar. The curved bar, with notches on the outer side to receive this upright lever, is attached to the axle, and part of a brace running from the axle to the tongue. The crank-bar thus bolted to the plow-beam can be held in any position to which the lever is adjusted. By this device and manner of construction and bolting, the plow can be locked, either in the ground at any depth, or up at any height, at the will of the driver, and in the operation of raising the plow the point comes up first. By means of the lever the point turns up, and the horses are made to raise the plow out of the ground.

In the Haslup patent sulky plow there is a sleeve around the axle proper, which is revolved by a lever affixed to it. This sleeve has two arms projecting towards the rear, and pivoted to the plow-beam underneath. When the lever is pushed forward, the plow is raised, and a trigger pivoted to the lever falls into a notch on a circular plate, fastened on the right of the axle, or its connection, with arms running to the tongue. The plow is thus held up while it is turned or taken from the field. The plow can be locked in the ground, or depth to be plowed determined, only by inserting a pin in holes made for that purpose in the circular plate fastened as heretofore stated. The driver cannot regulate the depth to be plowed, and lock the plow in the ground, while it is in motion. The pin prevents the plow being raised by the lever, and

it could not be operated while in motion so as to raise the point of the plow, and make the horses pull it out of the ground.

The Haslup plow does not have the combination of the plaintiff for the purposes described in his patent, and does not anticipate his invention. The motion for a new trial is denied.

CORNELY *v.* MARCKWALD.

(*Circuit Court, S. D. New York.* March 6, 1885.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DAMAGES.
   On an accounting under a decree finding that the defendant had infringed, all that the plaintiff proved upon the question of royalty was that he had instituted 10 or 11 suits against infringers, and in all the cases except one a settlement had been had between the parties—in some instances before and in others after a decree—by the payment of $50 for each infringing machine sold or used by the respective defendants. *Held*, that the evidence was insufficient to establish a price as for a fixed royalty.
2. SAME.
   A patentee, in whose favor a decree of infringement has been entered, is not entitled to an allowance for the loss sustained by him by reason of the diversion of sales of the patented article, which he would have made but for the sales made by the defendant, when he fails upon the accounting to put in any evidence showing the cost of the articles.
3. SAME.
   On an accounting for an infringement it appeared that the patentee had gradually reduced his prices from the time he first put his patented article on the market, down to the time when the defendant commenced to compete, and that this reduction had continued after the defendant was enjoined. *Held*, that the loss sustained by reason of the reduction in prices owing to the competition of the defendant was conjectural, and not the subject of damages.

In Equity. On exceptions to master's report.

William H. L. Lee, for plaintiff.

William A. Coursen, for defendant.

WALLACE, J. The complainant's exceptions to the report of the master upon the accounting under the interlocutory decree raise the question whether the master erred in finding that no damages were established by the proofs before him. The complainant insists that he is entitled to recover, upon the theory that he proved an established royalty for the use of his patented invention when licenses were granted by him to others. It appears that he instituted 10 or 11 suits against infringers, and in all these cases, except one, a settlement was made between the parties—in some instances before and in others after a decree—by the payment of the sum of $50 for each infringing machine sold or used by the respective defendants. No other testimony was offered bearing upon the question of royalty. Whatever effect it might seem proper to give this testimony were the question an open one, in view of the decision in *Westcott* v. *Rude*, 19 Fed. Rep. 830, where it was carefully con-

sidered by Woods, district judge, it should be held, as there held, that evidence of payments made for infringements is incompetent to establish a price as for a fixed royalty. See, also, *Shoe Co.* v. *Car Co.*, 19 Fed. Rep. 514. There are so often extraneous influences, considerations of expediency, coercion, and sometimes collusion, affecting settlements thus made, as to suggest strong practical reasons for rejecting the evidence as wholly unreliable. *Black* v. *Munson*, 14 Blatchf. 268.

The complainant also insists that he should be allowed for the loss sustained by him by reason of the diversion of sales which he would have made but for the sales made by the defendant. He failed, however, to give any evidence showing the cost of his machines, and therefore there was no basis for a computation of his loss of profits.

The conclusions of the master are fully approved concerning the alleged loss of the complainant by reason of the enforced reduction in his prices for his machine, owing to the competition of the defendant. A circumstance in addition to those suggested by the master, as tending to show this part of the plaintiff's claim to be merely conjectural, is found in the fact that the complainant gradually reduced his prices from the time he first put his machines on the market, down to the time when the defendant commenced to compete, and this reduction continued after the defendant was enjoined, the prices for 1882 being lower than they were in 1880. It is probable, from the fact that the defendant sold his machines at an average price of about $36 below the complainant's price, to the complainant's customers, that the complainant has sustained damages for which he has not been compensated, because he would probably have sold these machines himself, and realized his usual profit on them. But, in the absence of any proof to show what this profit would have been, no other conclusion was possible than that which was reached by the master. He may have sold his machines at a loss.

The exceptions are overruled.

WELLING *v.* LA BAU.

(*Circuit Court, S. D. New York.* August 1, 1885.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DAMAGES—ACCOUNTING.
The patented process, which the defendant was found to have infringed, consisted of the use of shellac and talc in substantially equal parts, and the accounting was confined to infringements of that combination. A sworn statement of sales, etc., was filed before the master, which the patentee impeached, and called for a supplemental statement. By leave of court, the defendant, to avoid the expense of such statement, introduced evidence in rebuttal, but the master found against him, and ordered him to produce it. *Held*, on appeal, that as the question, whether the articles made and sold by the defendant, not included in the original statement, were composed of shellac and talc in substantially equal proportions, was a complicated question of fact which depended in part upon the veracity and the credibility of

some of the witnesses, and in part upon the testimony of experts concerning the correctness of analyses of specimens of the article and the character of one of its components (fibre-white) commercially, mineralogically, and chemically, the finding of the master would not be disturbed.

2. SAME.

It is only in cases of extreme hardship to the defendant that the court will review an incidental ruling of the master, in the course of the accounting, when that ruling can be reviewed upon exceptions to his report.

In Equity. On application to review an order of the master.

At the hearing an infringement was found of reissued letters patent No. 5,940, of June 30, 1874, to William M. Welling, for a process for the manufacture of artificial ivory, and as to the patent a decree was entered for an injunction and accounting; "the injury upon the accounting to be confined to infringement, consisting of the use of shellac and talc in equal parts substantially." 12 Fed. Rep. 875.

Frederic H. Betts and *C. Wyllys Betts*, for plaintiff.

Lucien Birdseye, for defendant.

WALLACE, J. An interlocutory decree having been ordered for the complainant, adjudging the validity of his reissued letters patent, No. 5,940, and the infringement thereof by the defendant, the cause was referred to a master, to take an account of damages and profits. During the course of the hearing before the master, an order was made by the court requiring the defendant to render a statement, under oath, before the master, of all sales and deliveries of articles made by him, containing shellac and talc in composition, with the names of the persons to whom such articles were sold, and the quantity sold to each, since the thirtieth day of June, 1874; and to produce specimens of all the articles of shellac and talc in combination, made and sold by defendant since that date. Upon the production of this statement before the master, the question arose whether in the account produced all the articles which were composed of shellac and talc in substantially equal proportions were included; only such articles being an infringement of the complainant's patent. The complainant introduced evidence to show the manufacture and sale of other articles by the defendant, composed of these ingredients in the requisite proportion, and called for a supplemental statement. As the making of such a statement was likely to devolve considerable labor and expense upon the defendant, leave was granted to the defendant, by an order of this court, to introduce evidence to show that none of the articles made or sold by him, which had not been included in the former statement, were composed of shellac and talc in substantially equal proportions, in order that, if the master was satisfied that the former statement contained a full account of the sales of all infringing articles made by the defendant, the defendant might be relieved from the burden of producing the supplementary statement. Voluminous proofs were introduced by the respective parties upon this preliminary issue, and the master has made an order requiring the defendant to produce the supplementary statement. An application is now made to the court by the defendant to review that order of the master.

A careful examination of the evidence shows that the question whether the articles made and sold by the defendant, not included in the original statement, were composed of shellac and talc in substantially equal proportions, is a complicated question of fact, depending in part upon the veracity and the credibility of some of the witnesses, and in part upon the testimony of experts concerning the correctness of analyses of specimens of the article, and concerning the character of one of the components commercially, mineralogically, and chemically. What amount of talc was used involves the questions whether a certain proportion of one of the ingredients was in fact talc, or was fibre-white; and, if fibre-white, whether fibre-white, although not commercially the same thing as talc, is mineralogically and chemically the same. The question also arises whether fibre-white is an equivalent for talc. The experts differ diametrically in their testimony The court has not the benefit of any opinion of the master, and is therefore ignorant of the theory which he has adopted. If he has found the fibre-white is merely an equivalent for talc, as it was not a known equivalent when the patent was granted, the complainant cannot predicate infringement upon its use by the defendant. If, on the other hand, he has found that it is talc, although not dealt in commercially by that name, he has determined a disputed question of fact, upon which the evidence is very conflicting. Upon the case as it is now presented, and without an opportunity of ascertaining the views and reasons of the master, the court cannot safely assume that he is mistaken. The report of the master will not be set aside as to matters of fact upon which the evidence is doubtful, or the inferences uncertain, much less where his conclusions are reached upon conflicting testimony, and involve to a greater or less degree the credibility of the witnesses.

The practice which has been pursued here is not to be commended. The regular and orderly way to test the question of the extent of the defendant's infringement, is upon exceptions to the master's report at the conclusion of the accounting. It is only in a case of extreme hardship to a defendant that the court should be asked to review an incidental ruling of the master, in the course of the accounting, which can be reviewed upon exceptions to his report. There was enough here, probably, to justify the attempt which has been made, but the hardship to the defendant is a less evil than the danger of reaching a wrong decision upon the merits. It is more judicious to require the accounting to proceed in the ordinary way. When the master's report is made, if it is excepted to, his findings of fact will appear, and the court can review them intelligently, and with a stronger probability of reaching a correct result than is now possible.

The application of the defendant is denied, and he is directed to comply with the order of the master

THE EDWIN BAXTER.[1]

PARK *v.* THE HULL OF THE EDWIN BAXTER.

(*District Court, S. D. New York.* June 21, 1887.)

1. ADMIRALTY—PRACTICE—INTERROGATORIES.
   Under admiralty rule 23 of the supreme court, which requires libelant's interrogatories to be propounded "at the close of the libel," libelant may not, of course, propound interrogatories to the claimant after the filing of the answer.
2. SAME—AMENDMENT OF LIBEL.
   The libelant's proper practice is to apply to the court for leave to amend his libel, and to add at the close of the amended libel the desired interrogatories.
3. SAME—RULES.
   Rule 99 of this court is controlled and superseded by rule 23 of the supreme court.

In Admiralty.

Wilcox, Adams & Macklin, for libelants.

Carpenter & Mosher, for claimants.

BROWN, J. The claimants having in their answer interposed new matter in avoidance of the allegations of the libel, the libelants propounded interrogatories, under rule 99 of this court, which permitted interrogatories to be propounded by "either party to the other within four days from the putting in of the claim or answer or other pleading." The claimants, under rule 100, have objected to these interrogatories on the ground that they are not allowable under the provisions of the twenty-third rule of the supreme court in admiralty. Rule 99 regulated the practice in this district prior to the adoption of the twenty-third rule of the supreme court in 1844. The latter covers the same general ground as the former; and in the restrictions interposed, requiring the libelant's interrogatories to be propounded "at the close of the libel," it controls and supersedes the former rule of this court. The practice is essentially the same as that in equity, in which the interrogatories are limited to the subjects contained in the libel. Rule 51 of the supreme court, promulgated in 1854, affords to the libelant, in cases like the present, the desired relief in another form, namely, through an amendment of his libel upon application to the court. To such an amended libel, when allowed, the desired interrogatories can be regularly added, under rule 23. See *Taber* v. *Jenny*, 1 Spr. 315, 316; *Gladding* v. *Constant*, Id. 75, note; *The David Pratt*, 1 Ware, 497.

The objections to the present interrogatories must, under the rule, therefore, be sustained, and the interrogatories disallowed, except upon an amendment of the libel.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

THE STRAITS OF GIBRALTAR.

DRISCOLL *v.* THE STRAITS OF GIBRALTAR, Her Cargo, etc.

HICKS and others *v.* SAME.

(*District Court, D. New Jersey.* September 10, 1887.)

1. SALVAGE—TOWING BURNING LIGHTER AWAY FROM VESSEL.
While a steamer was discharging a cargo of saltpeter into a lighter, and after about 100 tons had been delivered, the saltpeter on the latter took fire, and spread with such rapidity as to compel the men to abandon the lighter, which was at once cast loose, and drifted under the port quarter of the steamer. The flames rose very high, but the wind blew them from the steamer, which was an iron-built one. There still remained on board the latter about 550 tons of saltpeter. While in this situation, the libelant's tug made fast to the lighter, and pulled her out of the slip, into the river, where she burned to the water's edge in about 40 minutes after first taking fire. *Held*, that the libelant was entitled to salvage.

2. SAME—AMOUNT AWARDED.
Five hundred dollars was held to be a proper compensation for salvage services rendered by the tugs of libelant, worth about $17,000, in pulling a burning lighter loaded with saltpeter away from a steamer valued at $115,000, there being other tugs present who would have performed the same service.

3. SAME—COSTS.
Where the court decrees that libelant is entitled to salvage, he is also entitled to costs, although his original claim may have been exorbitant, the defendant having refused to offer any compensation whatever.

In Admiralty.

John Griffin, for libelant Driscoll and tug Jesse Russell.

E. D. McCarthy, for libelant Hicks and tug Harry Roussell.

Butler, Stillman & Hubbard, for respondent steam-ship Straits of Gibraltar.

WALES, J. These are libels for salvage services rendered to the British steam-ship Straits of Gibraltar while lying at the Inman pier, Jersey City, on the twenty-sixth of May, 1886. The steamer had discharged into a lighter, fastened to her port side, 1,305 bags of saltpeter, weighing in all 110 tons, and the men had just knocked off work and gone to dinner, when one of the bags on the lighter was discovered to be on fire. Immediately on the alarm being given the chief officer, with two or three of the crew, jumped into the lighter and tried to smother the flames with a tarpaulin, and at the same time the steamer's hose was laid and attached to the donkey-engine. The flames spread with such rapidity that the men were soon driven from the lighter, which was then cast loose from the steamer, and pushed down the slip and towards the river, the steamer's hose in the mean time throwing water on the burning mass, until the lighter passed under the port-quarter of the steamer and lodged with one end near the steamer's rudder, and the other near or close up to the pier. By this time the fire had extended all over the midship, and to within 10 feet of each end of the lighter, which was 80 feet long, and the flames rose as high as the flag-staff and awning of the

steamer, both of which were scorched but not consumed. The bull's-eye windows at the stern of the steamer were cracked or broken by the heat, and the paint was burned off the iron plates. The wind was from the south and west, blowing off shore, and carried the flames and smoke away from the steamer. Water thrown on the burning saltpeter had little or no effect in extinguishing the fire, and when the lighter had lodged or gone under the overhang of the steamer, the hose from the latter could not reach it.

At this juncture the tugs of the libelants appeared on the scene. The Harry Roussell, the larger tug, came first, and entered the slip stern foremost; but, having too much sternway, went too far in, and, before he could go ahead again, the Jessie Russell run in, bow on, striking against the port-bow of the lighter, to which she made fast by a line, and then attempted to back out and draw the lighter after her. This movement, however, did not succeed, owing to the position of the Jessie Russell, which was athwart the slip with her bow within a few feet of the lighter, and her stern nearly touching the steam-ship Rhynland, which was lying at the Red Star pier, on the opposite side of the slip, the slip being 164 feet wide. The Jessie Russell, having a right-hand wheel, moved back to port, and thus threw her stern further in the slip, as she had not room enough to get sufficient sternway to make her rudder of any service to her. Under these circumstances, the Jessie Russell being comparatively helpless either to pull off the lighter, or to save herself, the Harry Roussell, at the request of her captain, threw a line which was made fast to the port stern of the Jessie Russell, and, shoving the latter aside, steamed out of the slip, taking along with him both the tug and the lighter, the Jessie Russell forming, as it were, a link on the tow line between the lighter and the Harry Roussell. In a few minutes after getting into the river the lighter burned to the water's edge, and sank. The Straits of Gibraltar was an iron-built vessel with iron deck, masts, and rigging, two years old, and worth at least $100,000. The cargo remaining on board is admitted to have been worth $15,000. The Harry Roussell was valued at $14,000, and the Jessie Russell at $3,000.

I have no doubt that the libelants are entitled to salvage, and the only question is what amount should be allowed to them. This question is always more or less embarrassing to a judge, who has to distinguish between what would be a fair compensation, *pro opere et labore*, and a sufficient and ample reward for the enterprise and energy voluntarily exercised by salvors. The libelants' services were promptly rendered at a time when the steamer appeared to be in great peril, and they exposed themselves and their tugs to considerable danger in taking the lighter, loaded with a burning mass of saltpeter, from under the steamer's quarter. It is true that the fire department of Jersey City came on the pier at which the steamer was moored, before the lighter was removed, and most probably would have prevented a total loss, or even any very extensive injury to the ship or cargo; also that several other tugs had come to the rescue, and were lying off the dock, ready to give needed assistance; but these facts should not detract from the merit which is due to

the libelants for their conduct in braving the actual danger which they encountered in hauling out the lighter. It is also true that a very brief time elapsed from the moment the alarm was given until all danger to the ship was over,—perhaps not more than 35 to 45 minutes; but the alacrity and speed with which the work was performed should increase its value, as each minute of delay would have only added to the peril and injury of the steamer. Five hundred and forty-seven tons of saltpeter still remained in the hold of the ship, and although the hatchways were securely covered, and the iron plates of the ship might have resisted the fire for an indefinite time, yet it was possible, had the lighter been allowed to remain under the stern, for the heat to have been communicated to the interior, in which case a serious disaster might have occurred. These are mere possibilities, but in estimating the degree of danger they are not to be lost sight of. The essential ingredients of salvage service were present in this case. The libelants expended labor and exercised promptitude and skill. The value of the property employed by them in the service was considerable, and their property was exposed to danger. The libelants themselves incurred some risks, the captain of the Roussell having been driven into his pilot house to escape the scorching heat and fiery shower of burning and exploding saltpeter. The property saved from destruction or injury was valued at not less than $115,000. *The Blackwall*, 10 Wall. 14.

But after all, it must be admitted that other tugs were present at the Inman pier, or near by, who could and would have given the assistance which was rendered by the libelants, and that the services of the latter, though prompt and successful, were not indispensable. After a careful consideration of all the facts, I have concluded to award to the Harry Roussell the sum of $350, and to the Jessie Russell the sum of $150, with costs. A decree will be entered for the libelants accordingly.

The claimants' proctor contended with much zeal that the libelants should not be allowed costs, because their original claims were exorbitant, and that the owners of the steam-ship were thereby subjected to extraordinary trouble and expense in obtaining sureties for their bond. It may be that the libelants were unreasonable in making an excessive demand, but the claimants were not less so in refusing to offer any compensation whatever; and (adopting the language of Judge BUTLER, in *The Indiana*, 22 Fed. Rep. 925,) "in the absence of any offer of adequate compensation, and considering the ease with which the respondent here might have had relief by application to the court, I do not feel called upon to withhold costs."

THE MAGGIE P.

MILLER *v.* THE MAGGIE P.

(*District Court, E. D. Missouri, E. D.* 1887.)

MARITIME LIENS—MARITIME CONTRACTS—CARE OF VESSEL.

A libel was brought against a vessel by one who was employed as watchman, while a steamer was lying in the port of St. Louis. A portion of the demand was for materials and labor procured for the repair and preservation of the steamer. It was further alleged that it was the duty of libelant to keep the steamer in a place of safety, and to that end to move and navigate her from place to place as circumstances demanded, and that on several occasions he did procure a tug to move her from one anchorage to another, to insure her safety. *Held*, that the entire demand grew out of a maritime contract, and was within the jurisdiction of the admiralty court.

In Admiralty. On exceptions to libel.

Dawson & Drummond, for libelant.

F. X. McCabe, for claimant.

THAYER, J. The sole question in this case is whether the libelant has a maritime lien for the demand described in the libel, and may proceed in a court of admiralty to enforce the same. The demand is, in great part, for services rendered by the libelant as watchman while the steamer was lying at the port of St. Louis. A small portion of the demand, amounting to $7.70, is for money expended by libelant in procuring necessary materials and labor for the repair and preservation of the steamer, while he was in charge of the same. It is averred in the libel that it was part of libelant's duty as watchman to keep the steamer in a place of safety, and to that end to move and navigate her from place to place as circumstances demanded, and that in the course of the 14 months that libelant had charge of the steamer, he did, in fact, on several occasions, procure a tug and move her from one anchorage in the harbor to another to insure her safety. It also appears that the services in question were rendered to the steamer in her home port. It is not averred, however, whether such services were rendered upon the credit of the steamer, or personal credit of the owner. Counsel for the claimant has taken no exceptions to the libel, however, on the special ground that this is the home port, nor upon the further ground that the libel fails to aver that the services were rendered, and the money was expended by libelant, on the sole credit of the steamer.

The broad proposition is asserted that the claim in question, as set forth in the libel, does not arise out of a maritime contract, and this is the sole question to be at present determined. The case principally relied upon is that of *Gurney* v. *Crockett*, 1 Abb. Adm. 490, in which it was held that a person employed to visit a vessel at anchor from time to time to see to her safety, etc., was not entitled to sue in admiralty to recover compensation for his services, as they were not rendered in execution of a maritime contract, although it was conceded in that case that,

if it had been the duty of the watchman to get the vessel under way, and navigate her from one anchorage to another, in the same port, he might have sued in admiralty for such services, as they are of a maritime nature. The cases of *Phillips* v. *The Scattergood*, Gilp. 3; *The Amstel*, Bl. & H. 215; *Cox* v. *Murray*, 1 Abb. Adm. 341; and *The S. G. Owens*, 1 Wall. Jr. 370,—have also been cited, and they are of the same general character as *Gurney* v. *Crockett*, *supra*. With reference to all of those cases it may be said that the tests therein applied to determine whether the contracts involved were maritime, were tests that have very generally been pronounced to be inadmissible and indecisive by later decisions, in some instances, of the same courts in which those decisions were pronounced. Thus, the case of *Gurney* v. *Crockett*, decided in 1849, in the Southern district of New York, was overruled, in effect, in the same district, by the case of *Roberts* v. *The Windermere*, decided May, 1880, *vide* 2 Fed. Rep. 722. The other later cases to which reference is made as establishing a more liberal interpretation of the term "maritime contract" are the following: *Insurance Co.* v. *Dunham*, 11 Wall. 26; *The Geo. T. Kemp*, 2 Low. 482; *The Onore*, 6 Ben. 564; *The Erinagh*, 7 Fed. Rep. 231; *The Senator*, 21 Fed. Rep. 191; *The Trimountain*, 5 Ben. 250; *The Hattie M. Bain*, 20 Fed. Rep. 289; *The Wivanhoe*, 26 Fed. Rep. 927.

A portion of the libelant's demand in the present case grew out of the performance of a maritime service, even under the narrow rule applied in the case of *Gurney* v. *Crockett*, *supra*, and as the exceptions are general, and are urged against the whole demand, they might properly be overruled for that reason. But I am of the opinion that according to the tests now applied to determine what are maritime contracts, the entire demand as described in the libel grew out of a maritime contract, and is within the jurisdiction of the admiralty courts. The exceptions are accordingly overruled.

WITHCOFSKY *v.* WIER and another.[1]

(*District Court, E. D. New York.* September 8, 1887.)

1. ADMIRALTY—PERSONAL INJURY—STATE STATUTE OF LIMITATIONS.
   The requirement of the New York state law, that an action for a personal injury must be begun within three years from the occurrence of such injury, has no effect to bar a suit in admiralty, begun after that limit.
2. SAME—LASHING SPARE-WHEEL—RENDERING WHEEL DANGEROUS—NO NOTICE TO SEAMAN—INJURY—LIABILITY.
   Defendant, master of a vessel, caused the spare-wheel, which in its ordinary condition rested loosely and unfastened upon the drum of the steam-wheel, to be lashed so that it would rotate with the drum, thus rendering the apparatus dangerous to one engaged in cleaning it. No notice of the changed condition of the wheel was given to libelant, a seaman, in conse-

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

quence of which, while the latter was engaged in his duty of cleaning the apparatus, his hand was caught and so injured as to require amputation *Held*, that defendant was liable for the injury.

8. DAMAGES—LOSS OF HAND—FOUR THOUSAND DOLLARS NOT EXCESSIVE.
Where an accident occurred through the negligence of defendant, resulting in the loss of libelant's hand, *held*, that a judgment for $4,000 was not excessive.

A. S. Cushman, for libelant.

BENEDICT, J. This action was instituted by the libelant, one of the crew of the steamer City of Rio Janeiro, to recover of William Weir, the master, and John Roach, the owner, of that vessel, damages for injuries to the libelant's hand caused by the steam-wheel. When the cause came on to be heard the defendant Roach was dead, and the fact that he had died since the commencement of the action was admitted. The legal representatives of the defendant Roach were not parties to the action, nor did they appear, and the action proceeded against the defendant Weir alone. In behalf of this defendant no contest was made, and as against him the trial proceeded by default. Upon the evidence the claim is not stale, and, although the action was not commenced within three years of the time of the accident, the state statute has no effect to bar its progress.

Upon the merits, I am of the opinion that the facts proved establish negligence on the part of the master of the steamer, in that, without reason, he caused the spare-wheel, which in its ordinary condition rested loosely and unfastened upon the drum of the steam-wheel, to be lashed so that it would necessarily rotate with the drum, thereby rendering the apparatus dangerous to any one engaged in cleaning it; and he omitted to cause notice to be given to the libelant of the changed and then dangerous condition of the apparatus. From this neglect it resulted that the libelant, when engaged in his duty of cleaning the apparatus, not having been informed of the lashing of the extra wheel, and the fact that it was lashed not being apparent to ordinary inspection, placed one of his hands where, when the steam-wheel revolved, it was caught by the extra wheel and injured.

The injury was serious, and caused the amputation of the hand. I think the sum of $4,000 claimed at the trial not excessive damages for an injury such as this was, and I add to that sum interest and costs.

THE CANIMA.

(*Circuit Court, S. D. New York.* March 6, 1885.)

COLLISION—VESSEL AT PIER—CANAL-BOAT.
The steam-ship C., coming up North river to make a landing on the south side of pier 47, caught sight of the canal-boat R. lying over 500 feet away moored on the north side of pier 48, with her bow projecting 10 or 15 feet into the river beyond the end of the pier. This pier did not extend into the stream by over 50 feet, the distance of the other piers, and the place where the R. lay was 250 feet to the north from the intended berth of the C. The C. meant

to back in, and as she came up to pier 47, she took a line from that pier to her starboard bow, but kept on with the flood tide until her bow was opposite to or beyond the north line of pier 48, when her bow was drawn in by the line and her stern carried out in the river by the tide, and thus she swung in towards pier 48 until her starboard bow struck the starboard bow of the R., which immediately sank. There was no one in charge of the R. at the time of the collision. *Held*, that the C. alone was in fault, the R. owing no duty to her or to any vessel intending to land at the south side of pier 47, and the captain of the R. being under no obligation to anticipate such an event as took place.

In Admiralty. Libel for damages. On appeal from district court. 17 Fed. Rep. 271.

WALLACE, J. The canal-boat Redfield, loaded with a cargo of coal, was lying moored on the north side of pier 48, North river, preparatory to discharging her cargo, when she was struck by the steam-ship Canima, and sank almost immediately. The Canima had come up the river intending to make a landing on the south side of pier 47, by backing into her berth. As she got opposite pier 46, her captain and first officer saw the Redfield with her bow projecting 10 or 15 feet into the river beyond the end of her pier. As the Canima came up to pier 47, she took a line from that pier to her starboard bow, but kept on with the flood-tide until her bow was opposite or beyond the north line of pier 48, when her bow was drawn in by the line, and her stern carried out into the river by the tide, and thus she swung in towards pier 48, until her starboard bow struck the starboard bow of the Redfield. As pier 48 did not extend into the river by over 50 feet, the distance of the other piers, and the place where the Redfield lay was 250 feet to the north from the intended berth of the Canima, and as the Canima saw the Redfield when she was over 500 feet away, there was no necessity and no excuse for the Canima's collision with the Redfield. The learned district judge before whom the case was tried in the court below was of the opinion that the Canima might and should have avoided the Redfield altogether, although the latter projected beyond the pier; and this conclusion is fully warranted by the proofs. But he was also of opinion that the Redfield was in fault because her bow projected, and upon this ground apportioned the loss. He also placed some emphasis, in his opinion, upon the circumstance that there was no one in charge of the Redfield at the time of the collision. 17 Fed. Rep. 271.

If the location of the Redfield had been such as to obstruct the Canima's access to her pier, or in any way to complicate her proper movements, the Redfield would have been culpable. But she owed no duty to the Canima or to any vessel intending to land at the south side of pier 47. She was not in the way of the Canima if the latter had not gone to a place where she had no right to go. If the Redfield had been wholly inside the pier, and obscured from the view of those in charge of the Canima, the conduct of the latter would have been more excusable than it was. And they can with no more justice complain of her location than they could if she had been wholly inside the pier. It might as well be urged that a sailing vessel holding her proper course,

but run down by a steamer, should be deemed in fault for want of a lookout. *The Fannie*, 11 Wall. 238, 243. If there was fault on the part of the Redfield, it did not contribute to the collision. That was due solely to the inexcusable negligence of the Canima. The Redfield was not even in the way of passing vessels, because the pier was so much shorter than the adjacent piers. The captain of the Redfield was under no obligation to anticipate such an event as took place. He was temporarily absent, but if he had been present he could not have rendered any material asistance in the emergency.

The libelant is entitled to a decree of $1,000, the sum at which his damages are adjusted by stipulation, as of the date of June 23, 1884, with interest from that date, with costs of the district court and of this appeal.

HUNT *v.* THE MISCHIEF and another.[1]

(*District Court, E. D. New York.* September 23, 1887.)

COLLISION—TUGS AND TOWS—NARROW CHANNEL—OVERTAKING VESSEL—PREMATURE START.

The evidence indicating that the tug B., after she had turned to the side of the narrow channel of Newtown creek, and had slowed to allow the tug M. and her tow to pass her, started her engine again while the M. was passing, and thereby ran against the latter's tow, forcing libelant's boat against a dock, *held*, that the tug B. was solely liable for the resulting damage.

Hyland & Zabriskie, for libelant.
Edwin G. Davis, for the Martha Bogart.
Alexander & Ash, for the Mischief.

BENEDICT, J. The decision of this case depends upon the determination of a single question of fact, namely, whether the tug Martha Bogart, after she had turned to the side of the narrow channel of Newtown creek, and had slowed to allow the tug Mischief and her tow to pass up to port of her, started her engine again while the Mischief was passing, and thereby ran against the canal-boat in tow of the Mischief, and so caused such a change of position in the respective boats as to force the libelant's canal-boat against the dock above, called "Cooper's Dock," whereby she sustained the damage sued for. Upon this question my opinion is that the weight of the evidence is clearly with the contention of the Mischief, and shows that the damage which the libelant's boat received by striking Cooper's dock was not caused by any negligence on the part of the Mischief, but by the wrongful action of the Martha Bogart in starting her engines, and pushing against the libelant's boat in the way she did, while the Mischief was in the act of passing.

The libelant must have a decree against the Martha Bogart for his damages, and the libel, as against the Mischief, must be dismissed, with costs.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

HARLAND v. BANKERS' & MERCHANTS' TEL. CO. and others.

(*Circuit Court, S. D. New York.* September 23, 1887.)

MORTGAGE—FORECLOSURE—RECEIVER—ACTION BY, TO DETERMINE ADVERSE CLAIMS.

Although the order appointing a receiver *pendente lite* in mortgage foreclosure authorized him to bring such suits as he might be advised, he cannot maintain a suit in equity to obtain an adjudication that certain real property is subject to the lien of the mortgage, and that all liens claimed thereon by parties in possession and parties out of possession are invalid against him, and to obtain possession thereof, against one claiming adversely, where neither the mortgagor nor mortgagee is made a party, and no assignment by them to him of the property or cause of action is shown.

2. SAME—BILL BY RECEIVER FOR ACCOUNTING—CONTRACT WITH MORTGAGOR.

A receiver, appointed in an action to foreclose a mortgage given by a telegraph company, claimed to cover all subsequently acquired property of the mortgagor, cannot maintain a bill for an accounting for damages suffered by the mortgagor from breach of a contract to construct certain telegraph lines.

3. EQUITY—JURISDICTION—BILL TO TRY TITLE TO PROPERTY IN ADVERSE POSSESSION.

Equity will not entertain a bill to try title to, and obtain possession of, property in the possession of one claiming adversely, although at the same time complainant seeks relief in the nature of removing clouds upon title.

4. SAME—COSTS ON DISMISSING BILL AFTER HEARING—FAILURE TO DEMUR.

Costs will not be granted on dismissing a bill after a hearing upon the merits, for objections which might have been taken by demurrer, but which defendants failed to take at any stage of the case.

Wm. T. Wilson and *Hamilton Wallis*, for complainant.
R. G. Ingersoll, for defendants.

WALLACE, J. The complainant is the receiver of the American Rapid Telegraph Company, and of the property covered by a mortgage or deed of trust executed and delivered by that corporation to the Boston Safe Deposit & Trust Company, bearing date September 1, 1883. This mortgage was executed to the Boston Safe Deposit & Trust Company as trustee to secure an issue of bonds for $1,000 each, of the aggregate sum of $3,000,000, bearing interest at 6 per cent. from and after March 1, 1884, and maturing September 1, 1893; and was created by the American Rapid Telegraph Company pursuant to an agreement made August 28, 1883, with the Bankers' & Merchants' Telegraph Company. The trustee named in the mortgage filed a bill of foreclosure in the circuit court of the United States for the district of Connecticut, the mortgagor being a Connecticut corporation, and the complainant was appointed a receiver *pendente lite* by the court in that suit. By that order the complainant was directed to take possession not only of the property included in the mortgage, but also of all other property legally or equitably belonging to the American Rapid Telegraph Company, and also to take suitable and proper proceedings to obtain possession of any part of such property which might be in possession of any other person or corporation claiming right of possession and title thereto. An ancillary bill for the forclosure of the mortgage was filed by the trustee in this court, and

an order was made by this court appointing the complainant receiver, similar in tenor with the order made in the original suit. The mortgage by its terms conveys all the existing telegraph lines and property of the American Rapid Telegraph Company, "together with the lines of telegraph intended to be shortly constructed or acquired by the party of the first part, (the American Rapid Telegraph Company,) so as to connect the following points, viz.: Buffalo, New York, by a northerly route with Chicago, St. Louis; Pittsburg, Pa., via Columbus, Indianapolis, and Terre Haute, Indiana, with St. Louis, Mo.; Columbus, O., with Cincinnati, O., and Louisville, Ky.; and Terre Haute, Ind., with Chicago, Ill."

When the complainant was appointed receiver, the property of the American Rapid Telegraph Company was in the possession and control of the defendant Farnsworth, who had previously been appointed a receiver of the property and effects of the Bankers' & Merchants' Telegraph Company, by an order of the supreme court of the state of New York, in certain actions then pending in that court brought against that corporation by certain of its creditors and mortgage bondholders. The present bill is filed against Farnsworth, the Bankers' & Merchants' Telegraph Company, and the Farmers' Loan & Trust Company, to obtain a decree adjudging that the complainant has the title, and is entitled to the possession, of all the property which belonged to the American Rapid Telegraph Company when the mortgage was created, and of all the property subsequently acquired by the American Rapid Telegraph Company to which the lien of the mortgage by the terms of the instrument was to extend, and that Farnsworth surrender to complainant such of the property as is in his possession. The Farmers' Loan & Trust Company is the trustee in a mortgage, created by the Bankers' & Merchants' Telegraph Company, bearing date November 24, 1883, to secure bonds to the amount of $10,000,000; and asserts a lien under this mortgage upon some of the property in controversy paramount to the mortgage created by the American Rapid Telegraph Company. Other relief is sought by the bill against the defendants mentioned, and against the other defendants. A decree is sought against the Bankers' & Merchants' Telegraph Company for an accounting for damages suffered by the American Rapid Telegraph Company by reason of the non-performance of a contract made in August, 1883, by which the former agreed to construct and deliver to the latter certain new lines of telegraph. Relief is also asked adjudging the American Rapid Telegraph Company entitled to a lien upon all the stock of that company mortgaged to the Farmers' Loan & Trust Company. The proofs are voluminous, and the controversy, which in some of its aspects is complicated, has been argued upon its merits. As presented at the hearing the issues mainly contested are whether the mortgage created by the American Rapid Telegraph Company is the first lien upon the telegraph property known as the "Reconstructed Lines" in the state of New York, and in the eastern states upon the wires placed by the Bankers' & Merchants' Telegraph Company upon the poles of the Rapid Telegraph Company known as the "Strung Wires," and upon the

new lines of telegraph built or acquired by the Bankers' & Merchants' Telegraph Company in the western states in alleged part performance of the contract of that corporation with the American Rapid Telegraph Company to build or acquire new lines and deliver them to the American Rapid Telegraph Company.

Notwithstanding the objection has not been taken by the defendants, the bill must be dismissed because of a radical defect in the averments and proofs. The bill does not allege, nor has the complainant proved, any assignment or transfer to him of the title of the Boston Safe Deposit & Trust Company or of the American Rapid Telegraph Company to the property in controversy, or to the cause of action upon which the bill proceeds. The court cannot decree in favor of a party who does not show himself entitled to the relief sought. The Boston Safe Deposit & Trust Company, the mortgagee in the mortgage made by the American Rapid Telegraph Company, in the absence of an assignment of its rights to the complainant, is the party entitled to the relief sought by the bill so far as it relates to the title of that corporation to the mortgaged property. This corporation is not a party to the suit, and the court cannot proceed to a decree without its presence, in the absence of allegations and proofs showing that the complainant has succeeded to its rights. As to other property and rights involved in the controversy the title is in the American Rapid Telegraph Company. As a receiver *pendente lite* the complainant is the mere custodian of the mortgaged property, and the other property of the American Rapid Telegraph Company. He was appointed according to the usual practice in chancery, and not under the provisions of any statute conferring special powers or rights, and consequently did not acquire the title to the property which belonged to the mortgagee, or to the American Rapid Telegraph Company. If such a receiver finds it necessary to bring suit to reduce choses in action to his possession, or to recover the property intrusted to his custody, he must sue in the name of the corporation having the title, upon leave obtained for that purpose. The question is very fully considered in *Yeager* v. *Wallace*, 44 Pa. St. 294. See, also, High, Rec. § 290, and citations there referred to. Although the complainant was authorized by the terms of the order appointing him receiver to bring such suits and take such proceedings as he might be advised, these must be brought in the name of the corporation having the title to the subject-matter.

It is proper to add that the bill is open to other objections. One controversy presented by it is whether the lien of the mortgage of the Boston Safe Deposit & Trust Company made by the American Rapid Telegraph Company extends to the reconstructed lines, the strung wires, and the new lines built in the western states. The proper parties to this controversy are the mortgagee, the mortgagor, the Bankers' & Merchants' Telegraph Company, and those who claim under the latter corporation. Another controversy presented by the bill is wholly between the American Rapid Telegraph Company, Bullens, the Bankers' & Merchants' Telegraph Company, and those claiming rights derived from the latter corporation. This relates to the lien upon the stock of the American Rapid

Telegraph Company transferred to Bullens, and the accounting for the breach by the Bankers' & Merchants' Company of the contract with the American Rapid Telegraph Company. The Boston Safe Deposit & Trust Company has no interest in this controversy, and it is distinct and independent from the controversy in which that corporation is interested. It is doubtful whether the bill is not multifarious, and one which should be dismissed by the court of its own accord for that reason. Story, Eq. Pl. § 271. As to the first of these controversies the bill proceeds upon the theory that the complainant has acquired the title of the Boston Safe Deposit & Trust Company to the real estate covered by the mortgage of the American Rapid Telegraph Company, and also the title of the American Rapid Telegraph Company to the real estate. As regards this controversy the main object of the bill is to try title to, and obtain possession of, the real property covered by the mortgage, (which includes all the real property of the American Rapid Telegraph Company,) as against those who are in possession of it, and to obtain an adjudication that all the liens claimed by those who are in possession and by the parties who are not in possession are invalid as against the complainant. As to this controversy, even if the complainant had succeeded to the title of the Boston Safe Deposit & Trust Company, and the American Rapid Telegraph Company to the real estate, there are serious difficulties in the way of maintaining the action. If a complainant asserts a legal title to real estate he cannot invoke the jurisdiction in equity as against persons in possession claiming adversely, but must resort to an action of ejectment. The circumstance that he seeks at the same time relief in the nature of removing clouds upon the title does not authorize the intervention of equity. The remarks of the supreme court in the recent case of *Frost* v. *Spitley*, 121 U. S. 556, 7 Sup. Ct. Rep. 1129, are pertinent:

"Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession or harassed by suit in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. *Alexander* v. *Pendleton*, 8 Cranch, 462; *Peirsoll* v. *Elliott*, 6 Pet. 95; *Orton* v. *Smith*, 18 How. 263; *Crews* v. *Burcham*, 1 Black, 352; *Ward* v. *Chamberlain*, 2 Black, 430. As observed by Mr. Justice GRIER in *Orton* v. *Smith*: 'Those only who have a clear legal and equitable title to lands connected with possession, have any right to claim the interference of a court of equity to give them peace, or dissipate a cloud on the title.' A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for if his title is legal, his remedy at law by action of ejectment is plain, adequate, and complete; and if his title is equitable, he must acquire the legal title, and then bring ejectment. *U. S.* v. *Wilson*, 118 U. S. 86, 6 Sup. Ct. Rep. 991; *Fussell* v. *Gregg*, 113 U. S. 550, 5 Sup. Ct. Rep. 631."

Upon the facts stated in the bill in respect to this branch of the controversy, it would seem plain that the relief sought is to be obtained by a bill brought by the Boston Safe Deposit & Trust Company to foreclose its mortgage; containing proper averments for the purpose of subjecting the after-acquired property to the lien of the mortgage, and making all

the corporations and persons who are necessary parties to a foreclosure, and whose rights would be affected by the decree, parties to the suit. Upon such a bill the court could determine what property should be sold under the decree, and what liens created subsequently to the mortgage should be extinguished. As has been suggested, the second controversy referred to, presented by the bill, would seem to be properly the subject of another suit in which the American Rapid Telegraph Company should be complainant, and the defendants should be those persons and corporations only who are necessary parties to such a controversy.

If the objections thus suggested had been taken as they might have been by demurrer, much expense and delay would have been saved to the parties. As they were not thus taken, and as they have not been taken at all by the defendants, although the bill must be dismissed costs will not be given to the defendants. *Brooks* v. *Byam*, 2 Story, 553. The dismissal is without prejudice to the complainant to bring such other suit as he may be advised.

UNITED STATES *ex rel.* SEEGER *v.* PEARSON, Postmaster, etc.

(*Circuit Court, S. D. New York.* June 29, 1887.)

MANDAMUS—JURISDICTION OF CIRCUIT COURT—POST-OFFICE.

A circuit court of the United States has no jurisdiction to issue a writ of *mandamus*, as an original proceeding, to compel a postmaster to enter and transmit through the mails a certain publication as second, and not as third, class matter.

Mandamus.

The relator alleges that he is the editor and proprietor of a newspaper periodical called "Medical Classics," and has requested the defendant, who is the postmaster of New York, to enter and transmit through the mails this publication as second-class matter. This request was refused by the defendant, and the publication was charged a higher rate of postage, as third-class matter, because held to be designed as an advertising medium. The relator denies any such purpose. On appeal by the relator to the first assistant postmaster general, this refusal was sustained; and the relator brings this proceeding to compel the defendant, by *mandamus*, to receive and transmit the publication as second-class matter.

Townsend, Dyett & Einstein, for relator.

Stephen A. Walker and *Abram J. Rose*, for the United States.

BROWN, J. I am constrained, by the weight of authority, to decline to entertain this proceeding by *mandamus*. A long line of decisions of the supreme court has affirmed the broad doctrine that the circuit court has no jurisdiction to issue a writ of *mandamus* as an original proceeding, but only as ancillary to some other proceeding or right of which it has jurisdiction.

Considering that the fourth subdivision of section 629 of the Revised Statutes gives the circuit court express jurisdiction "of all causes arising under the postal laws," (Act March 3, 1845; 5 St. at Large 739,) and that the fourteenth section of the judiciary act (section 716, Rev. St.) authorizes the federal courts to issue such writs whenever "necessary for the exercise of their respective jurisdictions, and agreeable to the uses and principles of law," it might have been inferred, in the absence of authority, that if the relator was entitled to the relief demanded, according to the general usage and practice of the law, and if a writ of *mandamus* was the proper remedy for such relief, the writ might have been issued in the exercise of the proper jurisdiction of the court; inasmuch as the cause is one arising exclusively "under the postal laws." Upon repeated examination of the decisions of the supreme court, however, I cannot find myself authorized to treat this question as an open one. In most of the cases in which the question has arisen, the circuit court had undoubted original jurisdiction of the subject-matter of the proceedings, under some one or other of the express provisions of the statutes, quite as clear as is its authority to determine "all causes arising under the postal laws." Nevertheless, the right to pursue the remedy by means of an original writ of *mandamus* has been uniformly denied. *McIntire* v. *Wood*, 7 Cranch, 504; *McClung* v. *Silliman*, 6 Wheat. 598; *Bath Co.* v. *Amy*, 13 Wall. 244; *Graham* v. *Norton*, 15 Wall. 427; *County of Greene* v. *Daniel*, 102 U. S. 187; *Davenport* v. *County of Dodge*, 105 U. S. 237; *Rosenbaum* v. *Board*, 28 Fed. Rep. 223; *U. S.* v. *Smallwood*, 1 Chi. Leg. N. 321.

Without considering, therefore, in what cases, or to what extent, a review of the decision of the postmaster or of the assistant postmaster general, as respects the determination of a question of fact upon which the rating of postal matter depends, is either reviewable at all, or under a proceeding by *mandamus*, (see *Carrick* v. *Lamar*, 116 U. S. 423, 6 Sup. Ct. Rep. 424,) I must dismiss the application upon the ground first stated.

STRAUSS *v.* ABRAHAMS.

(*Circuit Court, E. D. Missouri, E. D.* October 12, 1887.)

1. ATTACHMENT—GROUNDS OF—BURDEN OF PROOF.
   The affidavit for attachment charged that the defendant had (1) fraudulently conveyed or assigned his property so as to hinder and delay his creditors; (2) fraudulently concealed, removed, or disposed of his property with the same intent; and (3) fraudulently contracted the debt sued for. *Held*, that proof of all the grounds stated in the affidavit was not necessary to entitle the plaintiff to a recovery, but that proof of one or more was sufficient.
2. SAME.
   Where the attachment is based upon a charge of fraud on the part of the debtor, the burden of proof upon that question is on the plaintiff.
3. SAME—GROUNDS OF—FRAUDULENT INTENT.
   A fraudulent intent upon the part of the debtor in attachment, whether in contracting the debt sued for, or in concealing or disposing of his effects,

need not be established by direct testimony. His conduct, actions, financial situation, and the method of dealing adopted by him on a particular occasion, may be shown, and such an intent inferred therefrom, provided that a careful examination of all the details warrants such an inference.

4. SAME.
But if the circumstances relied upon by the plaintiff to establish the fraudulent intent are just as consistent with honesty as dishonesty of purpose, no such inference arises.

5. SAME.
When a merchant buys goods on credit with a preconceived intention of getting them into his possession, and disposing of them, and of not paying for them at any time, the debt is contracted with a fraudulent intent, and attachment will lie.

6. FRAUDULENT CONVEYANCES—BY DEBTOR—INSOLVENCY.
A debtor, even though insolvent, has a right in Missouri to prefer one creditor over another; and, although such preference has the effect of preventing other creditors from collecting their debts, it is not fraudulent if made in good faith.

7. SAME.
A conveyance of property made by a debtor for the purpose, and with the intent, of hindering or delaying some of his creditors, is fraudulent so far as the debtor is concerned, and will authorize an attachment against him, even though the debtor, by means of such conveyance, pays some other creditor whom he justly owes.

8. WITNESS—CREDIBILITY.
The jury may ignore the testimony of any witness who they believe has willfully testified falsely as to any material fact in controversy.

Nathan Frank and *Krum & Jonas*, for plaintiffs.
Martin, Laughlin & Kern, for defendant.

THAYER, J., (*charging the jury.*) When the plaintiffs in this case began their suit for the purpose of obtaining a writ of attachment, they filed an affidavit wherein they charged—

"*First*, that the defendant had fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors; *second*, that the defendant had fraudulently concealed, removed, or disposed of his property or effects so as to hinder or delay his creditors; and *third*, that the debt sued for in the case was fraudulently contracted on the part of the debtor."

The defendant has filed a plea, under oath, denying all the statements contained in the affidavit, and that plea raises the issue which you are to try. In other words, your duty is to determine whether either of the charges contained in the affidavit for attachment is true, or whether all of these charges are false.

When one person charges another with having perpetrated, or with an intent to perpetrate, a fraud, the law requires the person by whom the charge is made to substantiate the same by adequate proof. It accordingly follows that the burden of proof in this case is on the plaintiffs; and unless they have proven some one or more of the grounds of attachment stated in the affidavit, by a preponderance of evidence, you must find against them, and in favor of the defendant. It is not necessary that the plaintiffs should prove all the grounds of attachment stated in the affidavit to entitle them to a verdict, but they must prove some one or more of the three grounds to warrant a verdict in their favor.

Now, with reference to the kind of proof required in this class of

cases, I will say this: When a person contemplates or undertakes to perpetrate a fraud, he does not usually publish his intentions to the world. For this reason the law does not require that a fraudulent intention shall be established by what is known as direct testimony. The law permits a jury to find or to infer from a variety of circumstances, such as the conduct, the actions, the financial situation, and the method of dealing adopted by a person on a particular occasion, whether his intentions on that occasion were fraudulent or otherwise; and in trying an issue of this nature a jury should always pay careful attention to all the details of the conduct and actions and business dealings of the person accused of the fraud, in order to arrive at a correct conclusion as to whether his motives were honest or dishonest. Now, while the law permits the jury to find that a man has acted fraudulently on the strength of circumstantial evidence alone, yet the rule is subject to this just qualification: that, if the circumstances relied upon by a plaintiff to establish a fraudulent intent are just as consistent with honesty of purpose as with dishonesty of purpose, then the jury are not warranted by such circumstances in inferring that the person in question was actuated by a fraudulent intent.

Having given you these general directions as to the nature of the issue you are to try, and as to the burden of proof, and the character of evidence by which a fraudulent intent may be established, I will now direct your attention more particularly to the various matters charged in the affidavit for attachment.

The first and second grounds of attachment together charge that the defendant fraudulently "*conveyed*, *assigned*, *concealed*, *removed*, or *disposed of* his property or effects," so as to hinder or delay his creditors. There is no evidence before you of any concealment or removal of property or effects by the defendant, so that you will not give that portion of the affidavit any consideration, as there is no evidence to sustain it. The only conveyance, assignment, or disposal of property proven is the conveyance made by the defendant early in October, 1886, to his brother-in-law Desberger, of the stock of goods contained in the store at No. 1245 South Broadway. Practically, therefore, under the first and second grounds of attachment, you will simply have to determine whether the defendant made that conveyance to hinder, delay, or defraud his creditors; that is to say, you must determine what his motive or purpose was in making that conveyance or bill of sale.

The defendant's position is simply this: He says that in October, 1886, he owed Desberger, his brother-in-law, about $10,875,—that sum being made up of $7,000 that he had agreed to pay Desberger for his interest in the firm, and the balance being money that his brother-in-law had loaned to him subsequent to the dissolution of the firm; that Desberger demanded payment of that debt, and that he sold him the stock in the store, 1245 South Broadway, to pay the same. Now, gentlemen, if you believe that statement of Abrahams and Desberger, if you believe that Abrahams owed Desberger the sum stated, or about that sum, and that he made an out and out sale of the stock of goods to Desberger in good faith to pay that debt, then the sale was not fraudulent, and furnished

no ground for the attachment, and you should so find by your verdict. If that sale was made, as above stated, in good faith to pay an honest debt, then the sale was not fraudulent, even though the sale of that stock in the store at 1245 South Broadway did operate to hinder or delay other creditors of the defendant in collecting their debts. In other words, gentlemen, a debtor has a right to prefer one creditor over another, even if he is insolvent; and if he does so in good faith, that is, if he pays one creditor to the exclusion of another, such preference is not a fraudulent act, no matter how it may affect his other creditors.

Now, on the other hand, if you believe from the evidence that the whole or a part of the debt claimed to be due from the defendant to Desberger, which figured as the consideration in the sale of the stock, was fictitious, and was known to be fictitious, that is, was not legally owing to Desberger at the time of the sale, then the conveyance was for that reason fraudulent, and you should so find. Or if you believe that the sale and conveyance of the stock at 1245 South Broadway was contrived by Abrahams and Desberger together, or that it was contrived by Abrahams alone, for the purpose of hindering and delaying or defrauding Abrahams' other creditors in the collection of their debts, or to put the property out of the reach of his other creditors, then the sale and conveyance was fraudulent, and you should so find, even though you may believe that at the time of the sale Abrahams was indebted to Desberger. In other words, gentlemen, a conveyance of property that is made by a debtor for the purpose, and with the intent, of hindering or delaying some of his creditors, is fraudulent, so far as the debtor is concerned, and will authorize an attachment against him, even though the debtor, by means of such conveyance, thereby pays some other creditor whom he justly owes.

From the directions which I have given you respecting the first and second grounds of attachment, it follows that the questions you will mainly have to consider and determine on this branch of the case are—*First.* Whether the debt which figured as the consideration for the sale of the stock at 1245 South Broadway was a *bona fide* debt, that is, a debt justly due and owing by the defendant to Desberger, or was in whole or in part fictitious. *Secondly.* Was the defendant's motive in making that sale and conveyance an honest motive to liquidate a just debt, or a dishonest one to put his property beyond the reach of his other creditors, thereby hindering and delaying them?

Now, the third ground of attachment is that the debt sued for was fraudulently contracted by the defendant; and this branch of the case also merits your careful attention. Speaking generally, a debt may be said to have been fraudulently contracted for two reasons: *First*, when a debtor has induced his creditor to sell him goods and extend to him credit by means of false representations as to his financial condition, or as to his means and ability of paying for the same; and, *secondly*, when a debtor has bought goods or property of any kind on credit with a preconceived intention of getting the possession of the articles bought, and disposing of them, and not paying for the same at any time.

The court is of the opinion, and so instructs you, that there is no evidence in this case that will warrant you in finding that the debt sued for was fraudulently contracted in the mode first above pointed out; that is to say, because of fraudulent representations made when the goods in question were bought. There is no evidence, in my judgment, to substantiate any such charge. But the court submits this question for your consideration as one that fairly arises under the evidence in the case, viz., whether, when defendant bought the bill of goods sued for in this case of the plaintiffs, he intended to pay for the goods. If you believe from all the evidences and circumstances in the case that, when defendant bought the bill in question of these plaintiffs, he did not intend to pay for the goods at any time thereafter, but did intend to get the goods into his possession, and sell them, and pocket the proceeds, or sell them to Desberger, and not to pay the plaintiffs at any time, then you may find that the debt sued for was fraudulently contracted, and you may sustain the attachment on that ground; that is, on the third ground above stated. But unless the proof satisfies you that plaintiffs' bill was purchased by the defendant with the intent last stated, that is, with an intent never to pay for them, you ought to find that the third ground of attachment has not been sustained.

There is only one further direction to be given you, and it is this: In weighing the testimony of the various witnesses, you are the exclusive judges of their credibility, and of the weight to be given to their testimony; and you have the right to ignore the testimony of any witness (if there be any) who as you believe has willfully testified falsely on this trial as to any material fact in controversy.

WEINGARTNER and others *v.* CHARTER OAK LIFE INS. CO.

(*Circuit Court, E. D. Missouri, E. D.* October 8, 1887.)

INSURANCE—INSOLVENCY OF COMPANY—ACTION BY POLICY-HOLDER.

The defendant, a mutual insurance company of Connecticut, but licensed to do business in Missouri, having become insolvent, the insurance commissioner began proceedings in the supreme court of errors of Connecticut, under Laws Conn. 1875, pp. 12, 13, §§ 1, 2, to annul its charter, and wind up its affairs. Holders of running policies in Missouri commenced suits by attachment in the courts of that state to recover the reserve value of their policies, upon the theory that the insolvency of the company worked a breach of the contract of insurance, and entitled them to sue for the present value thereof, but it was decided (*Fry* v. *Insurance Co.*, 31 Fed. Rep. 197) that they were barred by, and must be remitted to, the proceedings in Connecticut. *Held*, that the principle of the above case applied to an action in Missouri by the holder of a death claim.

Suit by Attachment by the holder of a death claim in a mutual life insurance policy.

Geo. D. Reynolds, for plaintiffs.

J. S. Fullerton, for defendant.

THAYER, J., (*orally.*) In the case of *J. Weingartner* v. *Charter Oak Life Insurance Company* the only question is whether the case is controlled by the decision in the case of *Fry* v. *Insurance Co.*, 31 Fed. Rep. 197, which was decided at the last term of this court. In the *Fry Case*, the holder of a running policy had brought suit by attachment in this jurisdiction against the Charter Oak Life Insurance Company, to recover the reserve value of his policy, upon the theory that the insolvency of the company worked a breach of the contract of insurance, and entitled him to sue for the present value of the same. In that case, we held that the Missouri policy-holder was presumed to be acquainted with the charter of the company in which he was insured, and with the insurance laws of the state of Connecticut, that regulated and determined its existence, and to have assented thereto when he became a member of the company by taking out a policy therein; and we further held that under the charter of the company, and the insurance laws of Connecticut, that determined and regulated its existence, an action by attachment could not be maintained in this jurisdiction by the holder of a running policy to recover its present value, so long as there was a proceeding pending in the name of the superintendent of insurance of the state of Connecticut against the company, in the courts of that state, to annul its charter, and to liquidate its affairs. We held, in substance, that when the company became insolvent, and proceedings were taken against it, in the statutory form, by the insurance commissioner of Connecticut, to liquidate its affairs, that proceeding, so long as it was pending, operated to preclude policy-holders from maintaining a suit against the company in this jurisdiction of the kind above described.

In the present case the suit is by the holder of a death claim, and the fact is supposed to make a distinction between the two cases, and to entitle this particular plaintiff to sue by attachment in this jurisdiction. We think, however, that that view of the case is erroneous. We think that a death claimant occupies the same position as the holder of a running policy; that both claims are claims preferred by persons who are members, or the representatives of members, of the corporation; and that both classes of claimants are bound by the charter of the company, and the insurance laws of the state, which regulate the existence of the company; and that both claims rest upon the same meritorious consideration,—that is to say, the premiums which the respective parties have paid to the company; and that the death claimant cannot maintain a suit by attachment in this jurisdiction as long as the proceeding is pending in the home state, at the instance of the superintendent of insurance, to annul the charter of the corporation, and liquidate its affairs. The death claimant, as well as the holder of a running policy, should intervene in that proceeding, instead of suing by attachment in this jurisdiction.

Of course, we do not determine in this case, and it is not necessary to determine, whether the holder of a death claim, when the assets of

the company are distributed, will be entitled to a priority over the holder of a running policy. That is a question which will be determined by the court in which the proceeding to wind up the affairs of the company is pending, and can more appropriately be settled by the Connecticut court according to the construction placed on the insurance laws of that state. All we hold at this time is that the plaintiff is in the wrong forum, and that the suit cannot be maintained so long as a prior proceeding to wind up the company is pending and undetermined in the state of Connecticut. Therefore the judgment will be the same as in the *Fry Case*. In other words, judgment will be entered for the defendant.

COGHLAN *v.* SOUTH CAROLINA R. Co.

(*Circuit Court, D. South Carolina.* October, 1887.)

1. TENDER—SUFFICIENCY—EFFECT.
   When, upon a claim for money, the debtor, before suit brought, tenders a certain sum in lawful tender, absolutely and without condition, to his creditor, and this is refused, he may retain the money, and, on suit brought against him, will be relieved from payment of interest after the date of tender, and from payment of costs, if plaintiff recover no more than the sum tendered.
2. SAME.
   But, if the offer to pay be made pending the suit, it cannot avail him, unless he follow it up with an offer to pay the money into court, or, at the least, submit to a judgment for the sum admitted.

(*Syllabus by the Court.*)

H. E. Young, for complainant.
Mitchell & Smith, for defendant.

SIMONTON, J. This is a bill seeking to enforce the payment of certain bonds, secured by a mortgage of the property of the South Carolina Railroad Company. After an order of reference was made in the case, and the report thereon filed, but before the sum actually due was ascertained, the defendant offered to pay to the plaintiff the sum of $44,600, which the defendant alleged was in full of debt and costs. The money was tendered in legal-tender notes. No receipt was demanded. The offer was refused by complainant. The defendant did nothing after the offer was declined, and now insists that the complainant cannot recover interest on his claim accruing after the date of his refusal, to-wit, twenty-eighth February, 1883.

Where a claim is made on a money demand, and the debtor is prepared to admit a part of the claim, he can tender to the claimant the amount admitted. If the tender be refused, and suit be afterwards instituted, the plaintiff must establish that more was due to him than the amount tendered, else he will lose as well the costs as all interest accruing after the tender. The party making the tender must see that it

is made to the proper person, in legal tender; that it is absolute, not clogged with any condition; and that it is continuous,—that is to say, he must always be prepared to complete the tender and produce the money. *Fishburne* v. *Sanders*, 1 Nott & M. 243; *Black* v. *Rose*, 14 S. C. 278; 5 Rob. Pr. 947, 948; *Bissell* v. *Heyward*, 96 U. S. 587. No suit having been commenced, the acceptance on the part of him who is to receive is necessary to the full discharge of the party tendering. If this be withheld, the latter having done everything in his power, must retain his money, and need only keep himself in readiness to fulfill his tender if the other party changes his mind. 5 Rob. Pr. 947; *Dobie* v. *Larkan*, 32 Eng. Law & Eq. 501.

But when an action has already been commenced and is pending, if the defendant be disposed to admit the demand in part, it is not only necessary that he should offer to pay the amount admitted in the same way as the tender before suit should be made, but he must go further, and either pay the sum admitted into court, or, at the least, offer to submit to a judgment for that sum. This is the rule in the common-law courts. Even when a tender before suit has been made, the plea of the tender must be accompanied by an offer to pay the money into court. 1 Tidd, Pr. 540; 5 Rob. Pr. 949, 950; Civil Code Proc. S. C. § 265, subd. 5. It commends itself to this court. The reason for the practice is clear. A tender before suit cannot possibly be made complete if not accepted. There is no way of compelling the acceptance. An offer to pay, pending a suit, can be made complete by the action of the courts ordering the money paid in. The court, in this, represents both parties, and its orders bind the plaintiff as well as the defendant. The money paid in is for the plaintiff, and the possession of it cannot be resumed by the debtor. In the further prosecution of the case that much is stricken from the record, whether the plaintiff takes out the money or not. *Black* v. *Rose*, 14 S. C. 278. Or, as stated in *Boyden* v. *Moore*, 5 Mass. 367:

"The bringing of money into court is a practice adopted to relieve the defendant against an unexpected suit, for money which he is willing to pay, but which he has not tendered to the plaintiff before the commencement of the suit. After the defendant had brought in as much money as he thinks proper, and the plaintiff has refused to receive it in satisfaction, the defendant is entitled to have the same considered as a payment made on the day on which it was brought."

In the present case the defendant simply offered to pay the money, and, when it was refused, was content to do nothing more. The offer cannot avail it as if it were a tender.

PUETZ, Jr., *v.* BRANSFORD.

BRANSFORD *v.* PUETZ, Jr.

(*Circuit Court, E. D. Missouri, E. D.* September 30, 1887.)

1. PATENTS FOR INVENTIONS—ASSIGNMENT—JURISDICTION OF FEDERAL COURTS.
   Plaintiff assigned to defendant one-third of the right to an invention. The patent-office divided the application for the patent into three applications for as many inventions. The question in issue was whether this subdivision of the claims divested defendant of his interest in one of the patents issued. *Held*, that this was a question purely of patent law of which the circuit court of the United States had jurisdiction.
2. SAME—SUIT FOR INFRINGEMENT—PLEADING.
   In an action by plaintiff for infringement of a patent, a cross-bill by defendant, asking that plaintiff be compelled to assign to him a one-third interest in the invention to which he laid claim, is not germane to a defense. The matter should be made the subject of demurrer to the complaint, or other appropriate form of defense.
3. SAME—SUIT FOR INFRINGEMENT—FORMER ADJUDICATION.
   In an action for an assignment of an interest in a patent, defendant pleaded a former suit in bar. Plaintiff claimed the former suit decided the question of an interest in the invention, and not the question of an interest in the patent. It appeared that in the former suit it was alleged in the bill, and denied in the answer, that plaintiff was "the sole and exclusive owner of the patent," and the decree was in terms to the same effect. *Held*, that the plea in bar was a good plea.

Motion for Rehearing and Plea in Bar. See 31 Fed. Rep. 458.
Geo. H. Knight, for Tillman Puetz.
Paul Bakewell, for George W. Bransford.

MILLER, Justice, (*orally.*) In this case the application for a rehearing in the matter of the decree on the cross-bill in the original suit has been considered by us, and I have myself particularly examined the pleadings with reference to the main ground urged for a rehearing, and that is that it is founded on a contract simply, (and not involving the patent laws of the United States, so as to give the circuit court jurisdiction without regard to citizenship.)

It is true that the cross-bill sets out that there was an assignment by the plaintiff in the original bill, to the defendant, of an interest in the invention before the patent issued. If it were simply a question on the validity of the contract, or on its enforcement as a contract, for an assignment of the invention, the objection might be good. But while the plaintiff in the cross-bill sets out the assignment of the interest in that invention to himself, the answer of the other party admits that assignment, and there is no issue at all on the question of the validity of the assignment, and of its being capable of enforcement, but the issue that was made is, and the question decided by the court is, that the application so made was for the invention which was assigned. The patent-office required it to be divided into two or three applications for as many different inventions, and the question that the court decided, and the only one on which testimony was taken, was whether this proceeding of the

patent-office divested the plaintiff of his right to one of the patents issued on that subdivision of the claims. That is a question purely of patent law, and one of which the circuit court of the United States has jurisdiction; and the question which he insists should divest the court, or which he insists was the one tried by the court, was not in issue at all. There was no denial of the contract; there was an admission of the assignment. The assignment stood as confessed upon the pleading, and that which was in issue was the decision of the patent-office upon that assignment.

As regards that matter we think very clearly that the decision is right; that there was no error. It was suggested by myself, in the course of the argument, that the matter of the cross-bill was not germane to the defense; and very possibly, if that matter had been taken up on demurrer, or in some appropriate form, I do not say it is probable, but it is possible, it might have been made effectual at that time. But as the matter did have something to do with the patent, with the invention, and with the machine, I would not be willing, on a suggestion made by the court, but not from the bar, at this time to reverse a decree finally entered and rendered on full consideration on a point not brought before the court, and which is of very doubtful propriety anyway, and which does not reach the merits.

For these reasons the application for the rehearing in the original case is overruled.

In an independent suit subsequently brought by Bransford, against the plaintiff in the original suit, for a decree praying an assignment of an interest in the original patent, the defendant has pleaded the former adjudication, and it is difficult to see why it is not a complete bar to this suit. The counsel for Bransford argued, with a good deal of force and ingenuity, (and I was rather struck with it at first,) that the matter that was decided in the former suit was a question of an interest in the invention, and not the question of an interest in the patent, and, if that had been so, I am not prepared to hold this plea good; but, when I came to look at the pleadings, it is perfectly plain it was an interest in the patent that was in issue and decided in the first case. The plaintiff in that case alleges in his bill, among other things, that he is the sole and exclusive owner of that patent, and of the rights conferred by it. The defendant denies that he is the sole and exclusive owner of that patent, and, after asserting that he had this assignment of the interest in the invention, he then repeats that he is interested in the patent; so that they raised, as distinctly as language could possibly make it, the question whether Puetz was the sole owner of that patent, —he having asserted that he was, and the other party having asserted that he was not,—and the decree in term says that he was the sole and exclusive owner of that patent, and on that ground gives a perpetual injunction against the claim of the defendant under that patent, and it is impossible not to hold that that was not an adjudication of the ownership of that patent; and therefore the plea to the bill setting up that Bransford was the owner is barred by the former adjudication, and is a good plea.

KEARNEY and another *v.* LEHIGH VALLEY R. Co.

(*Circuit Court, D. New Jersey.* September 30, 1887.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—SPARK-ARRESTER.
   Letters patent issued April 11, 1871, to Kearney & Tronson for an improved locomotive spark-arrester, the specifications and claims showing a grating with vertical bars placed at the foot of the spark or petticoat pipe, etc., *held* infringed by a spark-arrester with grating consisting of upright cast-iron bars, with connections between them at intervals, leaving long spaces or slots between the bars, and only interrupted by the connections, exactly like the spaces between the bars required by the patent.
2. SAME—PRIORITY OF INVENTION.
   Complainants' application for a patent was made prior to the date of the patent of one S., introduced in evidence as anticipating it, but was not dated until after the date of the S. patent. *Held* that, in the absence of evidence showing that S.'s invention antedated complainants' application, the presumption was in favor of the priority of complainants' patent.
3. SAME—ANTICIPATION—SPARK-ARRESTER.
   Letters patent issued April 11, 1871, to Kearney & Tronson for an improved locomotive spark-arrester, the specifications showing a circular grate of longitudinal upright bars, marked D, and a tube, E, on top of it, extending upward into the smoke-stack, with the netting, marked F, around the top of this tube, to prevent cinders from escaping into the smoke-stack, *held* not anticipated by Vanclain's spark-arrester, consisting of a perforated cylindrical box or screen in which the perforations or apertures consisted of latitudinal (horizontal) slots, cut out of sheet-iron, nor by any other patent.
4. SAME—RESTRICTION OF CLAIM—SPARK-ARRESTER.
   In letters patent issued April 11, 1871, to Kearney & Tronson for an improved locomotive spark-arrester, the specifications showed a grating with vertical bars placed at the foot of the spark or petticoat pipe, etc. *Held*, that the patent was not to be restricted to the use of a petticoat pipe, but such pipe might be of any form or dimensions.
5. SAME—REISSUE—NEW MATTER.
   In an application for reissue of a patent, paragraphs explaining the difficulties and defects of prior inventions of the same character, and how they have been avoided by the new invention, is not that sort of new matter which renders a reissue void.
6. SAME—UTILITY.
   In an action for the infringement of a patent, the defense of lack of utility will not be sustained unless there is the clearest evidence that the invention claimed is utterly frivolous and worthless; and the fact that defendants have used it, and infringed the patent, is a strong argument against such defense.

Elwood C. Harris, for complainant.
Andrew McCallum, for defendant.

BRADLEY, Justice. This is a suit on a reissued patent, brought for an injunction and damages. The original patent was granted to Kearney & Tronson, April 11, 1871, for improvements in spark-arresters on locomotives. The spark-arrester thus patented was located in the smoke-head of the boiler, instead of the smoke-stack above. It is described in the specification as follows:

"In the unoccupied space in this smoke-head we place a grate, the peculiar features of which are its perpendicular bars, with fixed apertures sufficiently fine to stop the sparks that come from the fire; the size of the grate being determined by the area of opening needed for the regular draught and escape of

smoke on kindling the fire, or when the engine is not in motion. Upon the top of the grating a tube or pipe is fitted, extending upward a short distance above the top of the smoke-head into the chimney. A space is left around the top of the pipe between the edges of the aperture in the top of the smoke-head and the pipe. This space is covered with netting or grating to prevent sparks or coals from passing through into the chimney."

The claim was for "the grate, D, with the longitudinal bars, as and for the purposes specified and shown."

The drawings show the circular grate of longitudinal upright bars, marked D, and the tube, E, on top of it, extending upward into the smoke-stack, with the netting, marked F, around the top of this tube to prevent cinders from escaping into the smoke-stack. The exhaust steam is brought by pipes through the bottom of the grate, D, and blown upward into the pipe, E, creating a strong draught in the smoke-stack. Most of the smoke and gases are drawn by this draught through the grate, and upward into the pipe, E, and the smoke-stack; but some of them ascend and pass through the netting, F, into the smoke-stack.

The application for the reissued patent was filed June 7, 1872, a little more than a year after the date of the original, and was granted December 10, 1872. The drawings accompanying the specification are the same as those attached to the original patent; and the specification is the same in substance as the original specification, except that it is so framed as to correct some ambiguity and uncertainty in the original, and to supply an evident omission. The ambiguity or uncertainty was this: As the original was drawn, it might be construed as applying only to cases where the tube, E, in the smoke-head, was of less size at top than the smoke-stack, or orifice in the smoke-head on which the smoke-stack stands; whereas the particular form and size of the tube, E, had nothing to do with the invention, which was as applicable to a pipe which filled the orifice above, and was equal in diameter to the smoke-stack, as to one which was smaller. The invention had relation to the form and construction of the spark-arresting grate, and to that only; and was as applicable to one kind of pipe as to another. This correction was a proper one to be made, if made in reasonable time, as it was. The other correction was the addition of a clause to point out and describe the platform on which the grate was to stand in the smoke-head. This platform was a necessary incident to the apparatus, as the grate could not stand on nothing. It was fairly indicated by the original drawing, but was not described in the specification. Its description in the reissue was a very proper amendment to be made. It did not affect the invention,—it left that untouched; but it showed more clearly the surrounding parts related to it.

The paragraphs which explain the difficulties and defects of prior spark-arresters, and how the patents have avoided them by their invention, cannot be regarded as that sort of new matter which renders a reissue void. The reissue has two claims; the first of which is substantially the same as the claim in the original patent, and the second is merely for the combination of the grate, D, and netting, F, which

amounts to nothing. The first claim, which is the one contested in this suit, is as follows: "What we claim," etc., "is (1) the grating, D, with vertical bars placed at the foot of the spark or petticoat pipe, E, in the manner and for the purpose substantially as described." The defenses are anticipation of the invention by prior patents, non-patentability of the invention claimed, and non-infringement.

Patents had been granted before this for spark-arresters located in the smoke-head, and surmounted by a tube extending upward into the smoke-stack; but these generally consisted of perforated sheet-metal, wire-netting, or wire-gauze, and not of iron bars. The patents of this kind put in evidence were: One to W. W. Hubbell, dated June 26, 1841; one to E. May, dated July 28, 1857; one to J. L. Vanclain, dated August 20, 1861; one to A. S. Swett, Jr., dated June 23, 1863; one to J. Smith, dated August 16, 1870; one to Weidman and others, dated December 20, 1870; and one to J. Smith, dated March 7, 1871.

Vanclain's spark-arrester consisted of a perforated cylindrical box or screen in which the perforations or apertures consisted of latitudinal (horizontal) slots, which, from the drawing, appear to be cut out of sheet-iron. This slotted sheet-iron constituted the cylindrical box or screen. This screen could not be said to be made of iron bars, which are the thing patented to the plaintiffs; but it approaches very near to it. The slots and iron strips are also placed horizontally, while the plaintiffs' patent is for a grate with vertical bars.

Smith's last patent, dated March 7, 1871, about a month before that of the complainants, describes a spark-arrester consisting of a grated casing or tube, made by a continuous bar of wrought-iron, coiled spirally, in horizontal coils; or of cast-iron rings, one above the other, lying horizontally and strung to upright rods to keep them a proper distance apart; or, the patent says, "the grating may be made in any other desired manner, providing it presents rigid bars for the hard ignited cinders to strike against, and providing there are openings sufficient in number and size to permit the free escape of the lighter particles with the products of combustion." Now, this coiled wrought-iron bar, and these cast-iron bars or rings, approach very near to the invention patented to the plaintiffs; the only difference being that they are horizontally arranged, while the patent of the complainants requires the bars to be vertical. This would fairly raise the question whether the change was a patentable invention.

But the complainants contend that their patent, though dated a month later than Smith's, is not anticipated by it, inasmuch as their application was sworn to December 31, 1870, and was filed in the patent-office January 5, 1871,—two months before the date of Smith's patent. The time of filing of Smith's application is not shown. The relative priority of inventions is determined, first, by the dates of the respective patents therefor. But this is not conclusive. Evidence outside of the patents may be given to prove priority. The date of the application, if it described the invention sufficiently, is conclusive evidence that the invention was made prior to such date. The complainants, therefore, have

shown that their invention was made prior to the date of Smith's patent, and no evidence has been offered to show that Smith's invention was made prior to that time. The presumptions arising from the course of business in the patent-office are not sufficiently certain and precise to countervail the effect of the complainants' evidence. We may therefore lay the last Smith patent out of view. Without it, I do not see anything in the other patents relied on sufficient to justify me in holding that the invention claimed in the patent of the complainants was not patentable. Confining the patent to the terms of the claim, "the grating, D, with vertical bars," meaning, according to the specification, "straight vertical bars of iron, placed at small distances apart," I see nothing in any prior patent to prevent it from being a good and valid patent.

The defendants, however, have attacked it on the score of utility. They have endeavored to show, by a series of experiments, that a spark-arrester consisting of such a grate as that of the complainants has no superior utility or advantage over those of certain other forms. The first question which presents itself when such a defense is made is, "Then, why did you use it?" This mode of attacking a patent can never succeed without showing, by the clearest evidence, that the invention claimed is utterly frivolous and worthless; and the fact that the defendants have used it, and infringed the patent, is always a strong *argumentum ad hominem* against them. I do not think that this defense is sustained.

The defendants further contend that the patent is to be restricted to cases in which the petticoat pipe, E, which stands on the grate, is smaller at top than the smoke-stack, or orifice underneath the same, so as to leave an annular space to be covered by the netting, F. I have already adverted to this subject in considering the validity of the reissue. An examination of the latter will show that it is not restricted to cases of the kind referred to. The specification, it is true, calls the pipe, E, surmounting the grate, a petticoat pipe; but that only refers to its shape, smaller at top than at the bottom, and it is probably thus referred to because it was a pipe in common use at the time. It is not said, as in the original patent, that "a space is left around the top of the pipe between the edges of the aperture in the top of the smoke-head and the pipe." Provision, however, is made for such open space, when it exists, by the netting, F, which covers it. This may have been regarded as the common case, and hence was provided for. But it has nothing to do with the essence of the patent; that, as I have said, consists of a grating of vertical bars of iron, as applicable to one form of pipe as to another, and having no reference to the form. I do not think that the point is well taken. In my judgment, the first claim of the patent covers all spark-arresters coming within its description, and used and applied in the smoke-head of a locomotive boiler, no matter what the form or dimensions of the pipe to which it is applied.

Lastly, the defendants deny that they have infringed the patent. Specimens of the grating which they have used, and which are charged as an infringement, have been exhibited to the court. They do not, it is true, consist of separate bars, unconnected with each other. But the

patent does not say that the bars must be unconnected; on the contrary, the drawings show a connection running around the middle of the bars, as if it were a brace, or stiffener, to hold the bars at equal distances apart, and to keep them more firmly in position. The defendants' grate consists of upright cast-iron bars, with connections between them at intervals, leaving long spaces or slots between the bars, and only interrupted by the connections, exactly like the spaces between the bars required by the patent. The imitation of the invention described in the patent is not exact, but it is substantial. The bars used are the equivalent of the bars described in the patent. I think it is an infringement. I refer, of course, to the gratings used by the defendants in which the bars were upright, and the spaces between them were longitudinally conformable thereto.

The complainants are entitled to a decree for an injunction and an account of profits and damages in the usual form.

THE BRANTFORD CITY.[1]

HATHAWAY *v.* THE BRANTFORD CITY.

(*District Court, S. D. New York.* June 29, 1887.)

1. ADMIRALTY—PRACTICE—SECURITY ON APPEAL.
   On appeal from the district court to the circuit court it is not necessary for an appellant, who has given security on the release of the vessel, to give a new stipulation for the whole amount of the decree and costs. New security to cover the damages for delay, and the costs and interest on the appeal, is sufficient. A rejustification of the sureties on the original stipulation will, however, be ordered, if reasonably required.
2. SAME—BOND TO MARSHAL.
   It seems that in the case of a bond to the marshal a new bond on appeal, for the whole amount, may be required.

North, Ward & Wagstaff, for libelant.
Wheeler & Cortis, for claimants.

BROWN, J. The decree in this case, in favor of the libelant, is for the sum of $40,000, besides costs. Upon the arrest of the vessel at the time of the commencement of the action, that sum was taken as the agreed value, and a stipulation in that amount, with sureties, was given by the claimants, pursuant to the tenth and eleventh rules of the supreme court in admiralty. Upon appeal from the decree of this court to the circuit court, the question now presented is whether the defendant, in order to stay execution, shall be required to give new security for the whole amount of the decree and costs, or security only in an amount sufficient to secure "just damages for delay, and the costs and interest on the ap-

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

peal," upon the analogy of the twenty-ninth general rule of the supreme court. That rule provides only for "*supersedeas* bonds in the circuit courts." It does not expressly embrace appeals from the district court to the circuit court, although it covers admiralty causes in which security for the value of the property arrested, as in this case, will be in the custody or control of the appellate court. Since the promulgation of this rule in 1867, and its reaffirmance in the case of *Jerome* v. *McCarter*, 21 Wall. 17, there is no question that, upon an appeal from the circuit to the supreme court, the additional security required would only be for the "damages of the delay, with costs and interest on the appeal."

There has not been, so far as I am aware, any statutory provision to regulate either the *mode* of appeal from the district court to the circuit court, or the *security* to be given in order to stay execution upon such appeals in admiralty causes. *Norton* v. *Rich*, 3 Mason, 443; *The Glamorgan*, 2 Curt. 236. All the statutory provisions upon these points, beyond merely authorizing an appeal upon decrees for a certain sum, are confined to appeals to the supreme court. Rev. St. §§ 1000, 1012; Judiciary Act 1789, (1 St. at Large, p. 83, § 21;) Act March 3, 1803, § 2, (2 St. at Large, 244.)

Upon such appeals every judge signing the citation is required to take "good and sufficient security to answer all damages and costs, where the writ is to stay execution." In the absence of any statutory regulations, BETTS, J., under the general power of the court to regulate its own practice, prior to 1838, formulated rule 152 of this court, providing that, when an appeal should be entered, the appellant "shall, within 10 days thereafter, give security for damages and costs," in order to stay the execution of the decree. This rule was in evident analogy to the statutory requirements upon an appeal from the circuit to the supreme court. Under this rule the practice in this court was the same as the practice in the circuit court under the statutes above cited. By repeated decisions of the supreme court, up to the year 1867, that practice required new security to be given upon an appeal for the whole amount of the decree, without reference to any security previously given.

In the case of *Rubber Co.* v. *Goodyear*, 6 Wall. 153, a different construction from what had formerly prevailed was given to the language of the statute requiring security for "all damages and costs." It was then held that any security previously given, and under the control of the court, ought to be taken into account in determining what additional security should be deemed "sufficient for the costs and damages" upon appeal. Rule 29 was at that time promulgated, expressly declaring that, upon *supersedeas* bonds in the circuit court, "when property was in custody under admiralty process, or the proceeds, or a bond for the value thereof under the control of the court, indemnity in all such cases is only required in an amount sufficient to secure just damages for delay, and costs and interest on the appeal." Upon elaborate argument in the case of *Jerome* v. *McCarter*, 21 Wall. 17, the supreme court refused to modify this rule, and the equity of its provisions was reaffirmed.

These decisions do not, in strictness, embrace the practice in this court;

because neither the twenty-ninth rule, nor the statutory provisions, expressly includes appeals from the district court. But as rule 152 was based upon the analogy and the equity of the statute, and designed to assimilate the practice in both courts, the reasons for the twenty-ninth rule, and the decisions of the supreme court in construing the application of the phrase "damages and costs," as well as consistency in practice, would seem to require a corresponding modification of the practice, and of the interpretation of the same words in the rules of this court. In the English practice new security for the whole amount was required upon appeal for the reason that "the sureties below are not bound in the cause on appeal." The same reason is assigned in Clarke, Pr. tit. 59. See 2 Brown, Civil & Adm. Law, 437; Hall, Adm. Pr. 108, 109; Dunl. Adm. Pr. 322.

By the tenth and eleventh rules of the supreme court in admiralty, stipulations for the release of property under arrest must require the parties to abide by and pay the money awarded by the final decree rendered by the court, *or appellate court*, if any appeal intervenes; and such is the stipulation given in this case. The general rules in admiralty were promulgated under the act of August 23, 1842, (5 St. at Large, 518,) some years after rule 152 of this court, before referred to. Supreme court rule 10 provides expressly that the security given shall run to the appellate court as well as to the court below. There is no other rule of the supreme court on this point.

There is no question that stipulations which are given under these rules, and which in terms agree to pay the amount awarded in the appellate court, are as available in the appellate court as in the district court. The reason given in the ancient practice for requiring new security on appeal no longer exists in such cases. Such seems to be the intimation of Judge CONKLING in his Treatise, (Adm. 387, 405.) The very stipulation itself, so long, at least, as the sureties are responsible, is a continuing security, and seems so far to answer the requirements of the rule. For the rule does not require security for the amount of the decree and costs, but only for "damages and costs." If the vessel had remained in custody until the appeal were perfected, she would be released upon the same security that already exists, and the additional security required would be for the delay and costs only. The bond already given goes into the circuit court with precisely the same effect. So, also, a new bond for the whole amount, with the same sureties, could not be rejected, if the sureties are responsible. To give a new stipulation, with the same sureties, would be an idle form, except for the purpose of a new justification; and a rejustification of the old sureties may be ordered upon the reasonable demand of the respondent, as a condition of accepting the existing bond *pro tanto*. If the old sureties are unable or are unwilling to justify anew, a new bond for the whole decree should be executed.

The court will at all times sedulously endeavor to protect the parties from loss through insufficient security; but this, I think, should be done by the care and scrutiny exercised upon the acceptance of sureties, and in their justification, rather than in the duplication of bonds or stipula-

tions for the same thing. Considering the long time that often elapses after the release of the vessel from arrest at the time of the commencement of the action until the appeal, a rejustification of the sureties will be ordered as a condition of their acceptance, if reasonably required; but, if the sureties are entirely satisfactory, the existing stipulation, which runs in terms for payment in the appellate court, should be accepted as far as it goes. Bonds given to the marshal under the act of 1847 do not, in terms, provide for the payment of the decree in the appellate court, but only to abide and answer "the decree of the court" in such cause. In such cases it may be necessary to take a new bond for the whole amount. I do not pass upon that question now.

In the present case, if the sureties in the existing stipulation are approved, additional security for $7,000 will be sufficient to cover the damages and costs in the circuit. Should an appeal be taken to the supreme court on an affirmance by the circuit court, the additional delay will be then provided for by the requirement of still another bond.

THE COMFORT.

(*Circuit Court, E. D. New York.* October 26, 1885.)

REHEARING—APPLICATION AFTER TERM—ENTRY OF DECREE.

An application for rehearing not made during the term when final decree was entered comes too late.

Application for Rehearing. 25 Fed. Rep. 158.

Wilcox, Adams & Macklin, for libelants.

R. M. Sherman, for claimant.

BLATCHFORD, Justice. In this case, which is a suit in admiralty, there was a decree in the district court in favor of the libelants, from which the claimant appealed to this court. The appeal was heard in June, 1885, and the decision of this court was filed July 8, 1885, directing a decree in favor of the libelants, to the same effect with that of the district court, with costs in this court. The decree of this court was, on notice to the proctor for the claimant, signed by the judge, and filed and entered in this court on the fifteenth of July, 1885. It decreed that the libelants recover against the yacht and her claimant $248.23, with interest from August 13, 1884, amounting to $13.65, and $192.80 costs in the district court, and $58.49 costs in this court; and awarded execution therefor. It also decreed that as there was then in the registry of this court $274, deposited by the claimant to the credit of this action, in lieu of the yacht, and as security for the claim of the libelants, and as security for the costs of the clerk of the district court, to-wit, $15.50, and the marshal's costs, taxed at $100, had been paid by the claimant, the clerk of this court should pay to the libelants, out of the moneys so deposited,

$261.98, and that the stipulators for costs on the part of the claimant should cause the engagements of their stipulations to be performed, or show cause why execution should not issue according to their stipulations. On the sixteenth of July, 1885, pursuant to the decree, the clerk paid to the proctors for the libelants, the $261.98, out of the moneys so deposited. A certified copy of the decree of this court as entered was served on the proctor for the claimant on July 16, 1885, and service admitted by him in writing. The decree being unsatisfied as to costs, and no cause being shown by the sureties on the bond on appeal why the engagements of their stipulations should not be performed, and execution issue, a judgment was filed and entered in this court, on August 6, 1885, against the two sureties in said bond, for $250, the amount thereof, with a provision for execution. Execution against the sureties was issued August 7, 1885, to the marshal of the Southern district of New York, and was returned by him September 2, 1885, *nulla bona*. An *alias* execution has since been issued. No step was taken by the claimant to obtain a rehearing of the appeal herein, until September 24, 1885. Under an application then instituted, a motion has been made for a rehearing on one question involved in the appeal on the merits of the case.

Under the rule laid down in *Bronson* v. *Schulten*, 104 U. S. 410, this application comes too late, because not made during the term when the final decree of July 15, 1885, was entered. The terms of this court are fixed by statute (Rev. St. § 658, p. 122, 2d Ed.) to be held on the first Wednesday in every month. Besides this, after the decree had been served personally on the proctor for the claimant, on July 16, 1885, there should have been a prompt movement to apply for a rehearing, if desired, before any judgment against the sureties was entered. It is proper to say that I see no reason to question the correctness of the decision, made on the point sought to be reargued. As before held, the pleadings are such as not to permit it to be raised, and, if it were open, the decision of the court of appeals of New York, in *Gay* v. *Seibold*, 97 N. Y. 472, establishes that the statute invoked does not apply to this case.

The application for a rehearing is denied.

THE OLGA.[1]

REVERE COPPER CO. *v.* THE OLGA.

(*District Court, S. D. New York.* June 29, 1887.)

1. MARITIME LIEN—FOREIGN VESSEL—CONFLICT OF LAWS.
   When liens are enforced against an Italian vessel, the provisions of the Italian Code should be observed, by comity, in respect to the claims of those on board, as among themselves.
2. SAME—LEX LOCI CONTRACTUS—LEX FORI.
   As respects liens arising on contracts made within this jurisdiction by the master of a foreign vessel, and the priorities of such liens in respect to all the claims on the ship, our law, as the law of the place of contract, as well as of the forum, should prevail. In this case, *held*, that there was no conflict between the Italian Code and the provisions of the general maritime law, as applied in this country, in regard to the liens under consideration.
3. SAME—PRIORITY.
   A classification of liens against a foreign vessel for port dues, pilotage, provisions for crew, wages, towage, stevedore's charges, bottomry, master's lien for wages, etc., given.

The Italian bark Olga, hailing from Castellamare, Italy, contracted to the libelant company above named, at New York, in August, 1886, a debt for copper-sheeting. For the unpaid balance of that bill the master gave a bottomry draft, by which he bound his vessel and freight for repayment upon return of the bark to New York, and provided that any other draft he might draw upon his consignees should be secondary to the lien of this obligation. The vessel, on her return voyage, borrowed necessary funds at Cette and at Marseilles on bottomry; and at Almeria, her port for loading her return cargo, she obtained advances from the freighters which exceeded by $24 the amount of her freight found due on delivery at New York. Upon her arrival at Perth Amboy, New Jersey, her cargo was discharged, and she was soon after libeled and sold upon the claim of the Revere Copper Company. Libels for the other bottomry claims, and libels by the master and crew for wages, were filed; and petitions were afterwards presented for payment of the ship's obligations for pilotage, towage, custom-house, and port expenses, and provisions for crew while in port upon her last voyage. The proceeds of the vessel, less marshal's fees, were $2,531.24. The amount of the aggregate liens proved on the above claims was about double that sum.

Alexander & Green, for libelants, F. Mannberguer and others.

Olin, Rives & Montgomery, for libelants, Tod and others.

Hobbs & Gifford, for American Ballast Log Co.

Wing, Shoudy & Putnam, for Revere Copper Co., and wages, claims, etc.

BROWN, J. The proceeds of the vessel sold being insufficient to pay all the liens upon her, and the liens being diverse in character, they must be paid in the order of their relative rank under the maritime law.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

The vessel is Italian, and the provisions of the Italian Code should, therefore, be observed by comity, as respects the claims of those on board the vessel, as among themselves, including the claim of the master. *The Brantford City*, 29 Fed. Rep. 373, 384, 385. As respects the liens arising upon the contracts made by the master within this jurisdiction, and the priorities of such liens in respect to all the claims on the ship, our own law, as the law of the place of the contract as well as of the forum, should, I think, prevail. There is no conflict of laws, however, in this case; since the Italian Code[1] expresses, I think, the general maritime law, as understood and applied in the courts of this country, as to the relative rank of all the liens presented in this case.

The proceeds will therefore be distributed in the following order: (1) The taxed costs of the Revere Copper Company, upon whose libel the vessel was sold. (2) The port dues, as established by law. (3) The claims of the pilots for pilotage; also towage, if taken necessarily, and as part of a pilotage service, but not otherwise. *The Mystic*, 30 Fed. Rep. 73. (4) Claims for necessary provisions furnished for the support of the crew since the vessel's arrival in port, and up to the completion of the voyage and the discharge of the cargo. (5) Wages of seamen. As the fund is more than sufficient for the above claims, they will be paid in full. (6) In concourse with each other, to be paid ratably, since the residue of the proceeds will be insufficient to pay all, (*a*) bills for towage into port other than above stated in class 3; (*b*) stevedore's expenses of unloading cargo after applying the freight thereupon, which in this case is nothing; (*c*) other liens necessarily contracted by the vessel since her arrival in

[1]The following are the provisions of the Italian Code of Commerce, relating to liens upon vessels:

"Art. 674. Ships, and shares therein, are bound, even when in the possession of a third party, for the payment of debts which the law declares privileged, in the measure and within the limits stated below.

"Art. 675. The following claims are privileged upon the ship, and rank against its proceeds in the order prescribed in this article. (1) Law costs incurred in the common interest of the creditors, in preserving and enforcing rights against the ship. (2) Expenses, indemnities, and rewards for salvage services during the last voyage, in conformity with the provisions of the Mercantile Marine Code. (3) Navigation dues established by law. (4) Pilotage, expenses of custody, and charges of watching the ship since its arrival in port. (5) Expenses of storage for deposit of ship's tackle and apparel. (6) Expense of maintaining (*manutenzione*) the ship and its apparel and furniture subsequent to its last voyage and arrival in port. (7) Wages. emoluments, and compensation due (according to provisions of title third of this book) to the master and any other person of the crew, (*al capitano ed alle altre persone dell' equipaggio,*) for the last voyage, as well as the repayments due to the mercantile marine sick fund for the last voyage. (8) Contributions due for general average. (9) Principal and interest due on obligations entered into by the master for the needs of the ship in the cases provided by article 509, (relating to bottomry,) and executed with the prescribed formalities. (10) Premiums for insuring ship and appurtenances for the last voyage, if the ship is insured for the voyage, or by a time policy, (*a tempo,*) and for steam-ships in regular trips, and insured by time policies, the premiums corresponding to the last six months: and, moreover, in mutual associations, the assessments and contributions for the last six months. (11) Compensation due to affreighters for default in delivering cargo, or for damage to cargo by fault of the master or crew during the last voyage. (12) Unpaid purchase price due the vendor. (13) Debts under No. 9 above, when not registered and recorded with diligence, (*trascritti ed annotati tardivamente,*) every other maritime security (*cambio marittimo*) on the vessel, and the claims for which the ship may have been pledged. In the concourse of several claims mentioned in No. 13, the priority is fixed by the date of registration and entry in the ship's register."

port, in completion of her obligations on the last voyage. (7) The bottomry and supply claims before the arrival of the vessel, in the inverse order of their several dates; the claims being independent, and not concurrent. (8) The master's lien for wages is recognized, as given by the Italian law; but it must be postponed, in case of a deficiency, to those liens which the master has himself contracted, and upon which he is personally responsible. As between him and the lienors to whom he is answerable, he cannot be allowed to withdraw the fund from the registry to their prejudice. *The Selah*, 4 Sawy. 40; *The Velox*, 21 Fed. Rep. 479. The bills being more than sufficient to absorb the residue, there will be nothing left for the master.

The necessary disbursements upon each libel or petition, in enforcing the above claims, will be added to each lien, and paid with it in the same order of priority.

THE ALAMEDA, etc., *v.* NEAL.

(*Circuit Court, N. D. California.* August 1, 1887.)

PILOTS—HALF PILOTAGE—DISCRIMINATION—STATUTES.

Section 2466, Pol. Code Cal., providing rates for pilotage and half pilotage to be charged vessels entering the port of San Francisco, is not so affected by the joint operation of section 2468, Pol. Code Cal., exempting vessels sailing between San Francisco and ports in Oregon, Washington, and Alaska from half pilotage, and Rev. St. U. S. § 4237 forbidding discrimination in rates for pilotage and half pilotage, as to exempt vessels sailing from a foreign port to San Francisco from liability for half pilotage, but section 2466 will prevail, and section 2468 fail, so far as its provisions come within the United States statute forbidding discrimination in pilotage rates.

Appeal from District Court, N. D. California. See 31 Fed. Rep. 366.
Milton Andros and *Page & Eels*, for appellant.
P. D. Wigginton and *Lloyd & Wood*, for appellee.

FIELD, Justice. The libelant is a licensed pilot for the harbor of San Francisco, under the laws of California and of the United States, and on the nineteenth of March, 1887, within the cruising grounds of pilots, and outside of the bar of the harbor, he spoke the steam-ship Alameda, an American vessel, coming from the Hawaiian islands to San Francisco, and tendered to the master of the vessel his services as pilot. The services were declined, and the steam-ship entered the harbor without having on board any licensed pilot. The pilot thereupon demanded of the master half pilotage, under the laws of the state. Its payment being refused, he filed his libel against the vessel in the district court of the United States for the amount, namely, $83.78. The Oceanic Steam-ship Company appeared as claimant, and filed a peremptory exception to the libel, on the ground that the laws of the state allowing half pilotage were, by the provisions of section 4237, Rev. St. U. S., rendered inoperative and

void. That section declares that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

The laws of the state bearing upon the question are found in sections 2466 and 2468, Pol. Code. Section 2466 provides that "the following shall be the rates of pilotage into or out of the harbor of San Francisco: All vessels under five hundred tons, $5 per foot draft; all vessels over five hundred tons, five dollars per foot draft, and four cents per ton for each and every ton registered measurement. When a vessel is spoken inward or outward bound, and the services of a pilot are declined, one-half of the above rates shall be paid. In all cases where inward-bound vessels are not spoken until inside of the bar, the rates of pilotage and half pilotage above provided shall be reduced 50 per cent. Vessels engaged in the whaling or fishing trade shall be exempt from all pilotage, except where a pilot is actually employed." Section 2468 provides that "all vessels coasting between San Francisco and any port in Oregon, or Washington or Alaska territories, and all vessels coasting between the ports of this state, are exempt from all charges for pilotage unless a pilot be actually employed."

The district court overruled the exception of the claimant to the libel, and the case is brought to the circuit court on appeal.

The contention of the claimant and appellant is that the exemption, under section 2468, Pol. Code, of certain coasting vessels from the charge of half pilotage, has the effect of bringing the whole system of regulations for half pilotage prescribed by section 2466 within the inhibition of the federal statute, though the vessels against which it is made chargeable by that section come from a foreign port. If such be the effect of the exemption of the coasting vessels, the whole pilot system will be seriously impaired, and its usefulness greatly lessened. The allowance of half pilotage, when the services of a pilot have been tendered and refused, has always been deemed an essential means of establishing and supporting an efficient body of port pilots.

As said by the supreme court of the United States, in a case in which I had the honor to be its organ, nearly a quarter of a century ago, speaking of regulations respecting pilots of the harbor of San Francisco, and of the allowance to them of half pilotage when their services were tendered and declined:

"The object of the regulations established by the statute was to create a body of hardy and skillful seamen, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port, and thus give security to life and property exposed to the dangers of a difficult navigation. This object would be in a great degree defeated if the selection of a pilot were left to the option of the master of the vessel, or the exertions of the pilot to reach

the vessel, in order to tender his services, were without any remuneration. The experience of all commercial states has shown the necessity, in order to create and maintain an efficient class of pilots, of providing compensation, not only when the services tendered are accepted by the master of the vessel, but also when they are declined. If the services are accepted, a contract is created between the master or owner of the vessel and the pilot; the terms of which, it is true, are fixed by the statute, but the transaction is not less a contract on that account. If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, and the expenses and risks incurred by him in placing himself in a position to render the services, which, in the majority of cases, would be required." *Steam-Ship Co.* v. *Joliffe*, 2 Wall. 456.

The position of the claimant and appellant is that this system, so far as it provides for half pilotage, has been abolished with respect to *all* vessels, by reason of the discriminations adopted with respect to coasting vessels. I am not able to accept this conclusion. It is true that section 2468, Pol. Code, makes discriminations within the prohibition of the federal statute. It exempts from charges for pilotage, unless a pilot is actually employed, vessels coasting between San Francisco and a port in Oregon, or in Washington or in Alaska territories, but it does not exempt from such charges vessels coasting between any other port of California and a port in that state or in those territories. It also exempts from such charges vessels coasting between ports of the state, and does not exempt from the charges vessels sailing between those ports and ports of other states. But it does not seem to me to be a reasonable inference that because an exemption was thus made by the legislature in favor of certain coasting vessels between the ports of the state and between its principal port and ports on the coast in Oregon, Washington, and Alaska, that it would not have allowed half pilotage in any case, even where the vessel to which the services of a pilot were tendered was coming from a foreign port, had not this exemption of coasting vessels from such charges been allowed. There is no such necessary connection between the two things as would justify the inference that the charge would not have been allowed in the one case, if the exemption were not permitted in the other.

The federal statute prohibits regulations by any state making a discrimination in the rates of pilotage or half pilotage between certain vessels engaged in the coasting trade, or against vessels propelled in whole or in part by steam, or against national vessels; and it abrogates all existing regulations thus discriminating. But it has no further operation; it in no respect impinges upon any other regulations, or touches the general system of pilotage or half pilotage, with respect to vessels engaged in foreign commerce. The prohibited discrimination, if previously made, is abrogated; if subsequently made, it is inoperative to defeat regulations otherwise valid.

Discriminations in rates of pilotage in favor of certain vessels engaged in the coasting trade are, by their terms, necessarily limited, and could therefore never have been designed to affect the pilotage or half pilotage of vessels engaged in foreign commerce. The discrimination as to coasting vessels being invalid, section 2466 stands, as respects other vessels,

in full force. Whether the coasting vessels are, by the invalidity of the discrimination as to them, brought under the operation of section 2466, is a question not necessary to determine. It may be said that the discrimination indicates the intent of the legislature that such vessels should be exempt from half pilotage; but it may be also said that it is to be presumed that the legislature only intended the discrimination in case it could be lawfully made. We should hesitate to attribute to it a designed disregard of the federal statute. But as said above, the question is not before us for decision. The case is essentially different from *Spraigue* v. *Thompson*, 118 U. S. 90, 6 Sup. Ct. Rep. 988. There it was sought to charge a coasting vessel which was excepted from pilot charges by the Code of Georgia; here it is sought to except from such charges a vessel engaged in foreign commerce because of an exemption by the Code of California in favor of certain coasting vessels,—an exemption contained in an independent section.

I am of opinion that the decision of the district court was correct. It is therefore affirmed.

THE FLUSHING.

THE NIAGARA.

COLLINS *v.* THE FLUSHING and another.

(*Circuit Court, S. D. New York.* July 19, 1887.)

COLLISION—LIGHTS AND SIGNALS—COSTS.

The canal-boat C., while in tow of the tug N. on a short hawser, was injured by a collision with the ferry-boat F., off Eighth street, New York, at near 6 o'clock P. M. The N. with her tow was decending the East river, which was quite full of ice, extending from the Brooklyn shore beyond the middle of the river, on an ebb-tide Her course lay as far off the New York shore as was convenient, having regard to the ice. Between Eighth and Ninth streets the tug and tow met a flotilla of two tugs and two car-flats, bound up the river. The N. had the regulation lights set and burning, and pursuant to signal, the tug and tow and flotilla passed starboard to starboard. As they passed, the N. was at least 400 feet off the Ninth-street pier. The ferry-boat F., starting from the slip at Seventh street, had stopped to allow the flotilla to pass, and now exchanged signals with the N. to pass on her course across the bow of the F. The F.'s pilot did not see the N.'s lights indicating she had a tow, and, as soon as the flotilla passed, the F. started ahead, and collided with the canal-boat C. *Held*, the collision was caused solely by the fault of the F. *Held, also*, as the circumstances probably justified the libelant in joining the N. as a co-respondent with the F., that he was entitled to the costs of the district court against the F., and the N. was entitled to the costs of the circuit court against the F.

Josiah Hyland, for the Niagara.
Nathan Bijur, for appellee.

WALLACE, J. The libelant's canal-boat Curtis, while in tow of the steam-tug Niagara, was injured by a collision with the steam ferry-boat

Flushing on the third day of February, 1885, about 6 o'clock in the afternoon. This libel is filed against both the tug and the ferry-boat to recover the damages sustained by such collision. The district court dismissed the libel as against the Flushing, and condemned the Niagara for the whole damage. The Niagara and the libelant have appealed.

The proofs establish the following facts: On the day in question the Niagara left Sixty-third street, East river, New York city, with the Curtis in tow, bound for Jersey City. The tide was ebb, and running about four miles an hour. The East river was quite full of ice, extending from the Brooklyn shore beyond the middle of the river, but the New York shore was comparatively free. The tug attached the canal-boat to her stern by a short hawser, so that the bow of the canal-boat was within about seven feet of the stern of the tug. The tug proceeded down the river, keeping as well off from the New York shore as she conveniently could, to avoid the ice, and arrived off about Sixteenth street when she saw a flotilla consisting of two steam-tugs and two car-flats, lashed side by side, coming up the East river off the pier near the foot of Sixth street. At that time the tug had all her regulation lights set and burning. Her pilot gave a signal of two blasts of the whistle to the flotilla coming up the river, which was answered by two blasts of the whistle on the part of the flotilla; by which the vessels indicated that they would pass each other starboard to starboard. The tug met the flotilla at a point between the piers at the foot of Eighth and Ninth streets; the port side of the flotilla being something over 100 feet off the end of the Ninth-street pier, and the tug Niagara being about 200 feet off the starboard side of the flotilla. The flotilla was about 100 feet wide, and, when the tug passed, the latter was at least 400 feet away from the end of the Ninth-street pier. Just as the tug met the flotilla to pass it, the ferry-boat Flushing, which had started from her pier at the foot of Seventh street, and had stopped waiting for the flotilla to pass across her bow, gave a signal to the Niagara of two blasts of the whistle, which was immediately answered by two blasts of the whistle of the Niagara; the vessels thereby agreeing that the Niagara should proceed on her course, and across the bow of the Flushing. Thereupon the Niagara put her wheel gradually to starboard. The pilot of the Flushing did not see the lights of the Niagara indicating that she had a boat in tow, and, as soon as the flotilla had passed the bow of the Flushing, started ahead, intending to pass under the stern of the Niagara. The flotilla had obstructed his observation of the canal-boat; and assuming that there was no boat in tow of the Niagara, and probably being somewhat impatient at the delay caused his boat by the flotilla, he proceeded ahead under the stern of the flotilla until he discovered the canal-boat. He then reversed his engine, but it was too late to avoid collision, and the Flushing struck the canal-boat with violence on the starboard side a little aft of midships; the bow of the Flushing breaking in 23 timbers of the canal-boat.

The theory on the part of the Flushing is that, while she was waiting for the flotilla going up the river to pass across her bow, her bow was projecting a slight distance out of the mouth of the slip, and she contin-

ued lying in this position until the Niagara brought her tow into collision with the bow of the Flushing; that the Niagara had no lights set; that the canal-boat was towed with a long hawser of more than 100 feet; and that the Niagara, instead of keeping down the river at a safe distance after exchanging signals with the Flushing, continued to draw nearer to the New York shore as she approached, but, before reaching the ferry-boat, starboarded her wheel, and by this movement swung the canal-boat in and upon the ferry-boat.

The district judge found, what the proofs clearly show, that the tug had her lights properly set and burning; but he was of the opinion that the collision took place at the end of the Seventh-street pier, substantially according to the theory of the Flushing, and he therefore held the tug in fault, and exonerated the Flushing.

It is established beyond controversy that the tow was on a hawser which brought her bow within about seven feet of the tug's stern; and it is established by disinterested witnesses of intelligence, who had excellent opportunities for observation,—among them, the two pilots of the steam-tugs of the flotilla,—that when the Niagara passed the flotilla off the end of the Ninth-street pier she was 400 feet away from the end of that pier. That pier extends out into the river 84 feet further than the Seventh-street pier, and the two piers are 440 feet distant from each other. It is incredible that the Niagara, after exchanging signals with the Flushing, should have taken a course that would bring her tow nearly 500 feet to the starboard in going down the river a distance of 440 feet. Especially is this so in view of the fact that the piers below Seventh street extend further into the river than the Seventh-street pier, and the Niagara would thus be running against the pier at the foot of Fifth street. If the collision took place at a point between the Eighth and Ninth street piers, about 600 feet away from the end of the Eighth-street pier, it can be accounted for upon a rational and probable theory. It is highly improbable that if the collision had occurred in the manner claimed on the part of the Flushing, such violent injuries would have been inflicted upon the canal-boat.

Although the witnesses for the Flushing outnumber those for the Niagara, those of them who are not employes of the claimant are persons whose testimony carries very little conviction.

The Niagara was without fault which contributed to the collision. Although her course was nearer to the New York shore than would ordinarily be permissible, the condition of the ice in the river was a sufficient justification.

The decree of the district court is reversed, and a decree ordered dismissing the libel as against the Niagara, and condemning the Flushing for the libelant's damages. The circumstances of the cause probably justified the libelant in joining the Niagara as a co-respondent with the Flushing. The libelant is entitled to costs of the district court against the Flushing, and the Niagara is entitled to the costs of this court against the Flushing. *The Dentz*, 29 Fed. Rep. 525.

WESTERN UNION TEL. CO. v. BROWN and others.

(Circuit Court, E. D. Missouri, E. D. October 8, 1887.)

1. REMOVAL OF CAUSES—SINGLE CONTROVERSY.
   Where, in an action on a bond against several defendants, one of them being the principal obligor, and the others his sureties, the only relief sought is a money judgment against all the defendants, there is, for the purpose of removal, but a single controversy in the case.
2. SAME—CITIZENSHIP.
   In cases involving but a single controversy, where the jurisdiction of the court depends only upon the citizenship of the parties, the right of removal is governed solely by the second clause of the second section of the act of congress of March 3, 1887, and can be exercised only by non-resident defendants.
3. SAME—WHO MAY EXERCISE RIGHT OF.
   The third clause of the second section of the act of congress of March 3, 1887, relating to removal of causes, like the second clause of the second section of the act of March 3, 1875, governs that class of cases only where there are two or more controversies involved in the same suit, one of which is wholly between citizens of different states; and under the act of 1887 the right of removal in the cases last mentioned is limited to one or more of the defendants actually interested in such separable controversy, and does not extend to the plaintiffs therein.

On Motion to Remand.

On the eleventh day of May, 1887, plaintiff filed suit in the circuit court, city of St. Louis, Missouri, against Edgar H. Brown as principal, and the several other defendants as sureties, on a penal bond conditioned for the proper performance by said Brown of his duties as manager of the St. Louis office of the plaintiff company; alleging breaches of said bond, and praying judgment for $10,000, the penalty of the bond. The suit was returnable to the June term of said state court. The sheriff's return showed personal service on defendants Wells, Milford, and Eaton, and that the other defendants were not found in the city of St. Louis. At the return-term of the writ, and within the time prescribed by law for the defendants to plead, the three defendants who had been served filed their petition for removal of the cause to the United States circuit court for the Eastern division of the Eastern judicial district of Missouri; in which petition they alleged "that the plaintiff is, and at the institution of this suit was, a citizen of the state of New York, and that these defendants then were and now are citizens of the state of Missouri, and residents of the Eastern division of the Eastern judicial district of Missouri; that the matter in dispute in said suit, exclusive of interest and costs, exceeds the sum of $2,000; that the matter in dispute or in controversy is wholly between citizens of different states, and can be fully determined as between them; that these defendants are actually interested in such controversy." The petition concluded with the tender of a bond, and a prayer for an order of removal to the United States circuit court. Bond was filed, as provided by law, and the order of removal granted. On the first day of the next term of the United States court, September 19, 1887, the transcript of the cause was filed. On Septem-

ber 23, 1887, plaintiff filed its motion to remand the cause to the state court, alleging the following grounds:

"(1) The cause was improperly removed. (2) This court has no jurisdiction of the cause. (3) It appearing from the record and pleadings that all of the defendants, to-wit, three, who procured the removal, are residents of the state of Missouri and of the Eastern district thereof, no ground for removal was shown. (4) The cause is not removable to this court on the case stated in the petition for removal, or on the pleadings and record, either or both. (5) Under the amended act of congress of March 3, 1887, the above-named defendants, being residents of the district, could not remove the cause. (6) The cause was not removable under any law of the United States. (7) The laws of the United States relating to the removal of causes were not complied with in this case."

Charles Claflin Allen, for plaintiff.

William R. Walker, *W. B. Thompson*, and *A. M. Gardner*, for defendants.

BREWER, J. In this case a motion to remand has been filed. The question presented is one of interest and importance, involving, as it does, the construction of the removal act of March, 1887. The motion is rested upon this proposition: that in a case in which there is but a single controversy, and in which removal is sought on the ground of citizenship alone, the right of removal is restricted to non-resident defendants. That there is but a single controversy in the case at bar is, under recent rulings of the supreme court, not open to question. The action is on a bond,—one defendant being principal; the others, sureties. The only relief sought is a money judgment against all the defendants.

In *Ayres* v. *Wiswall*, 112 U. S. 187, 5 Sup. Ct. Rep. 90, which was an action to foreclose a mortgage, it was said by the court that—

"The fact that separate answers were filed, which raised separate issues in defending against the one cause of action, does not create separate controversies, within the meaning of the term as used in the statute. They simply present different questions, to be settled in determining the rights of the parties in respect to the one cause of action for which the suit was brought."

In *Railroad Co.* v. *Ide*, 114 U. S. 52, 5 Sup. Ct. Rep. 735, it was decided that the filing of separate answers, tendering separate issues for trial by several defendants, jointly sued in a state court on a joint cause of action, does not divide the suit into separate controversies so as to make it removable into the circuit court of the United States under the last clause of section 2, act of March 3, 1875. And in the succeeding case of *Putnam* v. *Ingraham*, 5 Sup. Ct. Rep. 746, it was ruled that the fact that one of the defendants did not answer, but was in default, was unimportant, and that the default placed the parties in no different position, with reference to a removal, than they would have occupied if that one had answered, and set up an entirely different defense from that of the other defendants. And in a still later case, of *Pirie* v. *Tvedt*, 115 U. S. 41, 5 Sup. Ct. Rep. 1034, 1161, the same rule was applied in an action of tort. See, also, *Sloane* v. *Anderson*, 117 U. S. 275, 6 Sup. Ct. Rep. 730, and

Insurance Co. v. *Huntington*, 117 U. S. 280, 6 Sup. Ct. Rep. 733. These cases put the question at rest and settle that there are not separate controversies, but a single cause of action.

We must now turn to the removal acts of 1875 and 1887. In the second section of the act of 1875 are to be found two clauses, which have received frequent consideration in the supreme court. That section reads as follows:

"Sec. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, 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 shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, either party may remove said suit into the circuit court of the United States for the proper district. And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

Section 2 of the act of 1887 contains three clauses; the matter contained in the first clause of the act of 1875 being in this later section divided into two clauses. This section reads as follows:

"Sec. 2. That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state. And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

The first clause in the act of 1875 refers to cases in which there is a single controversy, and, as we think will appear clearly from the authorities we shall cite, the last clause has been considered to refer solely to cases in which there are two or more controversies. Under the act of 1875, either plaintiff or defendant might remove; under that of 1887, clearly the plaintiff has no right of removal. The two clauses in the act of 1887 which apply to cases in which there is but a single controversy make this distinction. If the case is one in which there is a federal question, or, as the language of the statute is, "a suit arising under the constitution or laws of the United States, or treaties made, or which shall be made, un-

der their authority," then the defendant or defendants, no matter where they reside, may remove. In other words, in cases in which a federal question exists, this clause contemplates that a defendant may always invoke the jurisdiction of the federal courts, and have that federal question determined by those courts. But if there be no federal question in the case, if removal is sought on the ground of citizenship alone, then the removal can be had, in the language of the second clause, only by "the defendant or defendants therein being non-residents of that state." In other words, a resident defendant cannot remove simply on the ground of citizenship. The subdivision of this matter into two clauses, and the language used, make it obvious that that was the intent of congress.

The second clause of the act of 1875 and the third clause of the act of 1887 are alike, except that the word "plaintiffs" in the former is omitted in the latter. So far, therefore, as the scope of that clause has been determined by the rulings of the supreme court prior to the act of 1887, it is decisive upon the construction of the clause as it now stands; for, when the court has placed a certain construction upon language, the use of the same language in a subsequent act implies that congress intends that which has been already determined is its meaning. Now, that the last clause of the act of 1875 was applicable only to causes in which were two or more controversies will be apparent from a review of the decisions.

The Removal Cases, 100 U. S. 457, involve simply a construction of the first clause, and no attempt was made to construe the second; but in *Barney* v. *Latham*, 103 U. S. 205, the second clause was construed. The opinion of Mr. Justice HARLAN is very full and satisfactory, tracing the history of the legislation in respect thereto. He notices the act of 1866 which provided for the removal of a part of a case, and, after quoting the section of that act, uses this language:

"This provision is explicit, and leaves no room to doubt what congress intended to accomplish. It proceeds plainly upon the ground, among others, that a suit may, under correct pleading, embrace several controversies, one of which may be between the plaintiff and that defendant who is a citizen of a state other than that in which the suit is brought; that to the final determination of such separate controversy the other defendants may not be indispensable parties; that in such a case, although one citizen of another state, under the particular mode of pleading adopted by the plaintiffs, is made a co-defendant with one whose citizenship is the same as the plaintiffs', he should not, as to his separable controversy, be required to remain in the state court, and surrender his constitutional right to invoke the jurisdiction of the federal court, but that, at his election, at any time before the trial or final hearing, the cause, so far as it concerns him, might be removed into the federal court, leaving the plaintiff, if he so desires, to proceed in the state court against the other defendant or defendants."

Then, passing the act of 1867, he notices the second clause of the act of 1875; and after pointing out the distinction between the two, in that the act of 1875 contemplates the removal of the entire cause instead of a separable controversy, he adds:

"Both acts alike recognized the fact that a suit might, consistently with the rules of pleading, embrace several distinct controversies; but while the

act of 1866 in express terms authorized the removal only of the separable controversy between the plaintiff and the defendant or defendants seeking such removal, leaving the remainder of the suit at the election of the plaintiff in the state court, the act of 1875 provided in that class of cases for the removal of the entire suit."

The matter is further discussed by him, but the whole discussion simply emphasizes this distinction, and leaves the irresistible conclusion that the court construed this last clause as applicable only to cases in which there were two or more controversies, so that there might be, as they phrase it, a separable controversy.

Following this case comes that of *Hyde* v. *Ruble*, 104 U. S. 407, in which, referring to this second clause, the court say:

"To entitle a party to removal under this clause, there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other."

—Language which would be clearly inapt if there was but a single cause of action.

In *Corbin* v. *Van Brunt*, 105 U. S. 576, the court uses this language:

"In no just sense can it be said that the pleadings present separate controversies, such as admit of separate and distinct trials. If they do not, there could be no removal under the second clause of the act of March 3, 1875, any more than under the first."

So, also, in *Fraser* v. *Jennison*, 106 U. S. 191, 1 Sup. Ct. Rep. 171, we find this language:

"To entitle a party to a removal under the second clause of the second section of the act, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side and citizens of other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun."

Similar language may be found in subsequent cases.

It is impossible to avoid the conclusion from these authorities that the supreme court has placed upon this second clause this construction: that it applies solely to causes in which there are two or more controversies. And, indeed, this is but the natural and reasonable construction, for the first clause is broad enough and full enough to cover every case in which there is but a single controversy; and that the two clauses were intended to apply to different cases is evident from the fact that a different provision in respect to removal is found in them. Under the first clause *all* the defendants or *all* the plaintiffs must unite to accomplish a removal. The language is, "either party may remove;" under the second clause, "either one or more of the plaintiffs or defendants actually interested may remove." Why this difference, we do not know. As said by the court in *Barney* v. *Latham*, *supra*: "We may remark that with

the policy of the act of 1875 we have nothing to do. Our duty is to give effect to the will of the law-making power when expressed within the limits of the constitution." If, then, the last clause of the act of 1875 applied only to cases in which there was more than one controversy, of course the same construction must be given to the last clause of the act of 1887. That really ends this case; for, if the defendants cannot come in under the third clause of the act of 1887, because there is but a single controversy, they cannot under the second clause, because they are resident defendants, nor under the first, because there is no federal question.

It has been suggested, though not in the argument before us, that the whole of the second section of the act of 1875 is still in force, because not in terms repealed. Section 6 of the act of 1887 repeals, by name, certain provisions in prior statutes, and "all laws, and parts of laws, in conflict with the provisions of this act." It does not in terms repeal section 2 of the act of 1875, and, while sections 1 and 3 of the act of 1887 are declared in terms to be amendments of similar sections in the act of 1875, the same is not true as to section 2; and it has been suggested that, as section 2 is not in terms repealed or amended, it is still in force so far as any provisions therein are not directly in conflict with the act of 1887. We cannot agree to this suggestion. It is a familiar rule that when a later statute covers the ground, and is obviously intended as a substitute for the earlier statute, then the former is repealed, although no words of repeal are used, and although there may be some provisions in the earlier not absolutely incompatible with those in the later. Under that rule we think, clearly, section 2 of the act of 1875 is no longer in force, and that we must look to section 2 of the act of 1887 for a determination of the circumstances under which a removal may be had.

To briefly summarize our views on the subject under discussion, we hold—*First*, that in cases involving but a single controversy, where the jurisdiction of the court depends only upon the citizenship of the parties, the right of removal is governed solely by the second clause of the second section of the act of March 3, 1887, and can be exercised only by non-resident defendants; *second*, that the third clause of the second section of the act of March 3, 1887, like the second clause of the second section of the act of March 3, 1875, governs that class of cases only where there are two or more controversies involved in the same suit, one of which controversies is wholly between citizens of different states; and under the act of 1887 the right of removal in the cases last mentioned is limited to one or more of the defendants actually interested in such separable controversy, and does not extend to the plaintiffs therein.

We have given to this question a careful examination, because of its wide-reaching effect. The plaintiff may not remove under the act of 1887; and if a resident defendant may not remove, on the ground of citizenship alone, causes in which there is but a single controversy, it is obvious that removals will be very infrequent. Still, whatever may be the result, we are to give to the language of the act that construction

which will carry out its intent. Entertaining these views, we are of the opinion that the defendants have no right to remove this action, and the motion to remand must be sustained.

THAYER, J., concurs.

VINAL, Adm'r, etc., *v.* CONTINENTAL CONSTRUCTION & IMP. CO.

(*Circuit Court, N. D. New York.* October 20, 1887.)

1. CONTRACTS—PROOF OF.
   Where the evidence showed that plaintiff's intestate had a conversation with some of defendant's directors on a certain day, at which time it was alleged by him a contract was made; that intestate was the president of a railroad company; that the statements of the only witness to the contract varied at different times; that the agreement which plaintiff claims was made involved several millions of dollars; and no writing was then made, but, upon subsequent occasions, contracts made with the defendant by intestate, for the railroad company which he represented, covered the undertakings at first discussed, and were written in detail,—the evidence is not sufficient to sustain an allegation that defendant and intestate entered into an oral contract in favor of the latter personally.
2. SAME—WITH CORPORATION—LEGALITY OF CORPORATION—BREACH OF CONTRACT.
   Where it appeared that if a certain contract, between plaintiff's intestate and defendant, were really made, it was a contract to build a railroad of the "Consolidated Boston, Hoosac Tunnel & Western Railway Company," of which intestate was president,—the stock and bonds of which company were to pay for the road; and that the formation of this company was shortly afterwards declared void, and its stock, bonds, etc., worthless: *held*, that defendant was released from performing such contract for a company that had never legally existed, and that it was also released from all obligation to intestate to build a road for such a corporation.

This action is to recover $1,500,000 damages alleged to have been suffered by the plaintiff's intestate, William L. Burt, because of the failure of the defendants to perform certain contracts made by them with the said Burt, and also with the Boston, Hoosac Tunnel & Western Railway Company, (a corporation of which Burt was president and chief promoter,) to build a railroad across the state of New York. This railroad was never built. The plaintiff insists that the contracts were violated solely through the fault of the defendants. The defendants maintain—*First*, that they made no contract with Burt, and that his representatives cannot, therefore, recover for a breach of the contract with the railway company; and, *second*, that the breach by them was unavoidable and excusable, and was caused by the negligence and mismanagement of Burt in failing to properly organize the railway company, and by reason of his conduct in other respects, which put it out of their power to perform. The other facts appear sufficiently in the opinions of the court.

The cause came on for trial before the Honorable ALFRED C. COXE and a jury at a term of the court held at Utica, New York, on the twenty-

sixth day of March, 1886. At the close of the plaintiff's evidence, the defendants moved the court to direct a verdict in their favor. After hearing argument, the court delivered the following decision.

Matthew Hale, *Edward W. Paige*, and *William H. Bright*, for plaintiff.

Thomas H. Hubbard, *Edward D. Mathews*, and *William Allen Butler, Jr.*, for defendant.

"COXE, J., (*orally.*) It is to be regretted that upon a motion of this character more time is not allowed for the thorough and complete examination which its importance demands. The presence of the jury, however, makes such an examination impossible, and it becomes the duty of the court to decide it upon the spot. It must, of course, be a decision upon first impressions,—impressions formed during the trial, and upon this argument. It should at all times be borne in mind that there is here no allegation of fraud on the part of the defendant. The action is *ex contractu* in character, and the rights of these parties must be determined by the contract or contracts which are in evidence. These contracts must be construed in the light of surrounding circumstances. The parties must be held to have entered into their agreements, having in view what was at the time the known *status* of affairs; they contracted in the light of what they then understood to be existing facts.

"Upon the twenty-fifth of May, when the alleged oral contract was made, and upon the twenty-sixth of May, when the written contract was entered into, what was the *status* of the parties to these contracts? It appears that General Burt had, by virtue of a previous contract with Ames and Dexter, and an extension thereof, procured the right to control the constituent or foundation company, viz., the original Boston, Hoosac Tunnel & Western Railway Company, by the payment of a large sum of money, beyond his power, as an individual, to pay. He was, by virtue of the Ames & Dexter agreements, given the option to take the stock of that railway company, and control its future action.

"The railroad at that time had been constructed from its eastern terminus to Mechanicsville on the eastern bank of the Hudson river. Also, at that time, May, 1881, the construction company (this defendant) had entered into an agreement by which it was to increase its capital stock to the amount of ten million dollars, for the purpose of building the road to Buffalo. That amount had been subscribed; assuming that the subscription made by General Burt is to be regarded as a part of the sum total. The list, including the three million dollars which he subscribed, was filled up upon the twenty-sixth of May, 1881. Upon the question as to whether or not the transfer of the Ames & Dexter contracts is to be regarded as a full payment by General Burt of fifty per cent. of the three millions subscribed by him, I have no doubt whatever. In view of the evidence of Mr. Foster, and in view of the fact that the subscription paper signed by General Burt contained no clause upon that subject, and in view of the other fact that the only subscription paper which does contain the clause upon which the plaintiff's contention is based was never signed by any one, it cannot be held, and there is no question of fact upon this branch of the clause to submit to the jury, that Burt was entitled to a credit of fifteen hundred thousand dollars without paying a dollar in cash. It seems to have been the understanding of all the parties, and a fair construction of the agreement itself, that the only preference to be given to General Burt was that he was to have two years in which to pay, whereas the other signers were required to pay forthwith.

"Again, at the time of which I speak, May, 1881,—and the contracting parties must be considered to have had this in contemplation,—General Burt, as the chief mover and promoter, had effected a consolidation of various cor-

porations, or alleged corporations; thus extending the franchise of the foundation company, so that it might extend its line from Rotterdam, across the state, to the city of Buffalo, or the international bridge at that point, with various branches north and south. The name of the new corporation was the same as the old, viz., the Boston, Hoosac Tunnel & Western Railway Company. The consolidation was drawn up in March, 1881, and filed on the eleventh of April, 1881, in the office of the secretary of state. It was believed by all parties, at the time these agreements were entered into, that there was a valid consolidated company, having a charter under which the road could be constructed from the western terminus of the original Boston, Hoosac Tunnel & Western Railway Company through the state of New York. Having these facts in mind, upon the twenty-fifth of May, General Burt met the board of directors of the defendant at the office of the company. The testimony of Mr. Foster is that upon that day, the board being in session, and General Burt being present, there was a conversation on which it is sought to predicate an agreement between General Burt and the defendant that the latter should build the road or a road through the state to Buffalo.

"It is contended upon the part of the defendant that there is not enough of this transaction, assuming that the conversation as detailed by Mr. Foster took place, to constitute a contract. It is argued that, in any view, the language was so vague and uncertain as to terms that the court cannot say, or submit it to the jury to say, that a valid contract was entered into at that time. It is also asserted that, upon the undisputed testimony, the alleged contract was void under the statute of frauds, as an agreement not to be performed within two years. It is indisputably proved that no formal vote of the board of directors was taken upon that occasion. And it is, of course, true, that when the parties met together upon the day following, the 26th, to put in writing and formally sign the agreement between them, no mention was then made of the alleged agreement of the day preceding, and not a word regarding it was incorporated in the written paper. But, in any aspect of the case, the parties must be deemed to have acted in view of existing facts, and therefore this agreement of May 25th, assuming now that it was made, was an agreement, not to do an indefinite, vague, and intangible thing, not to build a road whether there was a franchise to build it or not, but an agreement to build a road for the consolidated Boston, Hoosac Tunnel & Western Railway Company, under the consolidation referred to. Surely it was in this respect no more valid or binding than the subsequent agreement in writing, which was entered into formally between the railway company and the defendant on the eleventh of August, 1881.

"Upon the twenty-sixth of May the agreement, which it is conceded upon both sides must measure the rights of these parties, at least so far as damages are concerned, was entered into between General Burt and this defendant. By the terms of this contract, General Burt agreed to assign, and did assign, all his right, title, and interest under the Ames & Dexter contracts; thus giving the defendant the right, practically, to control the constituent or foundation company. The defendant agreed with General Burt to deposit with the Central Trust Company of New York thirty thousand shares of its capital stock, to be taken and paid for by him at any time within two years. To this extent the subscription which General Burt had signed was, so far as these parties are concerned, modified by this agreement. The agreement further recited that for every thousand dollars which should be paid in by General Burt he should receive a consolidated gold bond of the railway company, and twenty shares of defendant's stock half paid; and that upon paying the full amount of the subscription, that is, the three million dollars, he should receive two of the bonds of the railroad company, and, upon surrendering the half-paid stock, twenty shares of the stock of the construction company, full paid.

General Burt, on his part, promised to subscribe three million dollars to the stock of the construction company. Upon the eleventh of August following, the railway company entered into a formal agreement with the construction company, by which the terms upon which the railroad was to be built were set out at great length, and attached to it were specifications for building the road from Rotterdam to Buffalo, or the international bridge, with the various branches, etc. At that time, therefore, August 11, 1881, there existed the agreement of May 26th, and, for the purposes of this motion, the agreement of May 25th also, and the contract with the railroad company to construct the road. The latter contract was signed by the Boston, Hoosac Tunnel & Western Railway Company, by its president, William L. Burt. I believe it is in proof, conceded, that he was president of the company at that time only by virtue of the articles of consolidation. It is conceded that General Burt never paid a dollar upon his subscription, unless, of course, the assignment of the Ames & Dexter contract is to be regarded as payment, and I have already disposed of that branch of the case; therefore it is entirely clear that his representatives have no right whatever under the contract of May 26th, unless it can be shown that the action of this defendant put it out of the power of General Burt and his administrators to perform that agreement. If that be true, it is possible that the rule quoted by the counsel for the plaintiff applies; the law would not then require of General Burt or his representatives to do a vain or inconsequential act. So that the controversy is narrowed down to the proposition whether or not there was a breach of this contract, upon the part of the defendant, and, if so, whether it was a breach which was unavoidable and excusable so far as the defendant was concerned.

"It appears that in the spring of 1883, a few months after the contract was made to construct the road, the attorney general of the state of New York, in the name of the people of the state, filed a bill for the purpose of having declared void the consolidation of the railway company, and for the purpose of having the bonds issued by the company delivered up as invalid, and canceled; also to enjoin any further proceedings under the franchise or agreement of consolidation. In March of that year the attorney general delivered a formal opinion, in which he clearly states the grounds upon which his suit proceeded, holding that the consolidation was wholly illegal, and that all acts under it must be so construed; that the railway company with which defendant contracted never had a legal existence, and that all its acts were void. When that opinion was delivered, this railroad company, if not dead, was stricken with legal paralysis; it was moribund. It seems quite clear that pending that action this defendant was not required to proceed under its contract. It was not called upon to construct a railroad for the consolidated company when the question whether or not it was a legal corporation was trembling in the balance. Had the defendant so proceeded, and had the subsequent action of the court been taken, all the bonds and all of the stock of the railway company transferred to it would have been invalid, and the defendant would have been required to give them all up for cancellation. The attorney general's suit proceeded to trial. I do not know that it appears precisely when the trial took place, but I believe it is alleged in the answer that the action was tried at the Chenango circuit in December, 1882. At any rate, in July, 1883, a decree was entered, as sweeping in its terms as it is possible to make a decree, holding the consolidation illegal, and all acts of the railway company void. The bonds were declared invalid, and the company was directed to give them up for cancellation, together with the stock.

"The question, then, is, first, did this defendant perform its agreement? To that, of course, there must be a negative answer. But, in view of all the facts and circumstances disclosed by the proof; in view of the action of the

attorney general holding that this consolidation was void from its inception, followed as it was by the decree of the supreme court deciding the whole proceeding null and void.—I must hold that the breach of the construction company was an excusable one, and that in the circumstances it would have been madness for it to have proceeded under a void agreement, with the danger threatening that all the securities issued by the railway company might be declared null and void. It is said that the railway company and the defendants might—and it is very probable the proposition is true—have made a new agreement of consolidation, or that they might have taken up these constituent companies by virtue of leases subsequently made; but the answer to that proposition has been suggested by counsel, and it is that this is an action upon contract, a contract made in May, 1881, and that defendants were under no obligation, by the terms of this contract, to take any step looking to the formation of a valid corporation. Fairness may have required them to proceed in that way, but under the contracts, which are set out in the pleadings, and proved by the testimony, there is nothing requiring them to organize another company, or to take up the constituent companies by leases subsequently made. The judgment of the supreme court, declaring the railway company void from its organization, must be regarded as relating back to all acts done by the company,—the making of the contract for building, the issuing of the mortgage, etc.; and I fail to see how the construction company could have performed its agreements to build the road in the face of such difficulties. These views must lead to the granting of the motion.

"Gentlemen of the jury, as the court has decided, as matter of law, that there is no cause of action, you will render a verdict in favor of the defendant."

Subsequently, the plaintiff moved for a new trial upon a bill of exceptions. The motion was argued at Albany, July 19, 1887, and was submitted upon printed briefs in September following.

Matthew Hale and *Edward W. Paige*, for the motion.

Thomas H. Hubbard, *contra*.

COXE, J. It is well not to lose sight of the fact that this is an action at law to recover damages for the breach of an alleged contract. In such an action the court is not permitted, in the adjustment of the rights of litigants, to exercise the comprehensive powers which appertain to a court of equity.

The questions to be determined are: *First.* Was a valid contract entered into between General Burt and the defendant? *Second.* If such a contract was made, did General Burt perform it, and the defendant violate it, and, if so, was the defendant's breach excusable?

The theory of the plaintiff is that there was an independent verbal agreement made May 25, 1881, between General Burt and the defendant, by virtue of which the defendant bound itself to build a railroad for General Burt across the state of New York. That the preliminaries to such a gigantic undertaking as was then in contemplation could be arranged without extended preparatory discussion is, of course, impossible. There was undoubtedly a conference between General Burt and the directors of the defendant on the twenty-fifth of May; but did the conversation on that day crystalize into the agreement referred to? The presumption is, certainly, a strong one, that the occurrences of the 25th

were only a part of the preliminary negotiations leading up to and merged in the formal written agreements of May 26th and August 11th. That men of affairs, versed in business usages, engaged as they were in an enterprise of great magnitude, should have made a contract involving millions, and left the proof to depend upon the fallible memory of man, is well-nigh incredible. Not a word appears in the minutes of the defendant on the 25th, or at any subsequent time, indicating the existence of such a contract. The written agreements of May 26th and August 11th are explicit, complete, and unambiguous. There can be no doubt that they fully express the intention of the parties; but there is in them no hint or suggestion of an agreement with General Burt, individually, to build a railroad. And yet the contention of the plaintiff is that the jury should be permitted to construct from the informal negotiations which preceded the written contracts an additional agreement, inconsistent with them, and wholly unnecessary to accomplish the desired purpose.

Remembering the different versions of this oral agreement given by the only witness who testified upon the subject, and in view of the numerous presumptions against it, it is a serious question whether the court would permit a verdict sustaining such an agreement to stand. But let it be conceded, as perhaps it must be upon a motion of this character, that such a contract was made, that the minds of the parties actually met, that it was the intention of the defendant to bind itself to General Burt, as well as to General Burt's company; yet it is entirely clear that it was still an agreement to build the road of the Consolidated Boston, Hoosac Tunnel & Western Railway Company, of which General Burt was the president. Divest the oral agreement of this element, and it lacks many of the essentials of a valid contract; it is vague, indefinite, and without consideration. The agreement was not to build a railroad for General Burt, to be owned by him as an individual; but it was, if anything, an agreement with General Burt to build a road for General Burt's railway company, pursuant to the terms of a contract to be thereafter made. The stock and bonds of this company were to pay for the work of building the road. The company's existence was necessary to give vitality to the contemplated project. It is, however, immaterial what interpretation is placed upon the agreement of May 25th, standing by itself; for, the moment it is read in the light of the contract of August 11th, all uncertainty regarding its import ceases. After that date there could be no doubt as to the party for whom the road was to be constructed. The agreement was then complete. Certainly, General Burt was estopped from saying, in the language of the plaintiff's brief, that "the contract was *not* to build the road of any particular company" after he, as president, had signed the contract to build the road of the consolidated company. It was in the contemplation of both parties that a valid railway company existed. It was an implied covenant on the part of General Burt. Upon this basis the contracting parties met. Is it not then entirely clear that, if there was no railway company, there could be no binding contract? The plaintiff cannot avoid the force of the decree of the state supreme court of July 16, 1883, declaring the railway consolidation void *ab initio*. That

decree was as comprehensive and drastic as language could make it. The attempted consolidation was declared illegal and void, and the association of persons wrongfully exercising corporate rights was dissolved. The mortgage, the bonds, the stock, and the leases issued or taken by the company were declared void, and were ordered to be canceled and destroyed. All persons connected with the association were enjoined from exercising any corporate rights. A receiver was appointed. The railway company was swept out of existence. There was not, and never had been, in legal contemplation, such a consolidated company as the Boston, Hoosac Tunnel & Western Railway Company. As it was out of the defendant's power, therefore, to build a railroad for this pretended corporation, which could not contract, and never had a legal existence, it was equally impossible for the defendant to fulfill the agreement with General Burt to build the road for such a corporation. If A. should agree with B. to build a manufactory for the C. & D. Company on its premises at the corner of two designated streets, it would probably be a defense to an action upon the contract if A. should show that there was no C. & D. Company, and that the premises in question were owned by another party; and such defense would hardly be met by the suggestion that A. might have organized another company, purchased another lot, and built a factory thereon, under a new contract which might have been made with the new corporation.

There is not the slightest pretense that the defendant promised to organize a new corporation if the one with which it contracted proved to be invalid, or that it agreed to build the road for six separate, independent corporations. Leaving out of sight the impossibility of floating a new loan, after the crash which followed the far-destroying judgment of the state court, it is enough to say that the defendant was under no obligation whatever, oral or written, to General Burt, or to any other individual or corporation, to attempt the construction of a new company out of the shattered fragments of the old. General Burt and the construction company embarked in a colossal enterprise, largely speculative in character. It failed, and involved in disappointment and disaster all connected with it. No reason can be suggested why one of the joint promoters of this project should saddle his losses upon his associates. Indeed, considering the ruin which followed General Burt's abortive attempt to organize a company, and his failure to pay a dollar on his subscription of $3,000,000 to the stock of the defendant, it might almost be said that justice would not be profaned if the position of the parties on the record were reversed.

The re-examination of the questions involved has only strengthened the opinion formed at the trial that the plaintiff is without a cause of action. The motion for a new trial is denied.

MACKINTOSH and others *v.* FLINT & P. M. R. Co. and others.

(*Circuit Court, E. D. Michigan.* March 7, 1887.)

CORPORATIONS—PREFERRED AND COMMON STOCK—RIGHTS OF HOLDERS OF COMMON STOCK.

A certificate of organization and articles of association of a railroad, reorganized after insolvency and judicial sale under 1 How. St. Mich. § 3314, provided for the issue of (1) preferred stock, upon which a 7 per cent. dividend was to be paid for five consecutive years, if the net income, after paying interest on prior bonds, repairs, expenses of equipment, and renewals should be sufficient; and (2) of common stock, which was not to be issued or represented at any meeting until after the payment of such five annual dividends. Complainants had received certificates entitling them to common stock, when it should be issued. They filed a bill alleging that the accounts of the company had been kept wholly in the interest of the preferred stockholders, that permanent improvements had been paid for out of income, and that, if the accounts were adjusted, and the actual net income ascertained, they would show that it had been sufficient to pay the five annual dividends to the preferred stockholders. The bill further claimed an injunction prohibiting the preferred stockholders from voting at any meeting until the common stockholders were permitted to vote upon the question of the issue of stock to themselves, and prohibiting the company from disposing of any moneys until the hearing of the case, and that meantime such moneys should be paid into the income account applicable to dividends. As it did not, however, appear by the bill and affidavits that such a diversion and misappropriation of the revenue as would threaten the rights of the common stockholders was imminent, *held*, that a preliminary injunction ought not to be granted.

In Equity.

Alfred Russell and *I. L. Stackpole*, for complainants.

Wm. L. Webber, for defendants.

MATTHEWS, J. This is a motion for a preliminary injunction, heard before me in chambers by consent of parties. The case as it appears upon the bill, exhibits, and affidavits, with affidavits heard in opposition thereto, including the answer, so far as it is necessary to state it for the purposes of this motion, is as follows:

The Flint & Pere Marquette Railroad Company, the principal defendant, is a corporation organized under the general railroad laws of Michigan, of May 1, 1873, and the acts amendatory thereof, providing generally for the organization of railroad companies; and specifically in section 3314, 1 How. St., for the organization into a corporation of the purchasers of railroads acquired by judicial sale. The certificate of organization and articles of association, filed August 31, 1880, with the secretary of state, in pursuance of that section of the law, recite the facts of the judicial proceedings and sale. The railroad was constructed by the Flint & Pere Marquette Railway Company, a corporation existing under the general railroad laws of Michigan, extending from Monroe, through the counties of Wayne, Oakland, Genesee, Saginaw, Midland, Isabella, Clare, and Osceola, with a branch extending from East Saginaw to Bay City, having extended the construction of its line westerly through the counties of Lake and Mason to Ludington, at the mouth of

the Pere Marquette river, on Lake Michigan, and having a branch in Genesee county known as the "Otter Lake Branch." This company having become insolvent in 1879, proceedings were instituted by the trustees of what was known as the "Consolidated Trust Deed," in the circuit court of the United States for the Sixth circuit and Eastern district of Michigan, for a decree for the sale of the mortgaged property. A decree for sale was entered on the twelfth of June, 1880, and the property sold on June 27, 1880.

The fourth article of the certificate of incorporation is as follows:

"The capital stock of the corporation hereby organized shall be the sum of ten million dollars, in shares of one hundred dollars each, divided into two classes, to-wit: *First*, preferred stock, which shall consist of the sum of six million and five hundred thousand dollars, divided into sixty-five thousand shares, each share being the sum of one hundred dollars; *second*, common stock, consisting of three million five hundred thousand dollars, divided into thirty-five thousand shares, of one hundred dollars each.

"And it is agreed that the rights of the holders of said preferred stock and said common stock shall be as hereinafter stated, to-wit: The holders of said preferred stock shall be entitled to receive, from the earnings of said railroad company hereby organized, dividends to the amount of seven per cent. per annum, payable semi-annually or annually, as may be directed by the board of directors; provided, the net income, after paying interest on prior bonds, repairs, expenses of equipment, and renewals, shall be sufficient for that purpose, or such portions thereof as the said net income shall amount to. In case there shall be any surplus of net income after the payment of said dividend of seven per cent. upon the preferred stock, the same shall stand undivided until the next dividend day, and so from time to time, and from year to year, until such time as the holders of said preferred stock shall receive five consecutive annual dividends of seven per cent., or semi-annual or quarterly dividends equivalent thereto. In case, on any dividend day, the net income as aforesaid shall not be sufficient to pay seven per cent. annual dividend to the holders of said preferred stock, such holders of preferred stock shall have no right to have the dividends made up out of subsequent earnings; it being the intention that there shall be no accumulation of claims against the company for dividends for such preferred stock. We further certify and declare that the said common stock shall not be issued, nor any portion thereof, until after the preferred stock shall have received five consecutive annual dividends of seven per cent. from the net income as aforesaid, or other dividends equivalent thereto; nor shall said common stock be entitled to any representation at any meeting of stockholders until the same shall have been issued.

"When five consecutive annual dividends of seven per cent., or, in lieu thereof, semi-annual or quarterly dividends equivalent thereto, shall have been paid upon the preferred stock, then the common stock shall be issued and delivered to parties who may hold the certificates issued upon the surrender of the common stock of the old Flint & Pere Marquette Railway Company, or other certificates which may be issued by this company in lieu thereof; and, if there shall be any surplus of common stock, it shall be the property of the company hereby organized. After the common stock shall have been issued as above provided, the preferred stockholders shall be entitled to receive from net earnings seven per cent. dividends each year before the common stock shall be entitled to participate; and, after the payment of the seven per cent. to the holders of the preferred stock, any surplus of net earnings that may remain shall be paid as dividends ratably to the holders of the common stock, not exceeding seven per cent. in any one year. Should the net income

be greater than sufficient to pay a dividend of seven per cent. upon the whole amount of stock, both preferred and common, such surplus shall be divided ratably among the holders of the preferred and common stock. Should the net income of the company, after the common stock shall have been issued, be insufficient to pay the dividends hereinbefore provided for in any single year, such deficiency shall not be made up out of the earnings of the subsequent year or years, and this shall apply both to preferred and common stock."

It is alleged in the bill that the defendant corporation, in pursuance of the certificate of organization, issued preferred stock to the amount of $6,500,000, representing the par value of the outstanding consolidated bonds and past due coupons to May 1, 1879, inclusive, originally secured by the consolidated trust deed on which the foreclosure took place, and that certificates were issued to the holders of the common stock of the original Flint & Pere Marquette Railway Company in the form following:

"CERTIFICATE FOR COMMON STOCK WHEN THE SAME SHALL BE ISSUED.

"STATE OF MICHIGAN.

"*The Flint & Pere Marquette Railroad Company, Incorporated August* 31, 1880.

"This certificate will entitle ——— to ——— shares of the common stock of the Flint & Pere Marquette Railroad Company, when such stock shall be issued. Said common stock consists of 35,000 shares of $100 each, but will have no vote nor voice in management until issued in accordance with the plan of organization, viz.: When the preferred stock shall have received five consecutive annual dividends of seven per cent., or semi-annual or quarterly dividends equivalent thereto. This certificate is negotiable, and may be transferred on the books of the company in the city of New York on the surrender hereof.

"By order of the Board of Directors.

"*Dated, East Saginaw,* ———, 1886. WM. W. CRAPO, President.

"H. C. POTTER, Jr., Secretary.

"A. S. APGAR, Transfer Agent."

The complainants—some of whom are citizens of the state of Massachusetts, and others of the state of New Hampshire—are severally holders of certificates of this character representing various amounts. They claim that by virtue thereof they are entitled to be regarded in equity as stockholders in the defendant corporation, and entitled to have issued to them certificates of stock in due form of law, investing them with all the rights and privileges of stockholders in such corporation.

In the first place it is contended for the complainants that the provision in the fourth article of the certificate of organization which declares "that the said common stock shall not be issued, nor any portion thereof, until after the preferred stock shall have received five consecutive annual dividends of seven per cent. from the net income as aforesaid, or other dividends equivalent thereto," is a departure from, and a violation of, the reorganization scheme assented to by the bondholders and stockholders of the Flint & Pere Marquette Railway Company, on the basis of which the decree of foreclosure and sale was had. A copy of that reorganization scheme is exhibited with the bill, and contains the following provisions:

"*Second.* The position of the obligations secured by mortgages prior to the consolidated mortgage will remain unchanged; subject, however, to the provisions hereinafter made for funding the past due interest on the same, and a portion of the interest to mature. These securities outstanding, including land-grant bonds, Flint and Holly lease bonds, Holly, Wayne, and Monroe bonds, Bay City and East Saginaw bonds, and Bay county bonds, are approximately three million five hundred sixty-eight thousand five hundred dollars, ($3,568,500.)

"*Third.* The new company to issue reorganized first-mortgage six per cent. bonds, having thirty years to run, and redeemable at the pleasure of the new company at par and accrued interest. This mortgage to be used only to fund the past due and maturing interest on the prior bonds, and for such permanent construction and improvement as may be deemed desirable by the board of directors of the new company.

"*Fourth.* Preferred seven per cent. stock shall be issued sufficient in amount to represent the par value of the outstanding consolidated bonds, and the past due coupons to May 1, 1879, inclusive. This preferred stock shall always be entitled to one vote for each and every share. Payment of dividends of seven per cent., or any part thereof, on this preferred stock, will be contingent on the net earnings of the company, and without accumulation.

"*Fifth.* Common stock shall be issued sufficient in amount to represent the outstanding common stock of the old Flint & Pere Marquette R. R. Co., and this stock shall not be entitled to vote until the new company shall have earned and paid for five successive years seven per cent. annual dividends on the preferred stock.

"*Sixth.* The preferred and common stock of the new company will be issued to the purchasing committee, who will deliver, or cause to be delivered, to the representatives, for the time being, of the holders of the eight per cent. consolidated bonds, and of the holders of the common stock of the old company who may join in this scheme of reorganization, the amount *pro rata* to which they are entitled, as near as may be, and the purchasing committee will dispose of fractions, for the benefit of the parties entitled thereto, in such manner as they may deem most expedient and equitable.

"*Seventh.* The benefit of these proceedings shall accrue only to those who shall deposit their securities and common stock with this committee within the time limited by them; it being understood that they may extend the same, from time to time, as seems to them proper for the interests of all concerned.

"*Eighth.* The purchasing committee will issue certificates and stock that they may be entitled to."

"*Twelfth.* The general principles in this scheme, and the order of priority, and the respective amounts of these organization securities and stocks, being substantially maintained, the purchasing committee may change this scheme to meet any exigencies that may arise."

1. It is insisted that according to this reorganization scheme, which it is alleged had the force of a contract between the bondholders and the stockholders of the Flint & Pere Marquette Railway Company, the complainants were entitled to the immediate delivery of certificates of common stock, instead of the certificates in fact issued under the act of incorporation, which only entitled the holders to stock to be issued in the future. It is, however, it seems to me, a sufficient answer to this claim, that the holders of the common stock of the Flint & Pere Marquette Railway Company surrendered their certificates of stock in that company to the purchasing committee, and accepted from the committee in exchange such certificates as are now held by the complainants. This they did, as it

seems, without objection or complaint at the time, and in that way must be considered to have assented to the alleged change in the scheme of reorganization as actually adopted and executed by the purchasing committee in the certificate of incorporation.

2. It is next insisted, however, upon the face of the certificate of incorporation, that the organization of the Flint & Pere Marquette Railroad Company, the present defendant, is illegal, so far as it undertakes to make any distinction in point of right or privilege between preferred and common stockholders. In other words, it is alleged and contended that there is no authority of law for the organization of a corporation by the purchasers of a railroad under a judicial sale, in which there shall be two classes of stock, preferred and common; the holders of common stock being postponed to the holders of the preferred stock in respect to the right to participate in dividends out of net earnings, or deprived of their voice and vote in the election of directors and the management of the corporation. In support of this contention, it is argued that the right to create a preferred stock cannot be implied from the general powers of the incorporation, and that it must be given by express authority of law; and that in Michigan it is given only to existing corporations, and then only to be created in a particular mode for specified purposes, and upon the happening of certain contingencies. The only statutory provision in Michigan relating to and authorizing the creation of preferred stock in railroad corporations is found in an act of February 10, 1859, § 2, (section 3409, How. St.,) which reads as follows:

"When it shall be necessary to make loans in order to meet the just liabilities, or to carry out the lawful objects and duties, of any railroad corporation within this state, or if any of its creditors holding its bonds or other obligations of indebtedness whatsoever shall be willing to exchange the same for preferred or secured stock, it shall be lawful for any such corporation, a vote of the majority of the stockholders being first obtained therefor, to issue such stock, and to secure in any lawful manner the prescribed dividends thereon, and to make the same payable in preference to dividends upon the other stock of said corporation: provided, that no dividend shall be secured greater than the rate of eight per cent., unless all the stockholders shall vote therefor, and in no case greater than the rate of interest allowed by law at the time such stock shall be issued. Such preference may be full or partial, and subject to such conditions and terms as said corporation may deem proper; and such stock shall be redeemable and payable upon such terms and at such times as shall be provided in the resolution authorizing the issue thereof, but no such stock shall be sold at less than its par value."

It is argued that, to justify the issue of preferred stock under the terms of this section, it is necessary that there shall be an existing corporation to authorize it; that the authority shall be given only by a vote of a majority of the existing stockholders, and that such preferred stock shall not be perpetual, but shall be redeemable and payable upon such terms and at such times as shall be provided in the resolution authorizing the issue thereof; and the conclusion contended for is that the section has no application whatever to the circumstances of the present case. It is thence inferred that the complainants are entitled to be regarded as

stockholders in the defendant company upon a footing of entire equality with the existing stockholders holding certificates of preferred stock under the act of incorporation, and so entitled to share with them in dividends and in the management of the corporation. On the other hand, it is argued that section 3409 shows that there may be a lawful creation of preferred stock, and, *inter alia*, by an exchange of bonds or other obligations; that railroad corporations organized under section 3314, by purchasers at a judicial sale, are invested with all the powers and rights of any other railroad corporation; that, therefore, they may be originally constituted with any classification of capital stock which it would be lawful for the corporation to adopt after its organization; that, in the present case, the necessary assent of all actual and prospective stockholders has been already given; and that in any event the complainants can claim no other rights than those defined in their contract, contained in their certificates, which is still executory, and, if that contract cannot be enforced without a violation of law, the loss must fall upon those who seek such relief, because, if the contract fails, those who claim under it have no remedy.

In the view I take of the rights of these parties, it is not necessary at present to decide whether such an organization of the stockholders of a railroad company as that provided for in the certificate of incorporation of the Flint & Pere Marquette Railroad Company can be upheld or not. The complainants assume that they are to be considered as having the *status* in a court of equity of being present stockholders in the corporation; but the only ground on which their right rests is the contract contained in the certificates which they hold. Those certificates do not constitute them present stockholders; they contain an agreement between the corporation and the holder that the latter may become a stockholder on a certain contingency, and not before. The certificates give them a right to become stockholders on the happening of a future event. They are not stockholders, with the legal rights of such, until the certificates are in fact issued; they are not stockholders in the view of a court of equity until the event happens which entitles them to call for the issue of certificates of stock. When those certificates shall have been issued, or if the contingency ever happens which requires them to be issued, the question now mooted may be decided as to the relative rights of the holders of the preferred and common stock. Until that contingency happens the question is immaterial.

It is urged on the part of the complainants, in support of their contention on this point, that the capital stock of the defendant corporation is fixed by the certificate of organization at $10,000,000, which by the terms of the statute, it is said, represents the property in the railroad, in which, therefore, they claim to have a definite and existing interest in equity. But the language of the statute is that the stock *issued* shall represent the property in the railroad. The *unissued* stock remains nominal, merely, and becomes an actual interest vested in a stockholder only when in fact issued and delivered or transferred to him; and there is nothing in the statute which forbids the corporation from fixing a

nominal amount of capital stock, in excess of the shares actually represented by the present value of the property, to be issued in the future to represent accretions and additions to that value. If it should turn out that the conditions attached to the promised future issue of common stock are illegal, so far as they create distinctions of right between classes of stockholders, it will have then to be considered whether the illegal conditions can be treated as void, without avoiding the obligation to issue the new stock. As the corporation is now organized, there is but one class of stockholders. If the complainants seek to enforce against the corporation the obligation to issue stock of a different class, creating a distinction between stockholders forbidden by law, the consequence may be that the court will find itself restrained by law from enforcing a contract, which can only be enforced with such a result.

3. It is, however, also contended by the complainants that, according to the terms of the certificate of incorporation, they are now entitled to the issue of certificates of common stock. This claim is predicated, however, not upon the allegation that the preferred stock has received five consecutive annual dividends of 7 per cent. from net income, which is the contingency upon which the common stock is to issue, but is based upon the allegations which may be summed up in the general allegation that the net income of the company has been sufficient to pay five consecutive annual dividends of 7 per cent., and that the failure to declare and pay such dividends by the directors is owing to a misappropriation and diversion of the net income of the company from its legitimate purpose to other uses not authorized by the terms of the organization of the corporation. The net income of the company applicable to the payment of dividends to the holders of preferred stock, as defined by the certificate of incorporation, is what remains of the earnings of the company after paying interest on prior bonds, repairs, expenses of equipment, and renewals.

It is alleged in the bill that—

"The accounts of the company have been kept wholly in the interest of the preferred stockholders, and without regard to the interest of the common stockholders, and in disregard of the trust created, and with the intent on the part of the preferred stockholders, and the officers and agents appointed by them, of preventing the common stockholders from having any voice whatever in the management, and with a view to postponing the issue of the common stock to an indefinite period. And your orators are informed and believe, and so aver, that for this purpose accounts have not been properly kept of permanent improvements in the property which should have been paid for as additions to the plant, by way of construction and equipment, out of funds applicable thereto, but that said permanent improvements have been in fact paid for out of the current yearly income from the property applicable to dividends. And your orators show that earnings have been diverted from their proper application to dividends, and spent upon the railroad, and upon its road-bed, rails, track, station buildings, and other property, and in the building of branches, especially a branch to the city of Manistee, and in the building of side-tracks and sidings, and the purchase and improvement of cars, engines, locomotives, and other equipment; that the operating expenses have in this way been unduly increased, and the net income diminished,—all to the

prejudice of the common stockholders, in violation of their rights, and of the agreement, whether contained in the scheme of reorganization, or in the certificate of organization filed with the secretary of state."

It is also particularly alleged in the bill that the Flint & Pere Marquette Railroad Company is in possession of a land grant received from the United States through the state of Michigan, the proceeds of which are applicable to the construction and equipment of the road, and to the payment of bonds issued to borrow money for such construction and equipment; and that of the said fund arising from the proceeds of the sales of said lands heretofore made, in addition to a large amount of unsold land, and in excess of the amount necessary to satisfy the trusts on which the said land is held by trustees for the payment of outstanding obligations, there is a large amount of cash on hand,—several hundred thousand dollars in the aggregate,—which constitutes a part of the general assets of the company applicable to the payment of dividends, or, if not directly so, which should be applied to making good the deficiencies in the net income applicable to the payment of dividends which have been created by the misappropriation of the net income to purposes of construction and permanent improvement.

It is alleged in the bill that dividends have in fact been made on the preferred stock, and paid, as follows: In 1881, 5½ per cent.; in 1882, 6½ per cent.; in 1883, 7 per cent.; in 1884, 7 per cent.; and in 1885, 4 per cent. And it is alleged "that the real and actual net income of these several years, if the affairs of said railroad company had been properly conducted, and the accounts thereof kept with a legal and proper consideration of the rights of your orators, as hereinbefore set forth, together with the surpluses remaining on hand in each several preceding year, was, after paying interest on prior bonds, repairs, expenses of equipment and renewals, sufficient for the payment of a dividend of seven per cent. in each year to said preferred stockholders; and that it was the duty of the defendant corporation to pay such dividends, and issue such common stock, on the first of January, 1886." It is further alleged in the bill "that the surplus on hand, and applicable to dividends, at the end of the year 1885, is not the true surplus, but that it is greater by many thousands of dollars; and they further show that they are entitled to share in the net income of the present year, to-wit, the calendar year eighteen hundred and eighty-six, and that they are entitled to have the true surplus of the previous years, and remaining on hand January 1, 1886, added to the true income of the current year; and they are informed and believe, and so aver, that said sum is more than sufficient to pay a dividend at the rate of seven per cent. to the preferred stockholders, and that a considerable surplus and excess remains for distribution as a dividend to the common stockholders." It is further alleged in the bill that the complainants have endeavored to procure an examination of the accounts of the corporation with a view of stating the results fully and accurately, but that upon application to the corporation this has been denied. The bill accordingly prays for a specific performance of the agreement for the issue of common stock, and to that end

for an account of the income of the defendant company from the date of its organization for each successive year, and a correction of the same, if necessary, so that the amount of the income applicable to the payment of dividends upon the preferred stock may be ascertained.

The injunction now moved for is described in the third and ninth prayers, as follows:

"*Third.* That the defendant corporation and the other defendants may be enjoined, both by preliminary and perpetual injunction, from recognizing such preferred stockholders as entitled to vote, or in any other way, or from paying any dividend on said preferred stock, until a vote of the common shareholders authorizing such issue of the preferred stock can be obtained, or until such equitable relief can be granted to the common shareholders as this court deem proper."

"*Ninth.* That your honors will enjoin said railroad company and its directors, its officers and servants, by preliminary writ of injunction, from disposing of or spending any moneys received, or to be received, from said trustees, until this case can be heard and determined; and that this honorable court will order such amounts from said trusts in the hands of said company to be paid into the income account applicable to dividends as will reimburse said income account for any sums wrongfully taken therefrom and spent upon construction or equipment, or in any other manner; and further, such other sums to be paid to said income account as may legally belong to the same."

The complainants will not be entitled to have certificates of common stock issued to them in lieu of the certificates now held by them, if at all, until it shall appear that the earnings of the company, after paying interest on prior bonds, repairs, expenses of equipment, and renewals, have been sufficient to pay to the holders of the preferred stock five consecutive annual dividends of 7 per cent. Whether they shall be entitled to such a decree can only be ascertained after the statement of the account prayed for and on final hearing. In the mean time, they might be entitled to prevent, by the writ of injunction, any plain diversion of the earnings and revenue of the company from the purposes named in the certificate of organization, to their prejudice. It does not, however, sufficiently and plainly appear to me, upon the statements in the bill and the affidavits, that such a diversion and misappropriation of the revenue as would threaten the rights of the complainants is imminent. If the directors have misapplied, or shall prior to the final hearing of the cause hereafter misapply, any of the net income of the road which ought to have been applied, or to be applied, to the payment of the dividends to the preferred stockholders, it will not and cannot prejudice the rights of the complainants to the issue of the stock contemplated by the certificate of organization; but in the mean time, and until the account of the income and of its applications can be satisfactorily adjusted, I see no ground or necessity for the injunction prayed for. The motion is therefore denied.

FARMERS' LOAN & TRUST CO., Trustee, *v.* TEXAS WESTERN RY. CO. and others.

(*Circuit Court, E. D. Texas.* 1887.)

RAILROAD MORTGAGE—FORECLOSURE—INTERVENTION AFTER DECREE.

A trust company, citizen of New York, filed a bill in the federal court against a railway company, citizen of Texas, to foreclose a mortgage, and for a sale of the premises, and also asked that certain persons, citizens of Texas, who had obtained judgments, and were seeking to enforce them, against the railway company in the state court, be made parties, and required to assert their claims, in the action in the federal court. Pending the hearing of the bill, a sale of the road was had, pursuant to a decree of foreclosure rendered in the state court in favor of a citizen of Texas, who was made a party to the bill. It was purchased by a citizen of New York, who afterwards assented to an appointment of a receiver in the federal court. *Held*, after judgment on the bill *pro confesso* against the defendants, citizens of Texas, that citizens of New York, who claimed an interest in the road acquired after the jurisdiction of the federal court had attached, as being the real parties in interest for whom the sale and purchase in the state court was had, were entitled to intervene and set up their rights.

In Chancery. Plea in intervention.

The Farmers' Loan & Trust Company, a corporation created under the laws of the state of New York, and a citizen of New York, filed its complaint against the Texas Western Railway Company and the Texas Western Narrow-Gauge Railway Company, both corporations organized under the laws of, and having their principal offices in, the state of Texas, and citizens of the state of Texas, seeking the foreclosure of a certain mortgage which had been executed to the complainant by the defendant narrow-gauge railway company to secure its mortgage bondholders. The defendant narrow-gauge railway company had previously been sold by decree of the United States circuit court, and the bondholders had purchased it, reorganizing under the name of the Texas Western Railway Company, defendant herein; which company, under the agreement of reorganization, assumed the mortgage sued on. The complaint sets out that Mary F. Gentry, administratrix of Abram M. Gentry, deceased, a citizen of Texas, James A. Baker, Walter B. Botts, James A. Baker, Jr., James G. Tracy, and David C. Ruby, all citizens of the state of Texas, had obtained judgments in the state courts, and obtained the appointment of a receiver therein, who had taken charge of the property; that these judgment liens were inferior to plaintiff's lien; that the defendant the Texas Western Railway Company was hopelessly insolvent; and asked that these judgment creditors be enjoined from prosecuting their claims in the state courts; that they be made parties to this action, and be required to set up their claims; for the appointment of a receiver, accounting, and a sale of the premises.

Pending this action, the defendant herein Mary F. Gentry, administratrix of Abram M. Gentry, deceased, caused to be ordered in the state court a sale of the Texas Western Railway Company, to satisfy her judgment for a claim due Abram M. Gentry, deceased, and to foreclose a

mortgage lien on the premises for the same; and the property was sold, May 5, 1885, to one John Cummins, who acted for Elijah Smith, a citizen of New York, and the sale was confirmed, and title made to Cummins, who conveyed the same to Smith.

The defendants in this action failing to appear and plead, judgments *pro confesso* were taken, March 18, 1886, and June 7, 1886; and on October 26 or 27, 1886, complainants, with the assent of Smith, made application for a receiver in this court, and asked that the claims of the intervenors, acquired pending this suit, and subject thereto, so far as the same are valid, should be asserted under the receivership in this court.

On October 30, 1886, Walter S. Cowles, Henry H. Boody, J. C. Chew, James R. Young, and C. C. Campbell, all citizens of New York, with leave of court, filed their motion to be allowed to appear as defendants in this cause, and to be allowed to plead thereto before final judgment, and to have the judgments *pro confesso* set aside; they averred that they were the actual owners of the larger part of the Gentry claim, to-wit, three-fourths, at the date of the institution of the said suit in the state court, but the legal title thereto was in Gentry, and the suit was prosecuted by Gentry's administratrix, for the whole claim; that at the instance of Elijah Smith, who then controlled the Texas Western Railway Company, they entered into an agreement with him by which they transferred to him their interest in the Gentry claim,—he stipulating within 90 days, or as soon as possible, after the date of the agreement, to deliver to them first mortgage bonds of the Texas Western Railway to the amount of 62½ per cent. of their original holdings, and that upon his failure so to do he would restore and reconvey to them their said previous holdings, rights, and interests unimpaired; that at the said sale Smith purchased the said property for the amount of the Gentry claim, actually paying therefor only the amount of the interest of the Gentry estate, and crediting on the bid, as his own share of the judgment, the amount transferred to him by the above agreement, using their interest in the same to pay for said property, and that he has wholly failed and refused to deliver the first mortgage bonds as agreed; that Smith has failed to defend this suit, as he was in good faith to these orators bound to do; that by his payment of the amount due the Gentry estate he has thereby divested it of any right to defend, and has procured the other parties defendant to withdraw their claims; and that if these parties are not permitted to intervene, and have the judgments *pro confesso* set aside, their interests in the Gentry claim and purchase by Smith will be utterly destroyed.

Turner, Lee & McClure, (*Herbert B. Turner* and *Stewart & Breaker*, of counsel,) for the Farmers' Loan & Trust Company.

Hutcheson, Carrington & Sears, for intervenors.

SABIN, J. In this case the bill was filed February 10, 1885, to foreclose a mortgage executed by the defendant narrow-gauge railway, dated September 17, 1878, securing by lien on its road-bed, franchises, and property some 350 $1,000 7 per cent. bonds, dated October 1, 1878,

with "coupons attached," maturing on the first days of April and October of each year, while said bonds matured October 1, 1918, (the mortgage was executed September 17, 1878,) and whereof the holders of 340 of said bonds had requested foreclosure of the same.

At the time the suit was filed, a decree of foreclosure had been rendered by the state district court of Harris county, which held possession of the property embraced in the mortgage sued on herein through its receivers in a suit against the Texas Western Railway Company, one of the defendants herein, which was a species of phœnix from the ashes of the Texas Western Narrow-Gauge Railway Company, through the kind offices of this court in a previous and different suit, and the Texas Western Construction Company as a species of godmother, co-operating with Abram M. Gentry in clearing up all the old *debris* of the Western Narrow-Gauge Railway, (and particularly the bonds now here in suit,) for which services he was to receive $200,000 in the first mortgage bonds of the Texas Western Railway Company thereafter to be created, and which were to issue as a portion of some $800,000 bonds of same class, and to take the place, among other things, of the bonds in suit here.

It seems that when Gentry had completed his contract, that the Texas Western Railway Company recognized his services, and acknowledged its liability to him; and, Gentry dying, his administratrix sued for the same, and obtained judgment therefor,—the court treating a contract for the making of a mortgage and issuance of bonds, which ought to have been done, as having been done, and foreclosed the same as if they were in actual being; just after which this bill was filed, the property then being in the hands of the state court, and so remained until after sale to Cummins for Smith.

It would seem that the parties interested, and so soon to open a varied litigation, were, up to the date of Gentry's death, engaged in the common pursuit of organizing the Texas Western Railway Company, embodying the assets of the Texas Western Narrow-Gauge Railway Company, for which $800,000 first mortgage bonds were to be issued; and that at some period an effort had been made to issue them, but which failed for want of formality. It is apparent that the intervenors herein were likewise part owners of a component part of the Gentry claim against the Texas Western Railway Company, and that the assertion of the same by his administratrix, with an attendant foreclosure, was hostile to the general purpose of the parties engaged in the formation of that company, and calculated to mar their expectations. It seems that, with the view of protecting their rights, these intervenors transferred all their claims, amounting to $117,600 first mortgage bonds, $16,750 income bonds, and $72,000 of capital stock, to one Elijah Smith, and that the Texas Western Railway was sold; by which sale said Smith acquired the title thereto, making payment therefor with their assigned claims to the extent of $105,500, and some $40,000 in cash paid by himself.

It will be observed here that this was a sale as under first mortgage bonds of the Texas Western Railway Company; and, further, that the foreclosure sought in this suit is of bonds of prior date, on property trans-

ferred by the Texas Western Narrow-Gauge Railway Company to the Texas Western Railway Company anterior to such foreclosure sale; and that Smith was placed in the possession of all the property; and that nothing now remained to be done, so far as the general purposes of reorganization were concerned, but the actual perfection of the reorganization of the Texas Western Railway Company, and the issuance of the bonds originally contemplated, in lieu of those sued on herein, and which latter had been collated by Gentry, and whose administratrix had recovered the compensation earned by him for such collation, and in which compensation intervenors had been or were interested, although embarrassed by the methods resorted to for its enforcement as having been contrary to the general programme of themselves and the construction company, who, aside from the claims of the administratrix, were sole masters of the situation.

This purchase of Elijah Smith, under decree of December 16, 1884, on the ——— day of December, 1885, rendered him master of the situation, according to the strict rules of the common law and Rev. St. Tex. art. 4260, to the extent of road then constructed; and it is evident that had he executed, or caused to be executed, to these intervenors, $100,000 in first mortgage bonds, and bonds to himself and associates, and others sufficient to cover the bonds sued on, and not to exceed $800,000, that the title to the road, with all necessary powers, would have been in him, and all these contentions would have been unnecessary. But it is said that Smith is not a party to this suit, and cannot be made so, as he is a citizen of New York, as well as the complainant herein, and as well, also, as these intervenors, and that this court cannot have jurisdiction over them or their contentions. However this may be, these contentions will have to be litigated herein, or this suit will have to be dismissed.

This is a suit by a citizen of New York against citizens of Texas, and the jurisdiction of this court attached after the decree of foreclosure in the state court, and before the sale and purchase by Smith. Smith was neither a necessary nor proper party at the time of the institution of this suit; neither were these intervenors, who anterior to their intervention herein, to-wit, October 5, 1886, had sued him in the state court; and, had he retained possession of the property purchased, it is not likely that this intervention would have been at all necessary, as the whole matter could have been litigated therein without the embarrassment of jurisdictional questions. But on the twenty-sixth or twenty-seventh day of October, as the case may be, A. D. 1886, the complainant herein asked for the appointment of a receiver of the property in question, with the assent of said Smith accompanying their application; and while said property was brought into this court by such joint action of plaintiff and Smith, without notice to intervenors, as into a city of refuge, and hung upon the horns of the altar, yet the application for receivership asks "that all claim of the intervenors having been acquired pending this suit, and subject thereto, so far as the same is valid, should be asserted under the receivership in this court."

This prayer in the application for a receiver is exactly my view of the law of this case. Had this suit been instituted after the sale to Smith, he would have been then a necessary party, as a virtual owner of the road, and the suit could not have been brought in this court; but jurisdiction having attached herein, and the bonds being narrow-gauge bonds, he is as important a party as the Texas Western Railway Company originally was; and the jurisdiction having attached, and Smith having assented to a receiver, and his brother having been appointed receiver herein, and he himself having made several affidavits in the case, seemingly voluntarily, in support of the plaintiff's claim, it is evident that while the main litigation as to foreclosing the mortgage securing the bonds may go on and be determined herein, yet in the ascertainment of to what extent complainants can recover thereon, and have such foreclosure made, it is evident that the rights of the intervenors may be considered; and Smith, having turned the property over to a receiver appointed herein with his assent, may properly make himself a party hereto, or may be made so either by complainants or intervenors, or the same may be proceeded with *in rem*, and the rights of the intervenors in the property, or to first mortgage bonds, may be treated as issued and due, in whole or in part, and entitled to foreclosure, and as of the same or higher grade and rank as the bonds sued on herein, or practically of the same grade and rank; that is to say, if these intervenors have in point of fact the right to establish their rights as set up by them in the papers herewith submitted to me. In the view I have taken of the case, the sale in the state court either perfected in them a title to the road as part owner, or as entitled to $100,000 in first mortgage bonds, to be issued with certain other bonds to which those in suit were to be subrogated or canceled. For the assertion of these rights, or either of them, as an intervening plaintiff, there can be no doubt but that the intervenors may do so herein. To fail to do so would result in the absolute destruction of their rights to the same. If the plaintiff herein is the trustee of any or all of the interest of Smith in the bonds sued on, there is nothing to hinder the assertion of all his rights thereto under the trustee. If the Texas Western Railway Company is the Texas Western Narrow-Gauge Railway Company, and has been sold out to said Smith, and he has turned its effects into this court to be administered upon nominally between a species of shadowy beings, there can be no objection to parties having an interest in the property, or the right to first mortgage bonds thereon, from asserting their rights thereto in the premises in the matter of its disposition or the enforcement of liabilities thereon. I do not see any difficulty in Smith himself becoming an intervening plaintiff herein for the assertion of any rights which he may have in these bonds sued on, or leaving the same wholly with the plaintiff trustees.

If it should be admitted, or a conclusion should be reached, that the intervenors herein were entitled to recover as against defendants, or either of them, to the extent of $100,000 or more, as of first mortgage bonds of the Texas Western Railway Company, of equal or greater rank to those sued upon, and that complainant trustees should likewise also

recover of defendants the amount of the bonds sued upon, and the property be decreed to be sold, and the proceeds, after payment of costs, etc., should be ratably divided between the intervenors and trustees, then, and in such case, in the absence of the question of title herein, justice would seem reasonably to be reached between the parties herein. But with the matter of what are the real rights between the parties, or the real facts of the case, I do not undertake to speak now. The case has been presented to me under a variety of suppositions as to actual rights and facts, but, in deciding upon these exceptions, I have to take as true the allegations set up by the intervenors; having reference, nevertheless, to such affidavits, documents, and pleadings as have been submitted to me.

In the great multitude of statements presented it may be that I have fallen into some errors of statement; but I feel quite sure that the intervenors have presented such an interest in the property, or its disposition, either under title or bonds, as the case may be, as to entitle them to come in and assert their rights, either to part ownership of the property above plaintiff's right to foreclosure, or to bonds of equal or higher grade to those of plaintiff, and to the foreclosure of the same, and a *pro rata* distribution of the proceeds. Whatever may be their rights, they clearly have the right to intervene and prosecute them herein. It would be wrong in this court to make use of its power over the property and jurisdiction herein to overthrow and utterly ruin the rights of parties which have fully matured and been brought into shape since the institution of this suit, although having an inchoate or incipient existence previous thereto. The complicated nature of the various transactions placed under consideration, however simple in themselves, have had a tendency to confuse and embarrass the mind; but I think I have fairly solved the problem of the method for the protection of the rights of all parties herein, and hence shall make the order annexed hereto in said cause.

ORDER.

In this case, the exception of complainant to the plea in intervention of Walter S. Cowles, H. H. Boody, and others, coming on to be heard at a former day of this term, and the same having been presented and argued and submitted to the court, and the same having been duly considered by the court, and it being the opinion of the court that the law is with the intervenors, it is therefore ordered that the exceptions of complainant to the plea of intervention herein be overruled; that complainant have until the rule-day in July, 1887, to make plea or answer thereto, and that all judgments or decrees *pro confesso* entered herein be set aside; and that both plaintiff and defendants and intervenors have leave to file such pleadings, or further amended pleadings, herein as they may desire, with right of replication thereto as in the usual course and time for making the same; and that this order be entered upon the minutes of the court.

HOGUE v. CHICAGO & A. R. CO.

(*Circuit Court, E. D. Missouri, E. D.* October, 1887.)

1. RAILROAD COMPANIES—NEGLIGENCE—CROSSINGS—DUTY TO MAINTAIN.
In an action against a railroad company to recover for injuries resulting from its negligence in not constructing and maintaining a sufficient crossing, as required by Laws Mo. 1885, p. 87, the defendant can be relieved of liability therefor only by showing that the crossing was constructed in strict compliance with the statute; that it has always been maintained in a safe condition; and that it is located in that part of the street that is graded and usually traveled by vehicles; or that the failure to do any of these things was not the direct cause of the injury; or that the accident was the result of the negligence of the person injured; or that it was the result of the negligence of neither; or when the plaintiff, upon whom the burden of proof rests, fails to show by a preponderance of evidence that the defendant has failed to discharge its duty in some respect.
2. NEGLIGENCE—ACTION FOR DEATH OF HUSBAND—DAMAGES.
In an action brought by a wife against a railroad company, to recover damages for her husband's death caused by the failure of the company to construct and maintain a sufficient crossing, it is proper for the jury, in assessing the damages, to consider the age of the husband, his health and habits of life, and his capacity for earning a livelihood for himself and his family.[1]

D. P. Dyer, for plaintiff.
R. H. Kern, for defendant.

THAYER, J., (*orally charging jury.*) The sole ground relied upon by the plaintiff in this case for recovery is that the defendant railroad company failed to construct and maintain a good and sufficient crossing where the defendant's railroad crosses the Louisiana and Prairieville graveled road in the city of Louisiana, Missouri; and that in consequence of such neglect plaintiff's husband was thrown from his wagon, and killed, as he was driving over that crossing. The statute of this state with regard to railroad crossings is as follows (I read section 807, Revised Statutes of Missouri, as amended on March 27, 1885, Session Laws of Missouri, 1885, p. 87:)

"Every railroad corporation shall construct and maintain good and sufficient crossings, where its railroad crosses public roads or town streets now or hereafter to be opened for public use, which crossing shall be constructed out of materials and in the manner following: On each side of each rail shall be laid, and securely spiked to the cross ties, a plank of not less than 10 inches in width, and two inches in thickness, nor less than 16 feet in length on all public roads, nor less than 24 feet in length on all streets in towns and cities, to be of good and sound timber. The space between the inside planks shall be filled with macadam or gravel, even with the top of the planks; and shall make good and sufficient approaches thereto, of equal width therewith, and

[1] In an action brought for the benefit of the widow, for the negligence of a railroad company in causing the death of the husband, the jury may consider the age of the deceased, the injury to his business, his capacity to earn money, his health, and his general condition of life. Clapp v. Railway Co., (Minn.) 29 N. W. Rep. 340. In general, as to the measure of damages for negligently causing death, see Cooper v. Railway Co., (Mich.) 33 N. W. Rep. 306; County of Howard v. Legg, (Ind.) 11 N. E. Rep. 612, and note.

of easy grade. The same shall be covered with gravel or macadam to a depth of not less than six inches, and shall be substantially and properly joined up to the plank required to be laid on the outside of each rail; provided that such corporation may make such road or street to pass under its said railroad where the same can be done with equal convenience and safety to the traveling public."

I read as much of the section as is material for the purposes of this case. This statute which I have just read to you is obligatory upon the defendant in this case, and determines its duty with respect to railroad crossings. It is a statute that requires no particular explanation, but I may remark that it may sometimes happen that a street as dedicated or laid out is 40, 50, or even 60 feet in width, whereas the part actually graded and traveled over, that is, the road-bed proper, may be much narrower, say 24, 20, or even 16 feet.

Now, in locating the planking specified by the statute, the court instructs you that in a case such as I have last supposed, it would be the duty of a railroad company to locate the planking on that particular part of the street that is graded and usually traveled over by wagons and vehicles. I may further say, gentlemen, that the duty imposed upon a railroad company by this statute is not discharged by merely putting down such planking as the statute describes. It is the duty of a railroad company not only to put down such planking as is described in the statute, and to locate it in that part of the street or road that is graded and usually traveled over by wagons and vehicles, but it is also its duty to maintain the planking, after it is laid, in a good and ordinarily safe condition at all times.

A railroad company is liable under this statute for all injuries that may be sustained by a person without any fault on his part, directly in consequence of a failure either to put down planking in the first instance, of the dimensions and quality described in the statute, or by a failure to locate it in that part of the roadway that is graded and usually traveled over, or by a failure to keep the planking in an ordinarily safe condition after it is laid.

Now in this case you must determine from the evidence:

(1) Whether the defendant, on February 8, 1886, had such a planking as the statute describes, 24 feet in length, on the north side of the northerly rail of its track, at the crossing of the Louisiana and Prairieville graveled road in Louisiana, Missouri, and whether such planking was laid in that part of the road that was graded and usually traveled by teams, and was at that time in an ordinarily safe and good condition.

(2) If you find under the testimony that there was not the requisite length of planking laid at that point or crossing, or if you find that there was the requisite length of planking, that is, 24 feet or over, but that it was not laid in that part of the street that was usually traveled over by teams, or if you find that the planking at that time was not in an ordinarily good and safe condition, then you must further inquire and determine, from the evidence before you, whether such lack of planking, or whether its being out of its proper place in the street, or whether its being in a defective and unsafe condition, as the case may be, was the immediate and direct cause of the injury which plaintiff's husband sustained; and if you find that it was such immediate cause, you will then return a verdict in favor of the plaintiff.

On the other hand, gentlemen, if you find that at and before the accident the railroad company had caused to be laid as much as 24 feet of planking, of the requisite dimensions and quality, described in the statute, at the point in question, that is, at this crossing, and had located it across the usually traveled portion of the street, and had maintained it in an ordinarily safe condition up to the time of the accident, then that will end the case, and you will find for the defendant.

Now, there is another view of the case I wish to present to you, and it is this: No person can recover compensation for an injury that is sustained in consequence of the fault or neglect of another person or corporation, if he has by his own fault or neglect directly contributed to produce that injury. It follows, gentlemen, that if plaintiff's husband, by any want of ordinary care or prudence on his part, immediately contributed to the injury sustained, then this plaintiff cannot recover, no matter how negligent the defendant may have been in taking care of this particular railroad crossing. In this view of the case, I call your careful attention to the testimony respecting the conduct of the plaintiff's husband as he approached the crossing in question on the occasion of the injury. If under the testimony you believe that he neglected on that occasion to take any precaution, either in driving or in sitting on his wagon, or in looking out for obstructions, that would under all the circumstances of the case have been taken by a person of ordinary prudence, and that such want of care on his part directly contributed to the injury, then the verdict in this case should be for the defendant.

If you believe that he drove the wheel of his wagon against an exposed portion of the iron rail or railroad tie, when he might in the exercise of ordinary care as well have driven over the track where it was protected by planking, and thus have avoided the injury, then he was negligent, and the plaintiff cannot recover, no matter what may have been the negligence of the railroad company.

There is still another view of the testimony which you may take in this case, and therefore I allude to it. You may be of the opinion that the plaintiff's husband was not guilty of any negligence, and that the railroad company discharged its full duty under the statute in taking care of the crossing. If that should be your view of the case, under the evidence, then the injury in question was the result of what is termed in law an accident, for which no one is legally responsible, and in that view of the case you must find for the defendant.

In weighing the testimony in the case you must also bear in mind that the presumption of law is that the defendant fully performed the duty imposed upon it by law with respect to taking care of the crossing, and the burden is on the plaintiff to show, by a preponderance of evidence, that it failed to discharge that duty in some respect, and unless they have so shown you must find for the defendant.

In the event that you find the plaintiff is entitled to a verdict, under the evidence in this case, and under these instructions, then the statute under which this action is brought allows you to assess such damages as you deem "fair and just, not exceeding $5,000, having reference to the

necessary injury resulting to the plaintiff from the death of her husband." The meaning of that is, gentlemen, that you should determine, as well as you can, what damage plaintiff will necessarily sustain by reason of the loss of her husband. You may take into account the age of her husband, his health and habits of life, and his capacity for earning a livelihood for himself and his family, and from such considerations determine, as well as you can, what would be a fair and just allowance to the widow, —that is to say, what was her necessary loss in consequence of her husband's death.

BOWMAN *v.* PATRICK.

(Circuit Court, E. D. Missouri, E. D. September 28, 1887.)

WITNESS—PRIVILEGED COMMUNICATION—LETTERS FROM HUSBAND TO WIFE.

The wife's administrator found among her papers letters from her husband which made against him in a suit in which he was then interested. The administrator, in a spirit of hostility to the husband, delivered the letters to the other side, which sought to use them. *Held*, that the letters were privileged.

On Motion to Strike out Certain Exhibits.

Erasmus McGinness, for complainant.

Edward Cunningham, Jr., and *Edward C. Eliot*, for respondents.

MILLER, Justice, (*orally.*) This case was argued on Monday on the motion to strike out certain exhibits filed in the master's report of the testimony in the case. Those exhibits were letters written by one of the defendants to his wife, and the ground of the motion to suppress them is that they are such communications as are protected by the principle which the law throws around communications between husband and wife. I confess I was very much astonished to find that there are some authorities which hold that while the wife cannot be permitted to tell, and not only that, but will be forbidden to tell, what her husband says to her in any matter of marital or private relations, or while the private relation exists she will be forbidden to tell anything,—will not be permitted to tell anything on the stand to the injury of her husband,—I say, I am surprised to find, while that general principle prevails, that there are some authorities holding that where this evidence can be got at, either by obtaining possession of a letter, or some method of overhearing communications by some third party between the husband and wife, that this evidence can be used. We have examined these authorities, and we are satisfied that, as exceptions, they do not include the present case. In the present case the report of the testimony shows, concerning the party objecting to the use of these letters written to his wife, that there was something like a separation between him and his wife, and proceedings for a divorce were instituted. Pending these proceedings the wife died, and the man who professed to be the executor or admin-

istrator of the wife's estate got hold of these letters, and, without any requirement of his office as administrator, without any necessity for his using these letters in any way, he—we will not say maliciously, but in a spirit of hostility to the husband—delivered the letters to the other side. Whatever exceptions there may be to the rule protecting communications between husband and wife which may exist, and in regard to which I do not propose to say anything further, I am quite clear that the wife has no right to publish these communications; that she would not be permitted to produce the letter if she were a witness on the stand; that she could be enjoined from producing the letter if she were supposed to be hostile to her husband; and that the executor, in a voluntary and hostile spirit to the husband, who has letters, has no more right to produce them and deliver them over to the husband's prejudice than the wife had. What might be the rule of law if this administrator had filed these letters in due course of administration for any useful purpose in a public office, and they had been obtained or copied by a third party, or if they had got into the hands of the party who now seeks to use them in any appropriate and innocent manner, I am not prepared to say; but I do rule that, under the circumstances in which these letters got into other hands, they are not to be used as evidence.

I think I ought to say to the parties that, while this decision precludes the use of these letters as evidence before this court, if the action ever goes to the supreme court the letters, of course, will go accompanied with the motion to exclude them and the ruling of the court on that motion, and all that will be before the supreme court on appeal, and if that court thinks the letters ought to be used in evidence they will be considered there; so that the matter is not of such extreme importance as might be supposed. But for the purpose of this trial in this court the letters will not be used.

In regard to the other point that was raised, that there is no evidence that the husband received one of these letters conveying information that looked like a fraudulent purpose, there is no reason why it should be admitted either, and they are all rejected.

The clerk will make the order that all three of the letters are to be disregarded and stricken from the testimony.

UNITED STATES *v.* MULLANEY.

(*Circuit Court, E. D. Missouri, E. D.* September 20, 1887.)

WITNESS—CROSS-EXAMINATION OF ACCUSED—HANDWRITING—ELECTION FRAUD.

A party prosecuted in a United States district court for violating the election law, by writing names improperly on the registration book, who on the trial testifies, in his own behalf, that he did not write the names unlawfully written, may be compelled, on his cross-examination, to write the same names on a paper in the presence of the jury, and such paper may be offered in evidence on rebuttal, and the jury permitted to compare it with the writing in the registration book, as this is a legitimate method of cross-examination, and the witness is not thereby compelled to furnish testimony against himself.[1]

On Writ of Error to District Court.

Thos. P. Bashaw, Dist. Atty., for the United States.

Chester H. Krum, for defendant.

BREWER, J., (*orally.*) This is a writ of error from the district court. A single question only has been presented and argued. That question is this: The defendant was charged with a violation of the election law. The government charged that he wrote certain names improperly on the registration book, and offered testimony tending to establish that fact. When it rested, defendant himself went on the witness stand, and was asked the single question whether he wrote those names in that book. He answered that he did not. The government, on cross-examination, called upon him to take a pen and write in the presence of the jury those names. To that he objected. The court overruled the objection, and he wrote the names, and, when he had finished his defense, the government, in rebuttal, offered the names thus written by him. The writing was admitted in evidence, and the jury were permitted to compare it with the writing in the registration book. That is the error complained of,—that the defendant was compelled to furnish testimony against himself by thus writing in the presence of the jury, and that the jury were permitted to compare this writing with that in the registration book.

Counsel have argued the question under two aspects: *First*, they insist that it is not legitimate cross-examination of any witness who has simply testified that he did not make a writing; and, *second*, that it is compelling him to furnish testimony against himself in violation of the constitutional protection.

I think really there is but one question, and that is whether it was legitimate, in the cross-examination of a witness who gave such direct testimony as he did, to compel him to so write in the presence of the jury. For while a defendant in a criminal case cannot be compelled to

[1] Respecting the latitude permissible in a cross-examination of a defendant in a criminal prosecution, where he offers himself as witness, see Disque v. State, (N. J.) 8 Atl. Rep. 281, and note; State v. Saunders, (Or.) 12 Pac. Rep. 441; People v. Sutton, (Cal.) 15 Pac. Rep. 86; State v. Robertson, (S. C.) 1 S. E. Rep. 443; Tickell v. Railway Co., (Mo.) 2 S. W. Rep. 407; State v. Brooks, (Mo.) 5 S. W. Rep. 257; State v. Johnson, (Iowa,) 34 N. W. Rep. 177.

give testimony against himself, while he may not be put upon the stand against his will, yet if he avails himself of the privilege, and goes onto the witness stand, and testifies in his own behalf, he subjects himself to the ordinary rules of cross-examination, and, if this was legitimate cross-examination, then he cannot be heard to say that by it he furnished testimony against himself. He may be impeached in any way that any other witness can be. Of course, cross-examination is, in the federal courts, limited to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject-matter of the direct testimony. The question will perhaps resolve itself into two forms or two phases.

The first, is the writing of the same names on an independent piece of paper, a matter directly connected with the subject of the direct testimony. I think there can be little doubt on that point. Of course, it would not be doubted but that questions could be asked as to whether the witness was present at the time of the writing, whether he could or could not write, and other kindred matters, because all that is connected directly with the question whether he did or did not make the writing upon the book. I suppose it matters not whether the case is one in which the testimony is sought to show that he did or did not make the writing. Supposing, in any civil case, a witness testifies that he did make a particular writing, would not it be germane to that matter to show that he could not write at all; to give him a pen, and have him show before the jury that he either could not write at all, or that his writing was so completely variant from that in question that it was utterly impossible that he could have written it? Surely, the two matters are connected as closely as two things can be; and it would be conclusive against the testimony of any witness that he had written a certain writing, if it appeared from his own demonstration before the jury that he could not write at all, or that his handwriting was completely variant from that in question.

Then the other phase is whether you can compel a witness on cross-examination to do other than answer questions. This was a physical act which he was called upon to do in the presence of the jury. It is a matter of common experience in a court-room that witnesses are often called upon either for some exposure of their person, or to do some physical act supporting or contradicting their direct testimony. A chemist who has stated that a certain test discloses the presence of poison may be called upon to repeat that test in the presence of the jury, that they may see whether the testimony is true, and the test accurate. A person who testifies as to his physical condition may be compelled, there being no improper exposure of person, to uncover his body, that the jury may see whether there be such a physical condition as he has testified to. The witness may say, for instance, that he never was wounded in the arm, and on cross-examination it would be competent to compel him to lift up his sleeve, that the jury may see whether or no there was a scar or mark of wound on his arm. In some recent cases, although the matter has been questioned, courts have required plaintiffs in personal dam-

age cases to submit themselves to an examination of the witnesses of the defendant outside of the court-room, in order that their testimony might be given to the jury as to the physical condition; so the fact that the witness is called upon to do some physical act, or to make some exposure of his person, which supports or contradicts his direct testimony, is not necessarily objection to its validity.

Taking this question in either one of the two phases, as to whether the matter was connected with the subject-matter of the direct testimony, or whether in the act,—the physical act which he was called upon to do,—there was any invasion of his rights, I am clearly of the opinion there was no error in the ruling of the district court, and that the testimony was legitimate cross-examination. The judgment of the district court will be affirmed.

Ex parte TURNER.

(*District Court, D. South Carolina.* September, 1887.)

WITNESS—FEES.

Plaintiff was a witness in a case under recognizance, and also at the same time a grand juror. He was paid his *per diem* as such juror. *Held*, that he was only entitled to the *per diem* of a witness from the time he was discharged as grand juror.

Thompson H. Cooke, for petitioner.

SIMONTON, J. A. B. Turner was a witness in this case under recognizance. He was bound over by the government. He was also a grand juror, and served as such until the seventeenth of this month. He resides in Greenville, and has been paid his *per diem* as juror. He now claims *per diem* as a witness in this case from the first day of the term to his discharge as a witness.

It has been ruled in this court that a defendant, under recognizance, who has also been bound over as a witness for the government, is entitled to his *per diem* and mileage as such witness. The ground of that decision was that, inasmuch as the person so summoned as a witness owed no duty to the government in attending court as a defendant, if he were summoned by the government as a witness, he was entitled to *per diem* and mileage as a witness. *In re Addis*, 28 Fed. Rep. 794. This is a different question. The mileage and *per diem* are paid to reimburse the witness for expenses to which he was put by reason of the recognizance or subpœna which brought him here. But when he has already been brought to the court, and maintained here at the expense of the government, this reason ceases. The whole practice and law of these courts of the United States are opposed to double pay for the same services. If one who receives *per diem* and mileage as a juror, at the same time receives *per diem* as a witness, he would receive double pay for the

same service. The case of *Edwards* v. *Bond*, 5 McLean, 300, decides that a juror can also receive pay as a witness. After careful consideration of the opinion in that case, I cannot agree with the learned judge.

It is ordered that the applicant, A. B. Turner, be paid the *per diem* of a witness from the time he was discharged as grand juror, and no longer.

McCLUNG and others *v.* STEEN and others.

(Circuit Court, D. Minnesota. September 12, 1887.)

1. PUBLIC LANDS—WHEN TITLE PASSES—QUITCLAIM.
   On payment of the purchase price and issue of the receiver's final receipt, the full equitable title passes to the person who has entered the land, and this title he may convey by quitclaim prior to obtaining the patent.[1]
2. SAME.
   As against the grantee under an unrecorded quitclaim executed, after issue of final receipt, by one who had entered the land under a warrant, a grantee under a subsequent quitclaim executed after patent issued takes no title.
3. DEED—VALIDITY.
   Where a deed is regular on its face and duly recorded, the burden of proof is on the party attacking it to show facts establishing its invalidity.
4. SAME.
   The fact that, at the time the grantor in a quitclaim deed executed it and left it with his agent for delivery, the name of the grantee and the amount of the consideration were not written in, does not render the deed void, where the agent had authority to fill out the blanks in a certain way and did so fill them out before the deed was delivered.
5. TRUSTS—IMPLIED.
   In Wisconsin, where money or other securities of one person are used by another to purchase property in his own name, an implied trust arises in favor of the party with whose means the purchase is made.
6. JUDGMENT—EFFECT ON THIRD PARTIES.
   Where A. and B. are the only parties to a suit affecting the title to *one* of several tracts of land conveyed by a quitclaim, a judgment in that suit declaring the deed to be void is, as to C. and D., neither of them privies with A. or B., simply *res inter alios acta*, and, in a suit by C. against D. to quiet title to another of the tracts covered by the quitclaim, is neither binding as *res adjudicata* nor estoppel.
7. EVIDENCE—ANCIENT DEED—CONDITIONAL ADMISSION.
   In a suit to quiet title the court intimated before the argument was closed that judgment would go for the plaintiff. The defendant thereupon moved to open the case and to introduce parol testimony to show that the deed under which plaintiff claimed title was in fact void. The deed in question was 36 years old, and the parties to it as well as those who were cognizant of the circumstances of its execution were dead. *Held*, that it was competent for the court to impose, as a condition of the opening, that the defendant should consent to admit in evidence testimony of those who knew the facts about the execution taken in other cases and between different parties, and subjected to cross-examination therein.

In Equity.

[1] Where the right to a patent for land has become vested in a purchaser, the government holds the legal title in trust for the purchaser until the patent is issued. U. S. v. Freyberg, *ante*, 195.

Williams & Goodenow, for complainants.
Robt. D. Russell and *Harris Richardson*, for defendants.

BREWER, J. This is an action to quiet title. The taking of testimony was all finished, the case submitted, and partially argued before my Brother NELSON and myself at the December (1886) term. As the case then stood, the facts were these: The land was entered by Charles R. Conway, and the final receipt issued June 1, 1850. On the same day a quitclaim deed signed by Conway and his wife to I. B. Heylin was executed, but not recorded until August 14, 1854. The patent was issued on October 5, 1852, and recorded October 14, 1854. Under this quitclaim deed to Heylin complainant claimed title. On May 27, 1854, after the issue of the patent, but before the record of the quitclaim deed to Heylin, Conway executed a second quitclaim deed to one G. Starkey, under whom this defendant claimed. Beyond the title derived through the quitclaim deed to Heylin, complainant claimed title by virtue of certain tax proceedings, and also in the third place by virtue of the foreclosure of a mortgage given by the ancestor of defendant. These last two chains of title I shall not stop to consider. In the argument then made before us, defendant's counsel claimed that the quitclaim deed to Heylin was void because executed before the issue of the patent. This was clearly wrong, for on the payment of the purchase price and issue of the receiver's final receipt the full equitable title passed to Conway. The government simply held the naked legal title in trust for him, and Conway's quitclaim conveyed this full equitable title. *Carroll* v. *Safford*, 3 How. 461; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Myers* v. *Croft*, 13 Wall. 291; *Camp* v. *Smith*, 2 Minn. 155, (Gil. 131.) The full equitable title having thus passed to Heylin, the subsequent quitclaim to Starkey conveyed nothing. *Marshall* v. *Roberts*, 18 Minn. 405, (Gil. 365;) *May* v. *Le Claire*, 11 Wall. 232; *Baker* v. *Humphrey*, 101 U. S. 494. In this last case the supreme court uses this language: "Neither of them was in any sense a *bona fide* purchaser. No one taking a quitclaim deed can stand in that relation." Defendant also relied on two judgments and decrees of the district court of Ramsey county, Minnesota, in the cases of *Steadman* v. *Heylin* and *Wolf* v. *Same*. The first was a case in which complainant brought suit upon a tax title and obtained decree in his favor; as the title thus established passed by subsequent conveyance to the present complainant, of course this judgment availed the defendant nothing. The other case was about different property, though covered by the same quitclaim deed to Heylin, and in that case appeared findings against the validity of that deed, but such judgment and decree, being in respect to other property and not between the parties to this suit, were simply *res inter alios acta*, and neither binding as *res adjudicata* nor estoppel. Before the argument was finished, we intimated to counsel our views upon these matters, and thereupon counsel prayed leave to open the case, and introduce parol testimony to show that this quitclaim deed from Conway to Heylin was in fact void. This application was strenuously resisted, but after full consideration my Brother NELSON and I thought the appli-

cation should be granted upon condition that defendant should consent to the reading in evidence of the testimony of Franklin Steele and Henry A. Lambert,—testimony taken in other cases between different parties and subjected to cross-examination. The reasons for imposing this condition were that Heylin, the grantee in that deed, was dead. Steele, who had been his agent in delivering certain land-warrants to the firm of Conway, Lambert & Nichols, was also dead, as was Lambert, the party who specially acted for Heylin, and who took the acknowledgment of the deed from Conway and wife to Heylin. The defendant had no absolute right to an opening of the case, and, as this deed had been executed 36 years before, it seemed to us no more than fair that all light that could be thrown upon the circumstances of its execution should be placed before us as a condition of the opening of the case. Of course, save as a condition imposed by the court of the opening of the case, such testimony would be incompetent, and counsel now insist upon its incompetence, and insist on the invalidity of the conditions imposed by the court. Believing that we had a right to impose the condition, I overrule the objection of incompetency. At the June term, 1887, the case, with the additional testimony, was argued before me alone, and upon this additional testimony I remark as follows: *First.* The deed being apparently regular and duly recorded, the burden is on the defendant to show facts establishing its invalidity. *Second.* The facts, as disclosed by the testimony of Conway, Steele, and Lambert, so far from proving invalidity, tend in my mind fully to establish its validity. The firm of Conway, Lambert & Nichols was formed in the spring or winter of 1850, and continued during the winter of 1852. This fact is shown by the advertisements in the papers at St. Paul, and does not rest upon the memory of witnesses. This tract was entered with a land-warrant. Conway testifies that he obtained this warrant from Lambert in settlement of the balance due him from Lambert after the dissolution of the partnership. Obviously this is a mistake, and he has simply confounded this transaction with some other, for this land was entered a year and a half before the dissolution of partnership. On the contrary, Lambert testifies that this land was entered with a land warrant belonging to Heylin, and that immediately upon the day of its entry a quitclaim deed was executed by Conway and his wife to vest the title in Heylin. Steele testifies that he delivered certain land-warrants to the firm of Conway, Lambert & Nichols, and that he paid the bill of that firm for their services for the location of his land-warrant, and in this testimony presents their receipted bill. These are the salient facts, and while there are other and minor matters in which there is some conflict, yet I have little doubt that this is substantially the truth. I think, therefore, the attempt to invalidate this deed by this parol testimony has failed.

It is said, however, by counsel for defendant, that when the deed was first prepared, and, as Conway testifies, when he signed and left it with Lambert, the name of the grantee and the consideration were not written in. Supposing this to be true, if, as seems to be conceded, authority was given to Lambert as an agent of Conway to fill in these blanks in a cer-

tain way, and they were so filled in before the deed was delivered, it would have to be held a valid conveyance. See *Pence* v. *Arbuckle*, 22 Minn. 417; *Drury* v. *Foster*, 2 Wall. 24; *Allen* v. *Withrow*, 110 U. S. 119, 3 Sup. Ct. Rep. 517.

Further, even if the deed as a deed was for any reason void, upon the testimony of Lambert and Steele it would have to be adjudged that Conway took the title simply in trust for Heylin; for the rule is and was in the territory of Wisconsin, where this transaction took place, that, when money or other securities of one person are used by another to purchase property in his own name, a resulting trust arises in favor of the party with whose means the purchase is made. *Rogan* v. *Walker*, 1 Wis. 454; *Moffatt* v. *Shepard*, 2 Bin. 66; *Friedlander* v. *Johnson*, 2 Woods, 675. So that under any event, without considering any questions arising under the last two chains of title set forth by complainant, I am of the opinion that his title derived under the Heylin deed is both by the record and the parol testimony good, and decree must go in his favor as prayed.

UNITED STATES *v.* MURPHY.

(*Circuit Court, W. D. Michigan, N. D* October 1, 1887.)

1. PUBLIC LANDS—CUTTING TIMBER—HOMESTEADER'S RIGHTS.
   While holding land under a homestead entry, the homesteader can only cut and sell the timber from such portion or parts of the land as are being cleared for cultivation or settlement.[1]
2. SAME—CUTTING TIMBER—MISTAKEN VIEW OF RIGHTS.
   The fact that defendant was induced, through the wrong representations of the register of the land-office, to believe in the unrestricted right of the homesteader to cut timber from his entry, does not estop the government from prosecuting him for such unlawful cutting.
3. SAME—CUTTING TIMBER—CRIMINAL INTENT.
   It is no defense to a prosecution for unlawful cutting of timber from public land that there was no criminal intent in the cutting.
4. SAME—ACTS RELATING TO — CONSTRUCTION OF, BY SECRETARY OF INTERIOR.
   The interpretation placed upon public land acts by the secretary of the interior is not binding upon the courts.

Criminal Prosecution for Trespass upon Government Lands, cutting and removing timber therefrom. Motion for new trial.

G. Chase Godwin, Dist. Atty., for plaintiff.

F. W. Clark and *B. J. Brown*, for defendant.

JACKSON, J. The defendant, having been indicted for cutting and removing timber from certain lands of the United States, contrary to the provisions of section 2461, Rev. St., was tried and convicted, and now moves for a new trial on the ground of certain alleged errors committed by the trial judge in the rejection of evidence offered by the defense,

[1] See note at end of case.

and in the instructions given to the jury as to the law applicable to the case.

There is no contest or controversy as to the material facts established by the evidence. It is conceded, as shown by the defendant's own testimony, that on the twenty-fifth of February, 1885, the defendant, as the agent and general superintendent of the Spalding Lumber Company, entered into a contract with one James Henderson, the occupant of a homestead entry located in Bagley township, Menominee county, Michigan, for the purchase of the *pine timber*, whether *standing* or *fallen*, on the entire homestead tract of 160 acres. By the terms of the contract, which was reduced to writing, the defendant's principal and its successor had the right "to enter upon said lands at its pleasure, and *cut*, *remove*, and *carry away* said timber, said timber to be cut and removed prior to April 1, 1888, without needless destruction of *other* merchantable timber;" the recited consideration was $200 paid to the vendor; that, under and in pursuance of said contract, the standing pine timber on said homestead land was subsequently cut and removed, by direction and under the superintendence of the defendant, and converted to the use and benefit of the Spalding Lumber Company; that the timber so purchased, cut, and removed by the defendant *averaged* about one pine tree to the acre, scattered over the entire homestead tract of 160 acres; that the defendant, before and at the time of purchasing, cutting, and removing said timber, knew the fact that the land from which it was taken was government land, and that the vendor, Henderson, had only a homestead right or entry in and to the premises on which the timber stood, and from which it was cut and removed.

It further appears that Henderson, who undertook to sell said timber, and confer upon defendant the authority to cut and remove it, first pre-empted this tract of land in the fall of 1882; that on the *thirteenth of October, 1883*, he changed his pre-emption to a homestead entry; that while occupying the land under his pre-emption entry he cleared about two acres, and built a small log cabin; that since the date of his pre-emption entry he has resided continuously on the land; that since changing to a homestead entry he has extended his clearing on the land, which amounted to eight or ten acres in February, 1885; that the timber cut and removed by defendant was not taken from the cleared and cultivated land, or from any portion in process of clearing; that while, in the preliminary negotiations for the purchase of the timber, the defendant had expressed the opinion that Henderson had the right to sell, or would get into no trouble by selling, if he would "put the money on the place," it was *no part of the contract of sale* that the proceeds of the timber should be applied in improving the homestead. Henderson, however, actually expended a portion of the money received from the sale of the timber, in making improvements on the land and the balance in supporting himself. His homestead entry was made, and the occupation of the land was continued, with the *bona fide* intention of completing his title according to the provisions of the laws; but he has not, in fact, yet perfected his entry and secured title to the land. Whether he

is in a position to do so does not appear from the record; nor is it material in the consideration of the questions presented by the pending motion.

The fact is clear and uncontroverted that, at the time defendant purchased, cut, and removed the pine timber on and from this homestead entry, the United States held, as they still hold, the title both to the land and to the trees standing thereon. The homesteader not having *then* so fulfilled his obligations under the law as to entitle him to a patent, the land was government land, and the timber was government timber. This was all known to the defendant when he bought the pine trees, and when he cut and removed, or caused or procured the same to be cut and removed, from the land, not for the use, benefit, and advantage of the land or homesteader, but for the Spalding Lumber Company. These facts and circumstances bring the defendant directly within the letter of the statute, (section 2461, Rev. St.,) and subject him to the penalties therein provided, unless he can bring himself within some recognized exception created by, or arising under, the homestead laws. The value of the timber so cut and removed being shown, the defendant's admitted acts, done with full knowledge, make out the case of the government, and the *onus probandi* rests upon him to extract the case from the penal consequences of an infraction of the law. What are the defenses relied on to do this?

In the first place, it is urged that congress, by the enactment of the pre-emption and homestead laws, has so far modified the provisions of section 2461, Rev. St., which embodies the act of March 2, 1831, that homesteaders occupying public lands under such laws may cut, sell, and use the timber thereon for the purposes of such occupation. This was so held in *U. S.* v. *Nelson*, 5 Sawy. 68; and it is undoubtedly a correct proposition that section 2461, Rev. St., is to be construed in connection with the homestead laws, and that, in so far as the latter confer rights and privileges in respect to the use or sale of timber by the homesteader, its provisions are to be modified. Assuming then, as contended by his counsel, that the defendant is entitled to claim and rely upon all the rights which the homesteader, Henderson, had in, to, and over the timber cut and removed, we are brought directly up to the important question in the case as to what, under the law, are the rights of the homesteader in respect to timber standing upon the homestead land. How far, and to what extent, and under what conditions and restrictions, may he cut and remove the timber, or confer upon another lawful authority to cut and remove it, while occupying the land in good faith, and before perfecting his entry by the acquisition of the title?

It admits of no doubt that the settler on public lands, whether he secures a mere *right* of *occupancy*, like the Indian, or acquires an inceptive or inchoate right to the land in the nature of an estate on *conditions precedent*, such as the homestead laws confer, has *not* an unlimited or unrestricted power and authority of disposition over the timber standing upon his homestead entry, which is in fact only an application to purchase, giving the applicant no property in either the land or timber thereon,

until acquired by compliance with the requirements of the law. Pending this acquisition of the title, the homesteader is authorized (section 2288, Rev. St.) to transfer, by warranty against his own acts, any portion of his homestead for church, cemetery, or school purposes, or for right of way of railroads,—his conveyance, however, being worthless against the government if he should fail to perfect his claim, (9 C. L. O. p. 94;) but there is no provision of the statute expressly declaring to what extent he may sell or dispose of timber for purposes other than these. His entry is required to be for his "exclusive use and benefit," and for the purposes of actual *settlement and cultivation*. Section 2290. To effectuate and accomplish these objects of the law, judicial construction has clearly and liberally defined the homesteader's rights. By numerous decisions of the federal courts it is settled that his right of user and disposition over the timber is *qualified* by the nature and character of his interest in and possession of the land.

While in the occupation of the premises with the "*bona fide*" intention of completing his homestead, it is held that the homesteader may clear any portion of the land for the purpose of *cultivation* and settlement. In making clearing for these objects he may cut and remove the timber, and such portions of the timber so cut and removed from the clearings intended for cultivation or tillage as may not be needed on the place for the improvements thereon he may sell; but not further or otherwise. He may also use the timber in the erection of buildings necessary for the convenient occupation of the land, and its improvement; that is to say, better adapting it to convenient occupation. The timber may also be used for necessary and proper fencing and repairs. In other words, the homesteader may use or dispose of timber as an *incident* to his settlement, cultivation, and improvement of the land. He has only those rights in or over the property which are *necessary to the perfecting of his title*. His title can only be perfected by settling upon and improving the land for cultivation. For these purposes he may exercise ownership over the timber, but he is not allowed to sever the timber from the land for the purpose of sale and traffic. As held in the *Timber Cases*, 11 Fed. Rep. 81, "a settler on the public lands has no authority to *go outside* of the improvements, cut or sell timber, and thus denude the land, and destroy the value of the public domain, even though he intends to acquire the title under his claim." The authorities, which need not be commented on in detail, fully sustain and support this statement of the law, and the proposition above stated. *U. S.* v. *Cook*, 19 Wall. 591; *U. S.* v. *McEntee*, 23 Int. Rev. Rec. 368; *The Timber Cases*, 11 Fed. Rep. 81; *U. S.* v. *Stores*, 14 Fed. Rep. 824; *U. S.* v. *Williams*, 18 Fed. Rep. 478; *U. S.* v. *Lane*, 19 Fed. Rep. 910; *Bly* v. *U. S.*, 4 Dill. 465; and *U. S.* v. *Smith*, (U. S. Dist. Court Ark., April Term, 1882.)

In the instruction to special timber agents issued by the interior department, June 1, 1883, for the protection of timber on public lands, and which were in full force when Henderson took out his homestead entry October 13, 1883, the rights of homesteaders as *defined* and declared in these *decisions* were fully set forth, as follows, viz.:

"(7) Lands covered by homestead or pre-emption claims are lands upon which citizens of the United States have made entry, and have filed certain papers in the proper district land-office, obligating themselves to conform to the requirements of the law as to occupancy, cultivation, and improvement. (8) The claimant to any such land, provided he is living upon, cultivating, and improving the same in accordance with law, and the rules and regulations prescribed by this department, is permitted *to cut and remove, or cause to be cut and removed, from the portion thereof to be cleared for cultivation, so much timber as is actually necessary for that purpose, or for buildings, fences, and other improvements on the land entered.* (9) *In clearing for cultivation, should there be a surplus of timber over what is needed for the purpose above specified, he may sell or dispose of such surplus; but it is not allowable for him to denude the land of its timber for the purpose of sale or speculation until he has made final proof and acquired title.* (10) * * * (11) *No person other than the one making the entry has a right to cut timber from such land for any purpose whatever.*" "(33) Any person who fells or removes timber, or who hires others to fell or remove timber, or who incites or induces others to fell or remove timber, from government land, for his personal benefit or advantage, or for the purpose of speculation and gain, (except he has the right or permission so to do as specified under heads of 'Lands Covered by Homestead or Pre-emption Entry,' 'Rights of Railroad Companies,' and 'Mineral Lands,') is a timber trespasser upon the government land."

And upon the duplicate receiver's receipt furnished Henderson at the time of making his homestead entry there was indorsed in red ink a marginal note as follows:

"Timber land embraced in a homestead or other entry not consummated, may be cleared in order to cultivate the land, and improve the premises, but for *no other purpose.* If after clearing the land for cultivation, there remains more timber than is required for improvement, there is no objection to the settler disposing of the same. But the question whether the land is being cleared of its timber *for legitimate purposes* is a question *of fact* which is liable to be raised at any time. If the timber is cut and removed *for any other purpose,* it will be subject the entry to cancellation, and the person who cut it will be liable to civil suit for recovery of the value of the said timber, *and also to criminal prosecution,* under section 2461, Rev. St."

This direct notice to the homesteader, and the foregoing instructions to special timber agents, merely embodied what the courts had previously decided to be the rights of claimants under homestead entry. They were in no sense departmental constructions of the law, or regulations adopted independent of such decisions.

On the trial the defense asked leave to show that it was the general understanding among lumbermen in that section that the homesteader could sell the standing timber on the land if he applied the proceeds in the improvement of his homestead, and the support of himself while perfecting his entry; and, further, that this understanding had been derived from the register of that district, Mr. Cochran, who informed homesteaders, when they made their entries, that the ruling of the secretary of the interior on the subject of their rights to and authority over the timber on their homestead entries were broader and more enlarged than defined in said notice upon their receipt, and in said eighth and ninth instructions to special timber agents.

The ruling referred to was made on the *twenty-seventh November, 1883*, in the case of John W. Baird, who was reported for cutting and removing timber from certain unsurveyed lands in Washington Territory. The special agent reported that Baird was a "squatter," and intending to make the claim his home, and, working in good faith to that end, supposed he had "a *right to clear off and sell the timber.*" The commissioners recommended that no criminal proceedings should be entered against him, but that the case should be referred to the attorney general with request that the proper measures be taken to secure the timber in question, and dispose of it for the United States. The secretary of the interior declined to accede to this suggestion, and in his letter to the commissioner expressed the opinion that, if Baird had taken the land in good faith, he was the owner thereof for all practicable purposes, although the title remained in the government. And—

"If it appears that he has cut more timber than he was compelled to cut to *clear* up the land, he is not liable, either criminally or civilly, for doing so, if all the time he has the honest purpose of ultimately completing his title under the laws of the United States. A jury, satisfied of that fact, would not, properly instructed by the court, find him guilty of trespass. Whether he is or is not a trespasser does not depend on how many trees he cuts, but on the '*bona fide*' character of his settlement. Baird was justified in doing whatever *clearing* was necessary to put in a crop, and he might cut and sell the timber to aid him in so doing, or *he might sell timber to support his family while* clearing his land and raising his crop, if during all that time, he had a '*bona fide*' settlement on the land," etc.

At the close of his letter the secretary says:

"Paragraphs 8 and 9 of instructions to special agents of the general land-office appointed to prevent timber depredations, relating to trespassers on lands covered by pre-emption and homestead claims, *should be revised* to conform with the views herein expressed."

It did not appear that any modifications of instructions 8 and 9, as above quoted, were ever actually promulgated as suggested by the secretary, and the trial judge refused to allow the defense to introduce the proposed evidence as to the understanding of lumbermen derived from the register who undertook to inform homesteaders of their rights to sell under the ruling in the *Baird Case.*

It is said that this ruling of the secretary, and the revision of instructions 8 and 9 therein suggested, has all the force and effect of law, inasmuch as by section 2478, Rev. St., the commissioner of the general land-office, under the direction of the secretary of the interior, is authorized to enforce and carry into execution any part of the public land laws not otherwise specially provided for. Where a department of the government is authorized by statute to make regulations, such regulations, when made and promulgated, have the force of law; but authority "to enforce and carry laws into execution" does not confer authority to make regulations inconsistent with the provisions of the statute as construed and interpreted by the courts. In respect to the ruling in the *Baird Case*, it is to be observed that all the circumstances of the case are not disclosed in the opinion. It does not appear what was the character and extent

of the cutting, nor whether the timber was cut and removed from the land generally, or only from that portion of it which was being *cleared for cultivation and settlement.* It does appear that he was making a *clearing* with a *bona fide* intention of settling the land; and if, as is no doubt true, the timber cut and sold was taken from *that clearing*, the ruling of the secretary can be reconciled with the decision of the courts which define the homesteader's right. The defense, however, seek to give it a wider scope, and claim that it is a construction of the law giving the "*bona fide*" homesteader the right to cut and sell timber for the support of himself and family, without reference to any immediate clearing for cultivation, especially if he intends to apply the proceeds of sale in the improvement of his claim. The trial judge refused to recognize the binding force of that opinion, as thus construed. Did he commit an error in so doing? We think not. The secretary of the interior is not authorized, by the statutes relating to public lands and homestead entries, to make any regulations which would be in conflict with the law, or which would enlarge the rights of the homesteaders thereunder. Their rights are fixed and defined by the statute, which it is the province of the court to construe. The secretary can neither change the law, nor place upon it any construction which would be binding upon the courts. This is well settled. In *U. S.* v. *Dickson*, 15 Pet. 161, the treasury department had for more than 20 years placed a certain construction upon an act of congress. The supreme court declined to follow that construction. The court say:

"The construction so given by the treasury department to any law affecting its arrangements and concerns is certainly entitled to great respect. Still, however, if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. The construction given to the law by any department of the executive government is necessarily *ex parte*, without the benefit of an opposing argument in a suit where the very matter is in controversy; and, when the construction is once given, there is no opportunity to question or revise it by those who are most interested in it as officers, deriving their salary and emoluments therefrom, for they cannot bring the case to the test of a judicial decision. It is only when they are sued by the government for some supposed default or balance that they can assert their rights. But it is not to be forgotten that ours is a government of laws, and not of men; and that the judicial department has imposed upon it by the constitution the solemn duty to interpret the laws in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it."

Any other rule than that here announced would subordinate the judicial to the executive department of the government. The cases cited and relied upon by the defense do not, when carefully examined, conflict with the principle as stated by the court in the case of *U. S.* v. *Dickson.*

If, then, the opinion of the secretary of the interior in the *Baird Case* was intended, as the defense contend, to enlarge the rights of homesteaders beyond what the courts had construed them to be under the law, the trial judge properly disregarded it as neither binding upon the court,

nor constituting any justification or defense, even if the defendant was led to rely upon it under information derived from the register. In *Whitesides* v. *U. S.*, 93 U. S. 257, it is said that—

"*Individuals as well as the courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act.*"

It is urged that the action of the government officials in inducing the belief that the homesteader could dispose of the timber on his entry without restriction while occupying in good faith, and on which it is claimed the defendant relied in purchasing, and cutting and removing the pine trees, should *estop* the government from maintaining this prosecution. The rule stated in *Whitesides* v. *U. S.*, 93 U. S. 247, is a sufficient answer to this suggestion. There is no estoppel against the government in such cases. *Carr* v. *U. S.*, 98 U. S. 438. If the defendant has really been misled to his prejudice by wrong representations, or information communicated to him through the interior department, or its subordinate agents, that would present grounds for *executive clemency*, but would not constitute any legal defense for a wrongful act, prohibited by law.

It is next urged that there was no *criminal intent* in the defendant's acts. A sufficient answer to this is found in the fact that the *penalty under the statute is incurred without any criminal intent.* The timber was cut and removed from government land under no *mistake* or *accident*. There was no mistake in point of fact. The defendant, knowing all the facts, intended to do just what he did do. The only mistake, if there was any, was a mistake of law as to what he could lawfully do. In *U. S.* v. *Darton*, 6 McLean, 46, the defendant was allowed to show that he got over on government land and cut timber by *mistake*, supposing it belonged to his principal. He did *not intend* to cut *government* timber. But in the present case the defendant *intended* to cut just where he did cut, and the only ground on which he can defend or protect himself against the penalty imposed by the statute, is to show that he did this under lawful authority. No evidence was produced or offered tending to show any mistake made by defendant, such as would properly raise any question as to his *intent*. His taking legal advice, or consulting "lawyers before this, on some such subject,—not this particular one; some other such subject,"—does not, of course, constitute any defense, or negative the intent which the law imputed to him in doing the forbidden act, even if any criminal intent had to be shown. The trial judge, we think, properly held that—

"When, by the admission of the defendant himself, he knew that he was upon the land of the homesteader, and cut timber not in the clearing, or in the course of clearing, but from the tract generally, selecting that which was marketable, and removed it, that closes the case so far as the jury is concerned, and no evidence of good faith or of intent will be admissible."

The court also properly declined to charge the jury that, if the money obtained from the sale of the timber was used by the homesteader in the improvement of the homestead, he had a right to sell. The right to sell

was limited to *surplus* timber removed from clearing, or portions of the land in course of clearing, and not needed for the improvement of the place. We think the authority to sell, as construed by the decision cited, is restricted, substantially, as stated by the trial court, and that any other construction of the law would open the widest door to the spoliation of the public domain. The defense in this case, if sustained, would have the effect of enlarging the rights of homesteaders far beyond anything yet conceded them by the most liberal construction of the homestead laws.

It is not pretended that the timber in this case was sold and purchased, or cut and removed, with the view or for the purpose of *clearing* the land from which it was taken. It would have been ridiculous in the extreme to have claimed that an average of one or one and a half trees to the acre, scattered over 160 acres of timber land, was cut and removed as an incident to the clearing of the land for cultivation, or was intended as the initial or preliminary step in that direction. No evidence tending to support such a proposition was introduced or offered by the defense. The cutting and removing the timber was attempted to be justified or excused on other grounds which have already been considered.

We regard it the soundest interpretation of the homestead law, and most in harmony with the decided weight of authority, to hold that the sale of timber by the homesteader should be confined to that taken from such portion or parts of the land as are being cleared for cultivation or settlement. The sale, or cutting and removal, of timber from portions of the lands not cleared, or in course of clearing, *is not in the line of perfecting his title.* Under the provisions of section 2461, whoever cuts and removes timber from public lands—which include all that the government holds title to—must be prepared to show, when indicted or sued as a trespasser, lawful authority for his act. If he is a homesteader, he may show his occupation of the land under entry, and that the timber was cut and removed for the purpose of *clearing* the ground for cultivation, or for fencing, or for the erection or repair of necessary and convenient buildings. When he shows that the cutting was done for these purposes, which are germain and incidental to the improvement of his homestead in the way required by the law in order to perfect and complete his title, his defense is made out. But when he makes sale of timber scattered over the entire tract covered by his entry, not with a view or purpose of clearing the land for tillage, but to raise money for his support or other uses, his act is unlawful, and he subjects himself to the penalties provided by section 2461, Rev. St. Under the facts and circumstances disclosed in this case, the vendor, Henderson, had no authority to sell the pine timber bought by the defendant, and for cutting and removing that timber the defendant was properly found guilty, under instructions which contain no reversible error.

When analyzed, the substance of the defense is that the defendant did not violate the law as he construed it, or as he understood the officials of the interior department had construed it in declaring the rights of the homesteader, whose good faith would constitute or furnish a valid and

lawful excuse for *his* act in cutting and removing the timber. This is not a valid defense. The law reserves the title in the government until the homesteader proves up his claim and his patent issues. Before title is perfected, it prohibits the sale of any portion of the land, (or standing timber, which constitutes part of the realty,) except for church, cemetery, school, and railroad purposes. But while occupying in good faith, and while his title is inchoate, the law authorizes the homesteader to improve the land for purposes of settlement and cultivation, which includes clearing for tillage, fencing, and the erection of convenient buildings; and, as an incident to such clearing, he may cut and sell so much of the timber taken from the cleared tract as is not needed for other legitimate purposes on the land. This incidental power of disposition extends only to *surplus* timber cut and removed from so much of the tract as is cleared, or in process of clearing, for cultivation.

The case has so far been considered upon the assumption that the defendant, by and under his purchase, had the *same* right to cut and remove timber that the homesteader himself possessed. In what has been said it is not intended to admit or concede this proposition, for the homesteader's entry is required to be made for his "*exclusive* use and benefit," for the purpose of settlement and cultivation; and he is forbidden to alienate *any portion* of his claim, except for church, cemetery, school, and railroad purposes. Rights and privileges which were intended or conferred for the homesteader's *personal and* exclusive benefit and advantage, to enable him to comply with the obligations, requirements, and general policy of the law in settling, improving, and cultivating the land, so as to complete and perfect his title thereto, (until which time he is forbidden to alienate except for certain purposes,) can hardly be the subject of lawful purchase by others. The eleventh and thirty-third instructions to special agents, above quoted, seem to embody a correct statement of the law on this question. So that, in any view that can be taken of this case, the defendant's act in causing the timber to be cut and removed from the public land in question was a trespass, for which he was properly convicted; there being no reversible error in the rulings of the trial judge upon the law and evidence.

The motion for new trial is accordingly overruled and disallowed.

SAGE and SEVERENS, JJ., concur.

NOTE.

PUBLIC LANDS — CUTTING TIMBER ON. One who enters upon public land in good faith for the purpose of securing title by pre-emption, or of claiming a homestead therein, may cut so much timber standing on the land as is necessary for cultivation, and the timber so cut he may dispose of to the best advantage possible; but he cannot go outside of his improvements to cut and sell timber, though he intend to acquire title under his claim. The Timber Cases, 11 Fed. Rep. 81; U. S. v. Lane, 19 Fed. Rep. 910; U. S. v. Williams, 18 Fed. Rep. 475. See, also, U. S. v. Smith, 11 Fed. Rep. 487. But where a settler is acting in good faith he may, for the purpose of improvement, cut timber even before he files his entry in the land office. U. S. v. Yoder, 18 Fed. Rep. 372. And where a settler on public lands has removed timber for other than the purpose of tillage, a subsequent issuance of the certificate of the register and receiver of the land-office to such settler, stating that he has complied with the law in making settlement, will relieve him from liability for such wrongful cutting. U. S. v. Ball, 31

Fed. Rep. 667. So a settler, who, pending an action for the recovery of the value of timber which he has wrongfully cut and sold to defendants, becomes entitled to the issuance of the patent to the land by the payment of the purchase money in full, thereby defeats the right of the plaintiff to recover, such action of the settler in securing an equitable title being held to relate back to the original entry. U. S. v. Stores, 14 Fed. Rep. 824.

MEASURE OF DAMAGES. In case a trespass upon public lands consisting in the wrongful cutting of timber thereon is inadvertent, the measure of damages is the value of the timber in the trees; but in case the trespass is willful, the measure of damages is the value of the property at the time the action is brought, with no deduction for the labor put forth and the expense incurred by the trespasser. U. S. v. Williams, 18 Fed. Rep. 475. And an innocent purchaser from a willful trespasser is liable for the full value of the timber at the time of the purchase. U. S. v. Heilner, 26 Fed. Rep. 80.

UNITED STATES *v.* MANN.

(*Circuit Court, W. D. Michigan, N. D.* October 1, 1887.)

Indictment for Trespass on Government Lands, cutting and removing timber.

JACKSON, J. The questions presented on the motion for new trial in this case are substantially the same as those considered and determined in the foregoing case of *U. S.* v. *Murphy*, *ante*, 376, and the conclusions reached in that case are equally applicable to this. The motion for a new trial is accordingly overruled and disallowed.

UNITED STATES *v.* HARRISON. (Two Cases.)

(*District Court, D. California.* 1887.)

CUSTOMS DUTIES — INDICTMENT FOR FALSE SWEARING — EXISTENCE OF OTHER BILLS OF LADING.

The fact that at the time a person entered merchandise at the custom-house there were in existence, to his knowledge, several copies of the bills of lading and invoices presented by him, does not make his sworn statement, as required by Rev. St. U. S. § 2841, that he does not know of or believe in the existence of any invoices or bills of lading other than those produced by him, a false oath; as the other invoices or bills of lading intended by the statute are bills of lading or invoices different from those presented, and not merely the copies thereof which by commercial usage or statute are required to be procured.

Indictment for False Swearing with respect to a foreign entry of goods at the custom-house.

John T. Carey, U. S. Atty., and *H. C. McPike*, Asst. U. S. Atty., for the United States.

Milton Andros, for defendant.

HOFFMAN, J., (*charging jury.*) This defendant is indicted for false swearing. The facts of the case are not disputed. It is admitted that

he took, when entering certain merchandise at the custom-house, the owner's oath, in the form prescribed by law. This form requires him to swear that: "I do not know or believe in the existence of any invoice or bill of lading *other* than those now produced by me, and that they are in the state in which I actually received them." Rev. St. § 2841. When he took the oath there were in existence two other copies or counterparts of this bill of lading presented by him, the master of this vessel having, according to immemorial custom, affirmed to three bills of lading, "all of this tenor and date, one of which being accomplished the rest to stand void." This fact appeared on the face of the bill of lading presented. With respect to the invoice, the law required it to be made in quadruplicate, each copy to be certified by the United States consul at the port of shipment. Two of these copies are to be furnished to the party producing the invoice, one is to be retained by the consul, and the other is to be by him transmitted to the surveyor or collector at the port of delivery. The only question in this case is, did the fact that these copies or counterparts of the documents presented by the defendant were in existence (a fact, of course, well known to him and the deputy collector who administered the oath) make his sworn statement that he did not know or believe in the existence of any invoice or bill of lading "other" than those produced by him a false oath? It is plain to me that it did not. If it did, no entry of imported merchandise can be made at the custom-house by either owner or consignee without false swearing; for bills of lading, like bills of exchange, are always signed in several parts. And the *law* requires that invoices shall be certified by the consul in quadruplicate. It is evident that the other invoices or bills of lading, of the existence of which the party making the entry is obliged to swear he has no knowledge or belief, are bills of lading or invoices different from those presented by him, and not merely copies or counterparts of those instruments which by universal commercial usage or by express statute are required to be procured. By contemplation of law all the bills of lading or invoices constitute but one instrument in several parts, just as a lease by indenture wherein the lessor and lessee each retains a counterpart is but one deed. It is absurd to suppose that congress, when prescribing the form of oath to be taken by owners or consignees of imported merchandise, intended to make entry of the goods impossible without false swearing.

I direct you to render a verdict of not guilty.

SAWYER CRYSTAL BLUE CO. *v.* HUBBARD.

(*Circuit Court, D. Massachusetts.* September 12, 1887.)

1. TRADE-MARK—BOTTLES—SHAPE AND APPEARANCE.
   Plaintiff used on the bottles, in which it sold liquid bluing, a bright metallic cap of tin, extending down over about half of the rim at the mouth of the bottle, the cap having six perforations. *Held*, that defendant should be restrained from using for the sale of his bluing a similar cap on bottles of the same shape and appearance as those of plaintiff.
2. SAME—USE OF OLD BOTTLES.
   Where both parties are manufacturers of liquid bluing, the defendant may be restrained from using for the sale of the bluing manufactured by him old bottles of the plaintiff having plaintiff's name upon them; following *Evans* v. *Van Laer*, *ante*, 153.

This was a bill in equity to restrain defendant from infringing rights in the nature of a trade-mark, and to prevent unfair competition in business, and was heard upon a motion for a preliminary injunction. The facts appearing by the pleadings and affidavits were substantially as follows: About 1864 Henry Sawyer commenced the manufacture of bluing in the city of Boston, Massachusetts, and succeeded in establishing a large and remunerative business, which was carried on by him until 1880, when he transferred it, with all its assets, including its trade-marks and good-will, to the plaintiff, a corporation organized under the laws of Maine, but having its principal place of business at Boston. Sawyer became the president of the company, and is a large stockholder. Among the bluings manufactured by Sawyer, and afterwards by the plaintiff, is an article known as "Liquid Bluing," which since 1868 or 1869 has had a large sale, and has been put up continuously in a special style of package of the following description: A bottle of light green color, having a flat body with rounded shoulders, and a neck about an inch long terminating in a rim or lip, upon one side of which is blown or moulded in three lines, in large letters, the words, "Sawyer's Crystal Bluing." On top of the bottle is a bright metallic cap of tin extending down over about half the rim at the mouth of the bottle, and in the cap are six perforations. On the side of the bottle opposite the words "Sawyer's Crystal Bluing" is a large oval label, partly in white and partly in red and blue, with the words "Sawyer's Crystal Blue," "H. Sawyer, Boston, Mass. Copyright secured," together with "Directions" for using. The defendant was formerly in Sawyer's employ, but has for some time manufactured and sold liquid bluing in Boston on his own account. The package used by defendant, which the plaintiff sought to restrain, consists of a bottle of the same size and shape as that used by plaintiff, with a bright metallic top of the same character. The labels on the bottles used by defendant are octagonal in shape, and are red, with the words "Hubbard's Concentrated Chinese Blue. Hubbard & Co., Boston," in white letters. Some of the labels used by him had a blue ground. So far as regards the labels themselves, there was no similarity between the plaintiff's and defendant's packages. Some of the bottles

used by defendant were old bottles of the plaintiff, with the words "Sawyer's Crystal Bluing" moulded or blown on one side. The defendant contended that the shape of bottle used by plaintiff was the one used generally for putting up liquid bluing, and that it was his custom to buy old bluing bottles indiscriminately.

Rowland Cox and *Warren & Brandeis*, for plaintiff.

F. D. Ely, for defendant.

COLT, J. Upon the papers submitted to me on this motion for a preliminary injunction, I am satisfied that the defendant should be restrained from using bottles having complainant's name upon them, (see *Evans* v. *Von Laer*, *ante*, 153,) and from using the bright metallic top on a bottle of the shape and appearance used by complainant. It seems to me that these things are calculated to deceive the public into buying the defendant's bluing for the complainant's, and that they are made use of by the defendant for this purpose. An injunction to this extent may be granted.

HILL *v.* LOCKWOOD and others.

(*Circuit Court, E. D. Wisconsin.* June 24, 1887.)

TRADE-MARK—CONTRACT FOR ROYALTIES—BREACH.

By the terms of a written contract between the plaintiff and the defendant, in which it was stated that it was for the mutual interest of both parties thereto that the defendant should have the sale of certain mineral water, known as "Clysmic Water," taken from plaintiff's spring of the same name, for the purpose of increasing the sale thereof, it was agreed that, in consideration of the payment of a certain royalty, the defendant should have, for a long term of years, the exclusive sale of such waters in the United States and foreign countries. *Held* that, during the life of the contract, the defendant had no right to sell other mineral waters, under the same name, in competition with the waters of plaintiff's spring, notwithstanding the fact that he had himself given the name to the waters before plaintiff acquired title to the spring.

Jenkins, Winkler, Fish & Smith, for complainant.

Finches, Lynde & Miller, for defendants.

DYER, J. The material facts upon which the decision in this case turns are, in the main, undisputed. The complainant's bill is for an injunction and accounting, and for the cancellation of a contract. It appears that on the thirty-first day of May, 1878, Samuel W. Warner and Alice E. Showerman were the owners of a lot in the village of Waukesha, upon which there was a spring of mineral water, valuable for its medicinal quality, and for table use. The owners of the spring, and the defendant Lockwood, on the day mentioned, entered into a contract, by which Lockwood acquired the exclusive right to sell the water supplied by the spring in the New England and Middle states, Maryland, and the Dis-

trict of Columbia, for the term of 15 years. He was to pay for the water fifty cents per barrel for five years, after that one dollar per barrel, and a certain proportion was to be furnished without charge. Shortly before, or certainly at the time of the execution of this agreement, the spring was named "Clysmic Spring;" and by that name it was ever afterwards known and recognized by the parties in interest, and by the public. No other spring in Waukesha bore the name of "Clysmic." The defendant Lockwood then entered upon the work of developing the spring, placed it in condition for conveniently taking the water therefrom, extensively advertised its medicinal qualities, and thenceforward, to the first of January, 1879, made sales of the water under the agreement of May, 1878, as "Clysmic Water."

On the sixth day of January, 1879, the complainant purchased the spring property from Warner and Showerman. It is claimed by the complainant that she was induced to make the purchase by representations of Lockwood that he had widely extended the reputation of the spring, and that, if she would acquire the ownership of the property, and give him the exclusive and unlimited sale of the water for a period of 20 years, he would devote his entire time to the control and management of the spring, and would make large profits for both parties. The defendant Lockwood denies that he made such representations to the complainant, and contends that she made the purchase independently of any solicitation or representation on his part. Whether it be true or not that she made the purchase upon the specific inducement or representation alleged, the court is satisfied from the evidence that the complainant, in becoming interested in the enterprise, and in acquiring the ownership of the spring, was largely influenced by the expectation held out to her by Lockwood, that, under his management, her acquisition of the spring would be made profitable. Of this it seems there can be little doubt; and she purchased the spring with the name "Clysmic" attached to it, and knowing that the waters of the spring were being sold by that name. Lockwood had been desirous, before Mrs. Hill's purchase, of securing an extension of his right to sell the water from 15 to 20 years, and also an enlargement of the right, so that it should be unlimited in territorial extent; and the negotiations and circumstances point to the conclusion that this was the chief object in view, on his part, when the complainant purchased the spring. This view of the circumstances under which Mrs. Hill acquired the ownership of the property, is confirmed by the fact that on the fifteenth day of February, 1879, she entered into a contract with Lockwood, which began with the recital: "Whereas, it is deemed for the mutual interests of the parties hereto, for the purpose of advancing the sale of the waters from such spring, [meaning the Clysmic spring in question,] that the party of the second part [Lockwood] should have the sale thereof;" and then provided, among other things, that the complainant should furnish Lockwood with the spring water as he required, for the purpose of selling the same in any and all parts of the United States, or for export to any foreign country; that Lockwood should have, during the continuance of the agreement, the exclusive

right to purchase and take the water, and that she would not sell or give away the water to any other person, and by which agreement Mrs. Hill gave Lockwood the right to enter upon and use the property for the purpose of procuring the water. The agreement, by its terms, was to continue in force 20 years, and provided for the payment by Lockwood to Mrs. Hill of certain fixed royalties on each barrel and half barrel of water taken from the spring.

After the execution of this agreement, Lockwood continued the sale of the water from the spring; and the testimony tends to show that, at the close of the year 1883, the business had become extensive and lucrative. He caused the water to be analyzed by a distinguished chemist, advertised it in newspapers and in pamphlet form, and procured many testimonials of its value for medicinal and table uses; and the water was not only sold in barrels and half barrels, but in bottles, which, with other inscriptions thereon, were labeled "Clysmic," "Natural Mineral Spring Water from Clysmic Spring, Wis.," "The King of Table Waters," etc.; and as "Clysmic Water" it acquired a high reputation among consumers throughout the country, which was largely due to the exertions of Lockwood in developing the enterprise and prosecuting the business.

As the reputation of the water became extended, and the demand for it increased, Lockwood conceived the project of developing another spring in his own right of ownership, and marketing water therefrom, under the name of "Clysmic," in connection with the sale of the waters of complainant's spring. In furtherance of this scheme, he purchased a piece of ground adjacent to the spring lot of the complainant, and subsequently opened up a new well or spring, and in February, 1884, began to ship and sell water from this source, in the same manner, by the same name, and under the same label, substituting only "Clysmic *Springs*" for "Clysmic *Spring*," as he had been selling from the complainant's spring; and by August 11, 1884, according to the testimony as it is understood by the court, he had shipped from the new spring, of which he was the owner, nearly 600 barrels of water, which were branded "Clysmic Water," and which he sold to patrons as and for "Clysmic Water." From the time the new spring was opened and developed, the defendant shipped water indiscriminately from either spring in filling orders for "Clysmic Water," and this he claims the legal right to do; his contention being that the contract relations between himself and the complainant do not oblige him to deal exclusively in the waters of complainant's spring, and that as he first adopted and used the name "Clysmic" in developing the spring and selling the water, he became the personal proprietor of the name as a trade-mark, and may therefore apply it to his own spring, and the water derived therefrom. A good deal of testimony has been taken on the question of the comparative merits of the waters of the two springs, in point of quality and chemical constituents, but this question is regarded quite immaterial, so far as it has any bearing upon the essential points of legal controversy in the case.

It is not difficult to discover the object which the parties had in view, and sought to attain, in making the contract of February 15, 1879. The

language of the contract and the attendant circumstances clearly explain the transaction. The right of the defendant Lockwood to deal in and sell the water under the Warner and Showerman contract was a narrow one, so far as it embraced territory in which sales could be made. Nevertheless, the business promised to be lucrative. To make it as fully profitable as he wished, the defendant desired an enlargement of his rights of sale, both as to term of years and territory, and this was undoubtedly contemplated by both parties when Mrs. Hill purchased the spring. Her purchase and the making of the contract of February, 1879, were unquestionably prompted by the expectation of such a conduct of the business as would make the spring a source of profit to her, as well as to Lockwood. The name of the spring was established and known, and its reputation was growing. In this state of circumstances, and with these ends in view, the contract was made. It was therein declared in the outset, as we have seen, that it was deemed for the mutual interests of the parties, for the purpose of advancing the sale of the water of the spring, that Lockwood should have the sale thereof. This was the declared purpose of the parties—the sale of the waters of the spring was to be advanced, and the mutual interests of the contracting parties thereby promoted. This was the basis of the contract relation to be established, and, on the faith of it, Lockwood was to have the sole and exclusive right to deal in the water, and the complainant bound herself not to sell, give, or dispose of any of the water to any other person. It is true that the contract contains no provision expressly restraining Lockwood from selling or dealing in the water of any other spring during the specified term. And we do not now decide that he was not at liberty, during the life of this contract, under any circumstances, to sell the waters of any other spring. That is a question which does not now necessarily arise. But we do say that it was his duty fairly and in good faith to advance the sales of the water of the complainant's spring, and thereby, so far as there was a demand for it in the market, and among consumers, enable the complainant to realize such profits as were contemplated when the contract was made. In view of all the circumstances then existing, it was certainly not consistent with a performance of the contract in its meaning and spirit, for the defendant to open up a new spring on an adjoining lot, in which he alone was interested, and place the waters of that spring in competition with the waters of the complainant's spring, supplying the demands of the market as well from his own spring as from that of the complainant. Especially was this act of the defendant a violation of the contract relations between himself and the complainant, when he advertised and sold the water taken from his spring as "Clysmic Water," for that was an act, the direct effect of which would be to diminish the sales of water from complainant's spring, which had become the recognized source of the water previously sold by that name.

The contention of the defendant that the name "Clysmic," as applied to the complainant's spring, was not appurtenant thereto, but was his own property, and that he was at liberty to use it as descriptive of any other spring, or any other spring water in which he might deal, is un-

tenable, and cannot be sustained. In the acquisition of the spring property, and by virtue of the contract relations between the parties, which were almost concurrent with Mrs. Hill's purchase, she acquired such an interest in the word "Clysmic" as a name or *quasi* trade-mark, when applied to the spring, and the waters taken therefrom, as forbade its use by the defendant, certainly during the term specified in the contract of February, 1879, in the designation of rival waters. It is true that the defendant first applied the name to the spring. The signification of the word, and its euphonious sound, made it, in his mind, an appropriate designation of the spring and its waters when placed upon the market. But it is to be observed that the spring bore that name when the complainant purchased it. Her purchase was made when the defendant was advertising and selling the product of the spring as "Clysmic Water," and, as we conclude, in anticipation of the contract relations which were speedily consummated. Such was the state of affairs when the contract was executed, and in view of all the circumstances the transfer of the name by the defendant to a rival spring was directly antagonistic to the interests of the complainant, which the contract in terms declared it was intended to promote, and operated as a fraud upon her rights.

There are trade-marks to which the characteristic of personal proprietorship attaches, because they assert to the public that some particular person has given his special skill to the production or selection of the articles they cover. *Leather Cloth Co.* v. *American L. C. Co.*, 11 H. L. Cas. 544; *Hoxie* v. *Chaney*, 143 Mass. 593, 10 N. E. Rep. 713; *Holt* v. *Menendez*, 23 Fed. Rep. 869. There is another class of trade-marks, which assert for the articles they designate some particular place of origin. In such case the trade-mark is inseparable from the place. It passes as an incident with the sale of the place. *Congress Spring Co.* v. *High Rock Congress Spring Co.*, 45 N. Y. 302; *In re Swezey*, 62 How. Pr. 219; *Manufacturing Co.* v. *Hall*, 61 N. Y. 226; *Pepper* v. *Labrot*, 8 Fed. Rep. 29; *Milling Co.* v. *Robinson*, 20 Fed. Rep. 218.

It is unnecessary to review the authorities in detail. Limiting this decision, as we do, to an adjudication of the rights of the complainant and the defendant Lockwood during the continuance of the contract relations subsisting between them, we must hold that the name "Clysmic" became affixed and appurtenant to the complainant's spring, as indicating the source of the water known to the public as "Clysmic Water," and that the complainant cannot be deprived, in the manner attempted by the defendant, of the advantage which has accrued to her, as the purchaser of the spring, from such designation. We regard this ruling as fully sustained by the principles laid down in the case of *Congress Spring Co.* v. *High Rock Congress Spring Co.*, *supra*.

Woodward v. *Lazar*, 21 Cal. 448, much relied on by counsel for the defendant, is distinguishable in principle, and in its facts, from the case at bar. There, the lessee of a lot of land, (the plaintiff in the case) erected upon it a building which he occupied as a hotel, to which he gave the name of "The What Cheer House." Before the expiration of his lease, he purchased an adjoining lot, upon which he erected a larger

building, and for a time occupied both buildings as "The What Cheer House," the principal sign being removed to the one last built. He subsequently surrendered the leased lot, with the building which was on it, and continued the business, under the same name, entirely in the building which he had erected on the lot he had purchased. Two months afterwards, the defendants, having purchased the first-mentioned lot and building, opened there a hotel under the name of "The Original What Cheer House;" the word "Original" being painted on the sign in small letters, and in a manner calculated to deceive the public into the supposition that it was the same name as that given to the first hotel. The point in dispute was as to whom the name "What Cheer House," as a business sign, belonged. The plaintiff claimed that it belonged to him as keeper of the hotel, which he continued to conduct under that name, after he surrendered the leased premises; while the defendants claimed that it was the designation of the building in which the business under that name was first conducted, and became theirs when they became the owners of the building. The court sustained the plaintiff's contention, holding that as a tenant he did not by giving a particular name to the leased building, as a sign of the business done at that place, thereby make the name a fixture appurtenant to the building, and transfer it irrevocably to the landlord. But suppose that a third person had come into ownership of the premises with the concurrence of the tenant, and in pursuance of a mutual expectation, speedily followed by a consummated agreement, to the effect that the hotel should be occupied and conducted by the same tenant, for a term of years thereafter, by the name of "The What Cheer House," and that both parties should participate in the profits of the enterprise—the one as landlord receiving rents dependent in amount upon the profits made, and the other as tenant directly receiving the gains realized, each agreeing to promote the interests of the other, by advancing, as far as possible, the patronage of the hotel. And then suppose that with this contract relation in force, the tenant had built another hotel on adjacent premises, and given it the name of "The What Cheer House," and established therein a rival business, tending directly to interfere with, and to diminish, the business of the first-named hotel, and thus to defeat the very objects which the parties had originally in view, and which constituted the inducement to the purchaser to purchase the property. That would have been a case similar to the one at bar, and a very different case from that decided in *Woodward* v. *Lazar*. Moreover, in that case the court placed stress upon the fact that the plaintiff surrendered the leased premises after he had transferred the business and name to the new hotel, and that the old building remained unoccupied for several months thereafter, during which time, if not otherwise, the plaintiff had established an exclusive right to the name, as the trade-mark for his new house.

On the grounds previously stated, and without extending the discussion further, we are of the opinion that the complainant is entitled to a decree in her favor. But we think the annulment or forfeiture of the contract of February 15, 1879, ought not, at least at present, to be

adjudged. It is true the defendant is found guilty of violating the contract, but it is doubtful if the violation is of such a willful and aggravated character as to justify a decree of forfeiture. The contract contains no provision to the effect that in case of its breach by either party the other should have the option to declare it terminated; and if the rights of the complainant can be sufficiently guarded in the decree,—as we think they can,—and the contract be continued in force, we are of the opinion that course should be pursued.

A decree will be entered restraining the defendants during the whole period of 20 years from the fifteenth day of February, 1879, from shipping or selling any water from the spring of the defendant Lockwood, as or under the name of "Clysmic Water," and from in any manner applying or using the word "Clysmic," during that period, in the sale of any water, except that derived from the spring of the complainant. Also, that the complainant recover damages against the defendant Lockwood by reason of the water shipped and sold from the defendant's spring as "Clysmic Water," which are assessed at $622.50, this being the amount which the complainant would have received, if the same had been shipped from her spring. The decree will also provide that, in case of further violations of the contract or breaches of duty by the defendant Lockwood, the complainant will have leave by supplemental bill, or by original bill to be hereafter filed, as she may elect, to apply for relief in that behalf.

Mr. Justice HARLAN sat with the district judge on the hearing of this case, and concurred in the foregoing opinion.

PERKINS *v.* HANEY MANUF'G CO. and another.

(*Circuit Court, S. D. Michigan, W. D.* September 19, 1887.)

PATENTS FOR INVENTIONS—SCHOOL-DESKS—LETTERS PATENT NO. 123,797—ANTICIPATION.

The second claim of letters patent No. 123,797, dated February 25, 1872, and granted to William A. Slaymaker for an improvement in school-desks, "for the seat described, pivoted at the apex of the triangle formed by its arms, and adapted to swing on its pivot back beneath the desk, as described," is anticipated by prior patents.

Bill in Equity for Infringement of Patent.

Action for infringement of letters patent No. 123,797, dated February 25, 1872, and granted to William A. Slaymaker for an improvement in school-desks. The second claim of said patent was for "the seat described, pivoted at the apex of the triangle formed by its arms, and adapted to swing on its pivot back beneath the desk, as described." Defendants claimed that the patent had been anticipated by prior patents.

to H. W. White, January 14, 1868; to Isaac Newton Pierce, December 5, 1871; to C. W. Sherwood, November 6, 1866; to A. Chandler, September 7, 1869; and to W. H. Soper, August 17, 1869. Defendants made the following claims as to these patents: The patent to H. W. White shows a seat-frame in the shape of an X, pivoted at its lower front, and adapted to fold beneath the desk. The patent to Isaac Newton Pierce shows a seat supported by a triangular-shaped block. The Sherwood and Chandler patents resemble the Pierce patent. The Soper patent shows a seat, folding beneath the desk.

Charles J. Hunt, for complainant.

This seat differs from any previous one in the place where it was pivoted, and the manner in which it swung out of the way. All prior seats folded up against the desk; but this goes under the desk, and is as much out of the way as though it had been a drawer, and was closed. The manner and place of pivoting the seat produces a new result. A slight backward pressure on the front of the seat moved the seat, and then the seat, impelled by its own weight, fell under the desk, and left a free passage-way. When it was necessary to have the seat out in place, a slight downward pressure on the front of the seat brought it forward, and it was ready for use. Thus the pupil, in taking his seat, presses down the front of the seat, and the seat falls forward, and is ready for use. When he rises, a slight movement of his leg sends the seat back under the desk, and out of the way of any one who wishes to pass between the rows of desks. This is a new result, and is sufficient of itself to sustain the patent.

Had he pivoted the seat by arms on the upper side, the seat would hang so that the center of gravity would be directly under the point of pivot, and the seat would, in the normal position, be half under and half out from the desk; and, if the pupil should draw it entirely out, it would swing back when he took his hand off of it, before he sat down, and it would be sure to swing back as soon as he relieved it of his weight. But when pivoted below the seat, as in the patent, the center of gravity being above the point of pivot, the law that a body falls over when the center of gravity passes beyond the base applies, and the bolt which supports the seat is just the pivot, and, when the center of gravity has passed beyond a perpendicular line erected on the pivot, the seat by its own gravity falls forward or back until arrested by the stops on the seat-frame, and remains in that position until changed by the person who occupies, or who wishes to occupy, the seat. By this construction of the seat, the change from one position to the other is made without friction or noise. This noiseless movement of the seat is a great desideratum in all school-rooms, where any noise is an annoyance to the whole school, and particularly to the teacher and the class which is reciting. This seat is equally adapted to theaters and other public halls, where spectators come and go during the exhibition. Thus the invention has been shown to be of great value, and that a new result has been produced by means not before used for this or any analogous purpose.

The patents introduced in evidence by the defendants all fold the seat up against the desk, and do not produce the same result as the Slaymaker patent. They do not anticipate the Slaymaker patent, for they do not show the same device, nor anything that can by any possibility produce the same result. If they are introduced to show the state of the art, they do not show any device like the Slaymaker seat, used for that or any analogous purpose, or even for any purpose whatever. In fact, they show that the Slaymaker invention was a new and radical departure in the construction of school desks and seats, and that the result produced by his invention was a new one, and by new

means. The Slaymaker patent and the Pierce patent were both before the patent-office at the same time, and that is a proof that the two were considered as different inventions by the patent-office, and is a strong proof that the one does not infringe the other.

Taggart & Denison, for defendants.

The several patents referred to in the answer as anticipations are anticipations of the broad construction put on the Slaymaker patent by the complainant, rather than anticipations of the limited claim which we believe to be the true construction of the patent. The triangular frame was not a novelty in itself, and the folding of the seat beneath the desk was not a novelty at the date of the Slaymaker patent, as will be seen by reference to the several patents referred to.

H. W. White Patent. This patent was issued January 14, 1868. It shows a seat-frame in the shape of an X, pivoted at its lower front foot, and adapted to fold beneath the desk. The seat is shown by D; its arms, by C, C. The method of folding the seat beneath the desk is fully seen by examining Figs. 1 and 2. The inventor says, "If desired, the chair, (seat,) D, may be lowered and turned back under the desk, A." This turns the seat entirely beneath the desk, A, as is readily seen. The hinge or point of turning is upon the legs of the desk, as is the case in the Slaymaker invention. This invention of White, while it differs much in construction from the Slaymaker device, in function and operation resembles it much more closely than does the Haney model. It is pivoted or hinged near the floor; there is no strain on the pivot; the shaking of the seat will not move the desk, etc.

Isaac Newton Pierce Patent. This patent was issued December 5, 1871. Application was filed before Slaymaker's. The seat is supported by a triangular-shaped block. The pivot is located similar to the pivot in the Haney model. The seat is placed above the frame. In both the Pierce device and the Haney model, the seat, in fact, does not fold beneath the desk.

C. W. Sherwood Patent. Patented November 6, 1866. Is similar to the Pierce invention, but differing slightly in construction.

A. Chandler Patent. This patent was issued September 7, 1869. Shows a seat folding like the Pierce seat.

W. H. Soper Patent. Dated August 17, 1869. The drawing shows a seat that folds beneath the back as much if not more than does the seat in the Haney model. See form of seat as illustrated in the cuts of Fig. 1.

The other exhibits show various methods of constructing folding seats, leaving very little invention to Mr. Slaymaker.

SEVERENS, J. I am of opinion, in this case, that so much of the matter covered by the second claim of the complainant's patent as is involved in the seat manufactured by the defendants, namely, a seat turning upon a pivot so as to be thrown back and under, or partly under, the back, was not new, but had been anticipated by former patents and manufacture. If that is all there is of the second claim, as construed in connection with the specifications and other claims, it is invalid, because it had already been anticipated in its substantial features. At all events, it is all of it that the defendant's construction employs.

An order will be entered dismissing the bill.

JENKINS and another *v.* STETSON.

SAME *v.* FERGUSON.

(*Circuit Court, D. Massachusetts.* September 20, 1887.)

1. PATENTS FOR INVENTIONS—CLAIMS IN REISSUE—SUBCOMBINATIONS.
Subcombinations may be claimed in a reissue of letters patent, if shown in the original as performing the same function, even though claimed only as a part of a larger combination.

2. SAME.
Where a reissue is applied for less than six months after the grant of the original patent, in which combinations are described which are found in the original patent, being merely subcombinations of the combination therein described, such reissue will not be held void simply for the absence of a showing of inadvertence or mistake.

3. SAME—BROADER CLAIMS IN REISSUE.
Reissued letters patent, granted December 24, 1872, to J Hyslop, Jr., for an improvement in machines for making shoe-shanks, described an arrangement of a fixed bending-die for bending a plate to form the middle curve of the shank, and actuating devices therefor, in a machine for cutting and punching said blanks, so as to receive the blanks from said cutting devices, and bend and discharge them automatically. Reissue of April 9, 1878, described, in such a machine, a plate, a convex-faced bender-plate, and a concave face, in combination. *Held*, that the latter description, embracing fewer elements than the former, was broader in its claims, and the reissue so far void.[1]

4. SAME.
Reissued letters patent, granted to J. Hyslop, Jr., December 24, 1872, for an improvement in machines for making shoe-shanks, described bending-dies constructed and arranged to form the middle bend and the reverse bends by one and the same operation of the dies. Reissue of April 9, 1878, claimed a fixed bending-die, movable bending-die, and projections whereby the middle and reverse bends of the shoe-shank are formed. *Held* that, while the second claim was more specific, it described the same elements, and was not broader than the first.

In Equity.

C. H. Drew, for complainant.

W. A. Macleod, for defendant Stetson.

D. H. Rice, for defendant Ferguson.

COLT, J. The demurrer filed to this bill raises the question of the validity of reissued letters patent, dated April 9, 1878, granted to J. Hyslop, Jr., for improvement in machines for making metallic shoe-shanks. The original patent was dated July 16, 1872, and contained one claim, as follows: "The combination of the punching mechanism, the cutting mechanism, and the bending mechanism, arranged to operate substantially as described." About five months thereafter, on December 24, 1872, the first reissue was granted with the following additional claims:

"(2) The arrangement of a fixed or stationary bending-die and a movable bending-die of suitable form for bending a plate to form the middle curve of

[1]Concerning the validity of reissues of letters patent, see Asmus v. Alden, 27 Fed. Rep. 684, and note.

a shoe-shank, and actuating devices therefor, in a machine adapted for cutting and punching said blanks, in such manner that the blanks are received in the bending-dies from the cutting devices, and bent and discharged automatically, substantially as specified.

"(3) The said bending-dies, constructed and arranged to form the middle bend and the reverse bends by one and the same operation of the dies, substantially as specified."

On April 9, 1878, more than five years after this, a second reissue was granted, with a further expansion of claims to the number of six, which are here given, except the first, which is the same in both reissues as in the original:

"(2) In a machine for making metallic shoe-shanks, the plate, d^2, the convex-faced bender-plate, w, and the concave face, v, in combination, for the purpose above specified.

"(3) In a machine for making metallic shoe-shanks, the combination, with the fixed or stationary bending-die and movable bending-die, of a pair of stop-pins, c^2, secured to the top, and plate, d^2, at the bottom, of the movable die, for arresting and holding the blanks, as described.

"(4) In a machine for making metallic shoe-shanks, the combination, with the fixed or stationary bending-die and movable bending-die, of a pair of pins or projections, e^2, extending from the bender-plate, whereby the middle and reverse bends of a metallic shoe-shank are formed at one and the same operation, as described.

"(5) In a machine for making metallic shoe-shanks, the combination of the cutting and punching mechanism, chute, m, h, stop-pins, c^2, dies, v, w, and projections, e^2, all arranged and operating in relation to each other substantially as described, whereby the shoe-shank is cut and punched, conducted to the dies, pressed into shape, and discharged automatically.

"(6) In a machine for making metallic shoe-shanks, in combination with the concave-faced stationary die, v, the reciprocating convex-faced bender-plate or die, w, with stop-pins, c^2, projections, e^2, and plate, d^2, secured thereto, as described, for the purposes specified."

The specifications and drawings are in substance the same in the reissues as in the original patent. The validity of the first reissue is attacked on the ground that no inadvertence, accident, or mistake is shown, such as would warrant the granting of a reissue under the statute; and, secondly, because the reissue contains broader claims than the original patent. The present hearing is upon demurrer. The bill alleges that the patent was surrendered for good and legal cause, and duly reissued. The combinations which go to make up the two additional claims in the first reissue are found described in the original patent. They are in fact but subcombinations of the general combination which constitutes the only claim in the original patent. The reissue was applied for in less than six months after the grant of the original patent. Under these circumstances, I am not prepared to hold that the reissue is void because no inadvertence or mistake is shown. As to the second objection, I do not understand that the law as it now exists, under the recent decisions of the supreme court, precludes a patentee from obtaining a reissue with broader claims than those covered by his original patent, provided that he is not guilty of laches in applying for such reissue, and the reissue is for the same invention as the original. In

Miller v. *Brass Co.*, 104 U. S. 350, the court say: "But 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." In the present case it is not seriously contended that there was unreasonable delay in applying for the first reissue. Nor can it be said that the new and broader claims of the first reissue are for a different invention from that described in the original patent, because the specifications and drawings in both are in substance identical. As I have already said, the two additional claims of the first reissue are subcombinations of the more general claim in the original patent. A subcombination may be claimed in a reissue if it was shown in the original as performing the same function, even though it was claimed only as a part of a larger combination. Walk. Pat. § 245, and cases cited.

The original specification states that "the invention relates to the organization of a machine by which, from sheet steel or other metal of requisite width, shanks for boots and shoes are cut, punched, and bent, and have their opposite ends reverse bent, the operations being continuous or automatically successive; and the invention consists in the combination and arrangement of mechanism for cutting, punching, and bending shoe-shanks." It is sought by this language, which also appears in the reissues, to limit the scope of the invention to the combination of the cutting, punching, and bending devices which are embraced in the first claim. But this language of the patent does not, it seems to me, forbid the patentee from making additional claims for subcombinations in a reissue seasonably applied for, provided those subcombinations are found described in the original patent. Upon the whole I fail to find any valid objection to the validity of the first reissue.

As to the second reissue, it is apparent that any claims therein which are broader than those covered by the first reissue are void by reason of want of due diligence in making the application. The plaintiffs seek to uphold the second and fourth claims of the second reissue, on the ground that they are the same in substance, or more narrow than the second and third claims of the first reissue. *Gage* v *Herring*, 107 U. S 640, 2 Sup. Ct. Rep. 819; *Gould* v. *Spicer*, 15 Fed. Rep. 344; *Cote* v. *Moffitt*, Id. 345. So far as the second claim of the first reissue and the second claim of second reissue, I am unable to agree with the plaintiffs that they are for the same combination. The words "and actuating device therefor, in a machine adapted for cutting and punching said blanks, in such manner that the blanks are received in the bending-dies from the cutting devices," in the second claim of the first reissue, make it clear that the arrangement covered by that claim embraced more elements than are contained in the corresponding claim of the second reissue, and consequently the claim in the second reissue is broader, and therefore void. But with respect to the third claim of the first reissue, and the fourth claim of the second, it seems to me that both are for the same combination. In the first reissue the claim is for the bending-dies, constructed and arranged

to form the middle bend and the reverse bends, by one and the same operation, substantially as described; in the second reissue, the claim is for the fixed bending-die, movable bending-die and pins, or projections, e^2, whereby the middle and reverse bends of the shoe-shank are formed. While the language of the claim is more specific in the second reissue, the elements which go to make up the combination are the same as those described in the first reissue. It follows that the demurrer to the bill must be overruled; and it is so ordered. Demurrer overruled.

HAT-SWEAT MANUF'G CO. *v.* DAVIS SEWING-MACHINE CO.

(*Circuit Court, N. D. New York.* October 14, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.

On motion for preliminary injunction, it appeared that the utility and value of the patent (letters patent No. 218,220, of August 5, 1879, to John Bigelow, for an improvement in sweat-bands for hats and caps) had long been recognized by the trade. A large number of licenses had been taken, some voluntarily, others upon settlement of litigation. The invention had been thoroughly investigated in the patent-office, and there had also been a *quasi* adjudication in its favor in the circuit court of a neighboring circuit. The defendant admitted infringement, but set up want of patentable novelty. The affidavits submitted in support of want of novelty were made, some by licensees, some by affiants who had made contrary statements out of court, and some by persons who in former litigation had been sworn, but had not pointed out these instances of anticipation. Many manufacturers testified that they knew of no prior use. *Held*, that these facts raised a presumption that the patent was valid, and, as the loss to the defendant from granting the injunction would be trifling as compared with that which the complainant would suffer from its refusal, the writ should issue.

In Equity. Bill for infringement. On motion for a preliminary injunction.

John R. Bennett, for complainant.

Edmund Wetmore, for defendant.

COXE, J. The complainant is the assignee of letters patent No. 218,220, granted August 5, 1879, to John Bigelow, for an improvement in sweat-bands for hats and caps, popularly known as the "Concealed Stitch Sweat." The complainant is engaged in manufacturing and selling, and in granting licenses to others to manufacture and sell, hat-sweats under various patents owned by it. One of the most valuable of these is the patent in controversy.

The capital stock of the complainant is $300,000. A large number of workmen find employment in manufacturing its products, and its business is prosperous and extensive. This flourishing industry has been built up and sustained through a long period of years by the enterprise, pluck, and energy of the men who have managed the affairs of the complainant. After the introduction of the "concealed stitch sweat" its

utility and value became generally recognized. It was received by the public with increasing favor until, at the present time, the number annually disposed of is almost fabulous. Its popularity is undisputed. All of the leading hat manufacturers, with, possibly, three exceptions, have directly recognized the patent. There are in all 145 licensees. True, that of these some 21 are stockholders in the complainant corporation; true, that in other instances licenses were taken upon the settlement of a litigation in which the validity of the patent was disputed, —a settlement which, certainly, was not cruelly oppressive to the defendants. And yet it is not easy to appreciate the argument that the acquiescence here is not controlling because many of the prior infringers found it for their pecuniary interest to cease acting in hostility to the patent by taking a license under it. The alternative, either to pay or defend a suit, is the one usually offered to an infringer, and it would seem that a general recognition, obtained after litigation, is at least as controlling as when given voluntarily, without investigation as to the merits of the patent or the chances of successfully resisting it. As was said by Judge CURTIS in *Sargent* v. *Seagrave*, 2 Curt. 553, 556:

"An unsuccessful attempt to interrupt a possession strengthens the presumption which arises from it. It tends to show that persons have found it for their interest to question the right; that they have questioned it, and for a time refused to submit to it; but on inquiry have submitted. Such submission is the most persuasive kind of acquiescence."

In *Caldwell* v. *Vanvlissengen*, 9 Hare, 415, (9 Eng. Law & Eq. 51,) the vice-chancellor says:

"In a case where there has been long enjoyment under the patent, (the enjoyment, of course, including use,) the public have had the opportunity of contesting the patent, and the fact of their not having done so successfully affords at least *prima facie* evidence that the title of the patentee is good; and the court therefore intervenes before the right is established at law." *Chase* v. *Wesson*, 1 Holmes, 274; *Miller* v. *Pulp Co.*, Id. 142; *Hill* v. *Thompson*, 3 Mer. 622.

Without entering into a minute analysis of the manner in which it was obtained, the unquestioned fact remains that to-day acquiescence in the patent is well-nigh universal. This is a genuine, and not a spurious or a manufactured, recognition.

In April, 1880, the patent in controversy was sustained by the circuit court of the district of New Jersey, and an injunction issued. *Greenwood* v. *Bracher*, 1 Fed. Rep. 856. The circumstances of that case, however, were such that the decision can hardly be recognized as a controlling precedent; although it is urged, with some force, that, if there had been any serious doubt as to the validity of the patent, the court would not, at that early date, have granted a preliminary injunction.

The defendant is a corporation which for 15 years has been engaged in manufacturing and selling sewing machines and their attachments. Its connection with the hat-sweat industry is of very recent date. In the latter part of 1886, or the early part of the present year, it commenced stitching the infringing hat-sweats, in a small way, in the city of New York. This business was begun under circumstances which, the com-

plainant vigorously argues, indicate bad faith, and was continued for a few months only. This being the situation, it is quite clear that but slight loss and inconvenience other than that occasioned by the delay of a few months can accrue to the defendant by the issuing of an injunction *pendente lite;* a flourishing business will not be broken up; no large amount of capital will be left idle; few, if any, operatives will be turned out of employment. On the other hand, to deny this motion will paralyze, if not irrevocably destroy, the business of the complainant,—a business which has been built up by long and persistent endeavor, but which, from its very nature, rests upon an unusually sensitive foundation. It is not to be supposed that licensees will continue to pay after the door has been thrown wide open to all. Such altruism is not often met with in the course of patent litigation. These considerations appeal strongly to the discretion of a court of equity. It is thought that this is peculiarly a case in which the court clearly should be satisfied of the rectitude of its position before overthrowing, *in limine*, a patent upon which such extensive interests depend. Even where serious doubts exist, if the court can see that these may be removed, and that the withholding of the injunction will work great injury without corresponding advantage, it should not hesitate to issue the writ. To quote again from *Sargent* v. *Seagrave*, *supra*, (page 557:)

"The court looks to the particular circumstances to see what degree of inconvenience would be occasioned to one party or the other by granting or withholding the injunction; and whether the defendant has voluntarily placed himself in the position to be subjected to that inconvenience. * * * It was argued that inasmuch as the court, upon an examinaton of the defendant's evidence, has some doubt concerning the validity of the patent, there should be no injunction. But I take it to be settled that sufficient possession, such as I consider to be proved in this case, will outweigh graver doubts than I entertain." *Harmer* v. *Plane*, 14 Ves. 130; *Isaacs* v. *Cooper*, 4 Wash. C. C. 259, 260.

Infringement is not strenuously denied, but it is argued that the patent is void for want of patentable novelty, and that the device disclosed by it has been fully anticipated. It is not the purpose of the present decision to determine these questions, or to discuss them at length, further than to say that the court is not so clearly satisfied that the defendant's positions have been sustained as to justify the withholding of the relief prayed for.

The question of patentable novelty is both important and difficult. It is true that the invention is not a great one, and that in many cases, somewhat analogous upon the facts, patentability has been denied; but it is also true that in others it has been sustained. *Smith* v. *Dental Co.*, 93 U. S. 486, 493-495; *Loom Co.* v. *Higgins*, 105 U. S. 580; *Tilghman* v. *Proctor*, 102 U. S. 707; *Crandal* v. *Watters*, 20 Blatchf. 97, 9 Fed. Rep. 659; *Paper-Bag Co.* v. *Paper-Bag Co.*, 30 Fed. Rep. 63; *Eppinger* v. *Richey*, 14 Blatchf. 307, 312; *Adams* v. *Howard*, 19 Fed. Rep. 317; *Hill* v. *Biddle*, 27 Fed. Rep. 560.

Considering the utility, the long recognition, the thorough investigation of the patent office, (*Shaver* v. *Skinner*, 41 O. G. 232, 30 Fed. Rep.

68,) and the *quasi* adjudication in *Greenwood* v. *Brasher*, *supra*, it is thought that at this point in the litigation, at least, the doubts arising should be resolved in favor of the patent.

Upon the question of anticipation, a number of affiants have sworn to prior use, but some of them have made contrary statements out of court; others have recognized the patent by taking licenses under it; others still were examined years ago, when their interest to defeat the patent was as keen, and their recollection presumably much keener, and they failed to mention instances of anticipation which they now relate with great elaboration and attention to detail. Many active and enterprising manufacturers, who could hardly have missed learning of these instances of prior use, testify that they never heard of them. It surely is a remarkable fact that, if this valuable improvement was known as early as 1865, it should have been permitted to fall into disuse by the trade which, after the patent, gave it such a cordial reception. The presumptions, invoked by the complainant, arising from these facts, certainly raise a doubt, which, upon this question, should be absent from the mind of the court, in order to overthrow the patent. *Cantrell* v. *Wallick*, 117 U. S. 689, 695, 6 Sup. Ct. Rep. 970; *Coffin* v. *Ogden*, 18 Wall. 120, 124; *Telephone Co.* v. *Telephone Co.*, 22 Fed. Rep. 309, 313. But these questions can best be determined upon the final hearing. It would be most unsatisfactory and unfair to all concerned to attempt to decide them upon affidavits. A question or two put by the cross-examiner will often destroy the entire force of an *ex parte* statement. Both parties should be allowed an opportunity to apply this test.

Without further comment upon the evidence now presented, it is sufficient to say that the considerations referred to lead to the conclusion that the present *status* should be preserved until the final hearing, unless the complainant unreasonably delays the prosecution of the cause; and that to this end an injunction should issue substantially in the language of the restraining order now in force.

Ex parte BYERS.

(*District Court, E. D. Michigan.* October 10, 1887.)

1. ADMIRALTY—CRIMINAL JURISDICTION—FEDERAL COURTS.
   The federal courts of Michigan have no jurisdiction of a felonious assault committed upon an American vessel in the Detroit river.
2. SAME.
   The criminal jurisdiction of the federal courts does not extend to the Great Lakes and their connecting waters.
3. SAME.
   The words "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state," used in section 5346, Rev. St. U. S., are limited to the high seas, and to the waters connected immediately with them.

4. SAME.

Under the power to regulate commerce, congress may provide for the maintenance of good order and discipline, and the punishment of offenses committed upon American vessels, in whatever waters they may happen to be.

(*Syllabus by the Court.*)

Hearing upon Writ of *Habeas Corpus.*

Petitioner was charged before a United States commissioner with having committed an assault with a dangerous weapon with intent to kill one James Downs, on board the steamer Alaska, an American vessel, then navigating the Detroit river. Petitioner was examined, and committed, in default of bail, to await the action of the grand jury. He thereupon petitioned for a writ of *habeas corpus*, upon the ground that the commissioner had no jurisdiction of the offense.

James J. Brown and *B. T. Prentis*, for petitioner.

Charles T. Wilkins, Asst. Dist. Atty., for the United States.

BROWN, J. Practically, the only question in this case is that of jurisdiction. This question has been suggested before in several cases, but has never been squarely presented for adjudication in this court. The increasing frequency of crimes of this description, particularly upon excursion steamers, the inability of the state courts to deal with them, and the fact that seven other persons are now in custody or on bail for participation in this same assault, demand that it should be carefully considered and definitely settled. Jurisdiction in this case is dependent upon Rev. St. § 5346, which provides that—

"Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board any vessel belonging, in whole or in part, to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another, shall be punished," etc.

With respect to the locality of the offense, the same language is used in numerous other sections of this chapter; although, in a few, jurisdiction is limited to the high seas alone. Upon the other hand, some of the more recent statutes apply to offenses committed upon any American vessel, wherever she may be. It will be observed that the language of section 5346 explicitly limits the jurisdiction, so far as the waters are concerned, in two particulars: (1) They must be within the admiralty jurisdiction of the United States. (2) They must be out of the jurisdiction of any particular state.

With respect to the *first* of these, there is no doubt that the Great Lakes and their connecting waters are within the admiralty jurisdiction of the United States; and by this we understand the *civil* admiralty jurisdiction. This was settled in the case of *The Genesee Chief*, 12 How. 449, and *The Eagle*, 8 Wall. 15, and must now be considered as beyond controversy. The exclusion of waters within the jurisdiction of any particular state, by which is meant any state in the Union, (*U. S.* v. *Pirates*, 5 Wheat. 184,) clearly limits our authority to crimes committed

upon the Canadian side of the boundary line. By the act of June 15, 1836, providing for the admission of Michigan into the Union, and by a subsequent act by which she actually became a state, the state of Michigan extends to the boundary line between Canada and the United States, along the whole length of the Detroit and St. Clair rivers. And as the jurisdiction of the state is co-extensive with her territory and with her legislative power, (*U. S.* v. *Bevans*, 3 Wheat. 336,) the state courts have, under this section, exclusive jurisdiction of all offenses committed upon this side of the middle of the channel. But as the assault in this case is charged to have been committed upon the Canadian side of the boundary line, this limitation has no effect upon our jurisdiction of this particular offense.

We are then led to consider whether any portion of the Great Lakes and their connecting waters is included within the words "high seas, or river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States." That the lakes are not "high seas" is too clear for argument. These words have been employed from time immemorial to designate the ocean below low-water mark, and have rarely, if ever, been applied to interior or land-locked waters of any description. *U. S.* v. *Wiltberger*, 5 Wheat. 76; *U. S.* v. *Wilson*, 3 Blatchf. 435; *U. S.* v. *Robinson*, 4 Mason, 307. Indeed, there is an express adjudication of this court to the effect that Lake Erie is no part of the high seas, in *Miller's Case*, 1 Brown, Adm. 156. Miller was convicted of willfully procuring the setting on fire of the passenger steamer Morning Star, plying between Detroit and Cleveland, upon Lake Erie. The indictment was framed under the act of July 29, 1850, punishing this offense when committed on the high seas. On motion in arrest of judgment, Judge WILKINS held that while it was within the constitutional competency of congress to define and punish this offense when committed upon other waters than the high seas, it had not done so, and the court could not take jurisdiction without an amendment to the act. The evidence in this case exhibited a state of facts frightful to contemplate; and yet the learned judge felt compelled to grant the motion in arrest, and discharge the prisoner.

If, then, our jurisdiction in this case can be supported at all, it must be upon the theory that the Great Lakes and their connecting waters are "rivers, havens, creeks, basins, or bays," within the meaning of the act. So far as the state courts are concerned, this question was settled adversely to our jurisdiction in the case of *People* v. *Tyler*, 7 Mich. 161, decided in 1859 by the supreme court of this state. The facts were that Tyler, a deputy-marshal of this court, in endeavoring to arrest an American vessel lying in the St. Clair river, upon the Canadian side of the boundary line, shot the master, who was taken to Port Huron, in this state, and died there. Tyler was subsequently indicted and convicted in this court of manslaughter, under the act of 1857, which uses the same language with respect to jurisdiction as is contained in the section of the Revised Statutes under consideration in this case. The question of jurisdiction was not raised, and Tyler was sentenced to 30 days' imprisonment. At the expiration of his term he was indicted in the

state court for murder, and pleaded his former conviction in bar. The case was argued and considered at great length, and with great ability, and the plea was held to be bad, upon the ground that this court had no jurisdiction to try him. The opinion was unanimous, but different grounds were assigned by the judges for their conclusion. In the opinion of the chief justice, in a note to page 162, the words "within the admiralty jurisdiction of the United States," contained in the act of 1857, had no connection with the words in the constitution, empowering the federal courts to take cognizance of "all cases of admiralty and maritime jurisdiction," but must be read in connection with, and therefore controlled and limited by, the power of congress in article 1, § 8, "to define and punish piracies and felonies committed upon the high seas, and offenses against the law of nations," and therefore they applied only to offenses committed upon the high seas. He then argued, what is perfectly obvious, that the lakes and their connecting waters are no part of the high seas. While he may have been correct in his view that the admiralty and maritime jurisdiction conferred by the constitution is exclusively a *civil* jurisdiction, although the authorities are not altogether harmonious, I am by no means satisfied with his further conclusion that these words, when used in the crimes act, should be limited by the words quoted from article 1, § 8; or, in other words, that the power of congress to punish offenses upon navigable waters is limited to piracies and felonies committed upon the high seas, and offenses against the law of nations. I apprehend that, under the power "to regulate commerce with foreign nations and among the several states," congress has undoubtedly authority to protect the lives, persons, and property of passengers, crews, and shippers, and all others connected with such navigation, by penal laws. If this be not so, then the words "river, creek, basin, or bay," used in the act, are superfluous and of no effect; and the cases in which the federal courts have taken cognizance of crimes committed in foreign and domestic waters were wrongly decided. *U. S.* v. *Ross*, 1 Gall. 624; *U. S.* v. *Keefe*, 3 Mason, 475; *U. S.* v. *Hamilton*, 1 Mason, 443; *U. S.* v. *Stevens*, 4 Wash. C. C. 547; *U. S.* v. *Bennett*, 3 Hughes, 466; *U. S.* v. *Seagrist*, 4 Blatchf. 420.

But we are not left to conjecture upon this point. In the case of *U. S.* v. *Coombs*, 12 Pet. 72, it was held that, under this grant of power to regulate commerce, congress had constitutional authority to punish the theft of goods belonging to a vessel in distress, though such thefts were committed upon the shore above high-water mark. In discussing this power, Mr. Justice STORY observed:

"It does not stop at the mere boundary line of a state, nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations, and among the states. Any offense which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by congress under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. * * * We do not hesitate, therefore, to say that, in our judgment, the

present section is properly within the constitutional authority of congress to enact; although the offense provided for may have been committed on land, and above high-water mark."

See, also, *U. S.* v. *Holliday*, 3 Wall. 407; *U. S.* v. *Cole*, 5 McLean, 513.

If the crime be committed while the vessel is lying in a port or harbor, foreign or domestic, there is also a concurrent jurisdiction on the part of the local authorities. *Wildenhus Case*, 120 U. S. 1, 7 Sup. Ct. Rep. 385.

The provision with respect to piracies and felonies upon the high seas was probably intended to apply to a different class of cases, viz., to crimes committed upon foreign as well as domestic vessels, which are offenses against the law of nations, and punishable wherever the offender is found.

In the opinion of Mr. Justice CAMPBELL, the words of the statute should not be extended to cover an assault committed in a foreign country, unless made by one of a ship's company or passengers upon another of the inhabitants of the ship. He also held that there was no construction of the act which, under any theory of jurisdiction, could extend it to offenses committed on the *lakes*, for they come within none of the terms used; and it would be a very forced construction which would apply the statute to their connecting waters. In the opinion of Mr. Justice CHRISTIANCY the terms, "within the admiralty jurisdiction of the United States," used in this act as descriptive of place, "must, I think, be understood to be confined to those localities where that jurisdiction is complete; where the United States have the right to exercise that jurisdiction by enforcing, upon their own vessels and citizens, at least, the observance of their laws; to places where they have the right to send their executive officers to enforce the laws, to prevent the commission of offenses, to seize the vessels, and arrest the persons offending." He concurred with Justice CAMPBELL in holding that it could not be supposed that "congress intended to extend the operation of any of these acts to the rivers or the connecting waters between the Great Lakes, and yet to exclude from their operation the lakes themselves. If they intended to exclude one, and include the others, every consideration would have induced them to include the lakes and exclude the rivers; as the lakes were vastly the more important in extent and in commerce, and bear much stronger resemblance to the ocean." He also criticised the opinion of the supreme court in *The Genesee Chief*, and combated with great force of reasoning the view of Chief Justice TANEY, that the lakes and navigable rivers of the United States were within the scope of the admiralty and maritime jurisdiction, as known and understood in the United States when the constitution was adopted. Mr. Justice MANNING went still further, and held that the act of congress of 1845, extending the admiralty jurisdiction over the lakes, was unconstitutional and void; and devoted most of his opinion to a criticism of the case of *The Genesee Chief*.

While I am unable to concur in much of the reasoning of the supreme court in the *Tyler Case*, I have reached practically the same conclusion

with regard to the construction of the statute. I have no doubt of the constitutional power of congress to legislate with respect to all crimes committed upon an American vessel while navigating the lakes and their connecting waters, or any portion of them, nor, under proper acts, of our authority to take jurisdiction of offenses committed in Canadian waters, by one of a ship's crew or passengers, upon another person lawfully upon the vessel. Indeed, I understand the opinion of Mr. Justice CAMPBELL to have been largely, though not wholly, influenced by the fact that Tyler had no connection with the vessel, and was in fact a trespasser from the moment he set foot upon it. In order to get at the real signification of the words "rivers, haven, creek, basin, or bay," used in the Revised Statutes, it is instructive to recur to the original acts from which these sections were taken. This course was declared to be proper in the construction of the Revised Statutes in case of doubt, in *U. S.* v. *Bowen*, 100 U. S. 508, 513. These words were originally used in the eighth section of the crimes act of 1790, defining and punishing piracies, felonies, and revolts, although the words "within the admiralty jurisdiction of the United States" are not found there. At this time the lakes were far beyond the bounds of civilization. They possessed little, if any, commerce, except such as was carried on by fur traders and others dealing with the Indians in *bateaux* and canoes, and were clearly not within the contemplation of congress in the enactment of the act. In 1825, a new act was passed, which was subsequently incorporated into this section, in which the words of locality used were, "upon the high seas; or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state." These words, which were also used in several other sections of the same act, were evidently copied from the act of 1790, with the addition of the words "any arm of the sea," and "within the admiralty jurisdiction of the United States," (an alteration in fact immaterial,) and should receive the same construction. *The Abbotsford*, 98 U. S. 440. This section was literally copied in the Revised Statutes, and nothing was added to it showing any intention on the part of congress to extend its application to waters not included within the acts of 1790 and 1825. Now, it seems incredible that, if congress had designed to extend the act of 1790 to the Great Lakes, a series of waters entirely separate, distinct, and distant from the high seas and their connection, it should not at least have inserted the word "lakes;" or have used still more explicit language to designate these interior waters. The words "haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state," following the words "high seas," seem to me very clearly to be such as are connected immediately with the high seas, and to be much the same as the words "arm of the sea," in the same section. While the word "river" may properly be used to designate the straits which connect Lake Huron and Lake Erie, it would be little short of absurd to impute to congress the intent to give criminal jurisdiction to those rivers, and not to the lakes from and into which they flow. It is equally improb-

able that jurisdiction should be given of crimes committed upon one side of the boundary line, and not upon the other, when both are within the competence of the legislative body.

The truth is, an act of congress is greatly needed to extend our jurisdiction to crimes committed upon American vessels navigating the lakes and their connecting waters. A vessel bound from Buffalo to Chicago, touching at Cleveland, passes through the waters of six states, besides those of the province of Ontario, and in her transit through the Detroit and St. Clair rivers is crossing and recrossing the boundary line almost every hour. While it may be entirely clear that a crime has been committed during the voyage, it may be utterly impossible, as it was in *Miller's Case*, above cited, to locate the time or place, and the offense goes unpunished, because there is no court having general jurisdiction of the voyage and of the vessel. If the ship be American, and bound from one American port to another, as in this case, the Canadian courts cannot be expected to take cognizance of crimes which, though nominally committed in Canadian waters, do not in fact disturb the peace and dignity of her majesty's subjects. However flagrant these crimes may be, they do not concern the people of Canada, and ought to be punished by the courts of the country in which the vessel is owned. That an American vessel is in reality a floating parcel of American soil, is a maxim of all writers upon the law of nations, (1 Bish. Crim. Law, § 579;) and is recognized in the *Case of Wildenhus*, 120 U. S. 1, 7 Sup. Ct. Rep. 385; and expressly decided in *Crapo* v. *Kelly*, 16 Wall. 610. See, also, *In re Ah Sing*, 13 Fed. Rep. 286. There is an additional difficulty in all these cases in the fact that the county as well as the state lines of the several states extend to the center of the lakes; and even if the particular state in which the crime is committed can be ascertained, it is often impossible to decide within what county the trial is to be had. So far as this state is concerned, this difficulty has been partly though not wholly removed by a statutory enactment giving common jurisdiction over lakes to certain counties upon their borders; but how far such practice obtains in other states, and in the dominion of Canada, I am not informed. So long as the laws remain as they are, crimes of the nature described in these proceedings must go unpunished, since offenders are not within the extradition treaty, even if the Canadian courts were willing to take cognizance of the cases.

But the heinous character of the offense charged in this case does not deprive the petitioner of the benefit of his exception to our jurisdiction, and I am reluctantly compelled to order his discharge.

THE NORMA.[1]

KIERNAN *v.* THE NORMA.

(*District Court, S. D. New York.* July 1, 1887.)

1. ADMIRALTY—TERRITORIAL JURISDICTION—WATERS OF HUDSON RIVER—NEW YORK AND NEW JERSEY.
   The limits of the jurisdiction of the federal Southern district of New York, and the district of New Jersey, over the waters of the Hudson river lying west of Manhattan island, are coincident with the boundaries of the jurisdiction of the states of New York and New Jersey over the same waters, as settled by the agreement between New York and New Jersey, entered into September 16, 1833, and approved by congress June 28, 1834.
2. SAME—VESSEL AT WHARF IN JERSEY CITY.
   By that agreement New Jersey retained exclusive jurisdiction over the wharves on her shore, and over all vessels fastened to such wharves. *Held*, therefore, that a vessel seized by the marshal while at a wharf in Jersey City was attached in the district of New Jersey, outside of the Southern district of New York, and a suit begun in the latter district by such attachment must fail for want of jurisdiction

Benedict, Taft & Benedict, for libelant.
Hector M. Hitchings, for claimant.

BROWN, J. The Norma was libeled in this court in 1881, and seized by the marshal, under process of this court, while she was made fast, as the proof shows, to the wharf in the Morris canal basin, Jersey City. The answer alleged that the Norma was not, at the time of seizure, within the jurisdiction of this court, but within the waters of the state of New Jersey. The answer also contained a defense upon the merits. Under various decisions, up to the time when this libel was filed, the Norma was understood to be within the jurisdiction of this court, being outside of the original low-water mark of the Hudson river on the western shore. *The L. W. Eaton*, 9 Ben. 289; *The Argo*, 7 Ben. 304; *Malony* v. *City of Milwaukee*, 1 Fed. Rep. 613. In the *Case of Devoe Manuf'g Co.*, 108 U. S. 401, 2 Sup. Ct. Rep. 894, the supreme court held that the territorial boundaries of the judicial districts should be held to expand or contract according to any change in the boundaries between the states, as lawfully altered from time to time; and that accordingly the agreement as to the boundaries between the states of New York and New Jersey, entered into on the sixteenth of September, 1833, and approved by congress, June 28, 1834, (see 4 St. at Large, 708,) became operative in determining the territorial limits of the jurisdiction of the federal courts of the two states. The court say, (pages 413, 414:) "We are all of the opinion that, when the act of congress of 1879 declared that the New Jersey district should consist of the state of New Jersey, it intended that any territory, land or *water*, which should at any time, with the express assent of congress, form part of that state, should form part of the district

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

of New Jersey." The court accordingly held that the tug in that case was within the territorial jurisdiction of New Jersey, "because she was within *that part of the waters* between Staten island and New Jersey, which by article first of the agreement was *set apart for New Jersey.*" The subsequent qualification in article 4 of the agreement was held to be a limited qualification, relating solely to quarantine laws, and laws relating to passengers, not affecting the boundary "*or jurisdiction*" given to New Jersey in article 1 of the agreement. The tug seized in that case was in the western half of the Kill van Kull,—waters which, by the general boundary line of the first article, were "set apart to New Jersey;" and it was held that that locality was not affected by the subsequent exception, which gives New York jurisdiction there "in respect to quarantine laws and laws relating to passengers" only; regulations of a police character, which do not affect the boundary line, or the general *jurisdiction* of New Jersey.

Upon the principle of the foregoing decision it must be held, therefore, that if it was the intent of the agreement between the two states, which agreement did receive the express assent of congress, that the *waters of the Hudson river* opposite Manhattan island, to the westward of the middle line of the river, should form a part of the state of New York, for all the purposes of government and of judicial jurisdiction, then these waters would also form a part of the Southern district of New York, and be within its jurisdiction. If by that agreement these waters were designed to form a part of the state of New Jersey, and to be subject to its jurisdiction, then they are within the federal district of New Jersey, and outside the jurisdiction of this court.

The agreement between the states was the result of a long-pending controversy, which had been begun by the state of New Jersey nearly a half a century before, in questioning the property rights and jurisdiction of the state of New York, both in the soil and the waters of the Hudson, up to low-water mark, to the westward of the middle line of the river, which had theretofore been exercised by the state of New York, substantially unquestioned, from the earliest colonial days. The question involved then, as it does now, matters of no small practical importance in the administration of justice. If the jurisdiction of the one court or of the other were dependent upon the proof as it might finally appear upon the trial, whether the *locus* of the tort, or the crime, or the place of seizure of the vessel, were upon the one side or the other of the middle line of the Hudson river, great practical embarrassments would often arise, both in the decision of causes and in the service of process. Practically, that line is an imaginary one, incapable of definition for immediate practical application in the service of process. Wide difference in the testimony as to the situation of vessels is a familiar fact. It is important, in the practical administration of justice, that such uncertainties, impediments, and embarrassments should be as few as possible. They could not well be avoided, with such a commerce as New York possesses, except either by giving concurrent jurisdiction over the whole river to both states, and to both districts, as is done by statute,

(section 542, Rev. St.,) as to the waters of different counties, in the case of the Eastern and Southern districts of New York; or else by conferring jurisdiction over the whole river upon one state or the other exclusively; or by some compromise, partaking in some degree of both.

The eight different articles of the agreement between the states (see 4 St. at Large, 708) bear the most evident marks of compromise, whereby it was plainly intended to obviate these difficulties, and to secure practical results. It is in the light of these plain objects that the agreement should be interpreted.

The first article of the agreement does not declare that the boundary line between the two states shall be the middle of the river, without exception or qualification; but only, "except as hereinafter otherwise particularly mentioned." Article third particularly mentions that "the state of New York shall have and enjoy *exclusive jurisdiction* of and over all the *waters of the Hudson river* lying west of Manhattan island, and to the south of the mouth of Spuytenduyvel creek; and *of and over the lands covered by said waters, to the low-water mark*, on the westerly or New Jersey side thereof, subject to the following rights of property, and of jurisdiction of the state of New Jersey; that is to say: (1) The state of New Jersey shall have the exclusive *right of property* in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey. (2) The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements made and to be made on the shore of said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock;" also except as to quarantine or health laws, passengers, and fisheries.

These provisions seem to me to show plainly that, as respects the land under water between the middle line of the river and the low-water mark on the western shore, except the docks and vessels fastened thereto or ashore, the state of New Jersey has nothing more than the mere right of property,—the naked legal title. She holds this as she might hold the title or exclusive right of property in any other land within the state of New York, and in the same way that any private individual might own it; that is, subject to the "exclusive jurisdiction" which article 3 of the agreement confers upon the state of New York. The "*waters*" of this part of the Hudson, moreover, are by article 3 expressly "set apart for New York" as unequivocally as the waters of the Kill van Kull, in the *Case of Devoe Manuf'g Co.*, 108 U. S. 401, 2 Sup. Ct. Rep. 894, were held to be "set apart for New Jersey."

The question should be determined with reference to practical objects, and not to mere theoretical or imaginary lines. The agreement was designed to secure practical ends to avoid practical difficulties; and, in doing so, it plainly excluded the state of New Jersey from the functions of sovereignty, legislative or judicial, over "the waters" of the Hudson below low-water mark on the western shore; and gave all functions, legislative and judicial, to the state of New York over these waters, except certain minor privileges as to fisheries reserved to the state of New

Jersey. The boundaries of a state, for practical purposes, are the boundaries that limit its sovereignty and jurisdiction.

The Revised Statutes, § 541, in defining what shall constitute the Southern district of New York, after defining the Northern and Eastern districts, says that the Southern district "includes the residue of the state, *with the waters thereof.*" These words evidently refer to all those waters that appertain to the state of New York adjacent to the counties of the Southern district, and of which the state of New York has exclusive jurisdiction. There is no similar language in reference to the district of New Jersey; nor by any reasonable implication, as it seems to me, can those waters of the Hudson river, over which, by the agreement between the states, ratified by congress, the state of New Jersey has no jurisdiction whatever, be deemed a part of the district of New Jersey. As those waters, by the express agreement of the states, and the assent of congress, "are set apart to New York," and declared to be within its "exclusive jurisdiction," they are a part of the waters of the state of New York, within the meaning of section 541, and therefore within the limits of the Southern district of New York.

The same practical reasons that led to the solution of difficulties in the administration of justice between the two states by means of the agreement of 1833, should, it seems to me, upon the principle in the *Case of Devoe Manuf'g Co.*, *supra*, be held to determine the intent of the statute as respects the limits of the jurisdictions of the Southern district of New York and the district of New Jersey, in the sense above given. Any other construction would result in reviving and perpetuating the very difficulties which this agreement, ratified by congress, was, in part at least, designed to avoid.

In the absence of any controlling authority, and until otherwise determined, I shall therefore apply the various provisions of the agreement between the states to the determination of all questions of jurisdiction as between the different federal districts. This was the solution applied in the *Case of Devoe Manuf'g Co.*, as respects the waters of the Kill van Kull.

In the present case, it is clearly shown that the Norma, when seized by the marshal, was made fast to the dock on the New Jersey shore. Although she was outside of low-water mark, she was still within the second reservation of article 3 of the agreement between the states, and she was therefore within the exclusive jurisdiction of New Jersey. The marshal had no authority, therefore, to make the seizure, and the court acquired thereby no jurisdiction of the *res*. The libel must, therefore, be dismissed upon the plea to the jurisdiction.

The plea to the merits did not waive the defense. Ben. Adm. §§ 367, 368. *The Monte A.*, 12 Fed. Rep. 331; *The Mary McCabe*, 22 Fed. Rep. 750. It is only the want of jurisdiction of the person that is cured by a general appearance. *Atkins* v. *Disintegrating Co.*, 18 Wall. 272, 298. In such cases the dismissal is without costs. *Wenberg* v. *Cargo of Mineral Phosphate*, 15 Fed. Rep. 285, 288; *Pentlarge* v. *Kirby*, 20 Fed. Rep. 898.

CHISHOLM *v.* THE J. L. PENDERGAST.

(*Circuit Court, S. D. New York.* July 20, 1887.)

MARITIME LIEN—WAGES OF MASTER—FOREIGN VESSEL.

The libelant, a United States citizen, made a contract with P., also a citizen, to act as master of the bark J. L. P. P. was the real owner of the bark, although she was built in Quebec, carried the British flag, and was registered in the name of a British subject; and he was in possession as owner under a mortgage and irrevocable power of attorney. The libelant did not know the J. L. P. was of British register until a fortnight after the contract was made. *Held*, that the libelant dealt with P. as owner, and that, as between the parties, the bark was an American vessel, and that therefore libelant did not acquire a lien for wages under the British merchant shipping act of 1854, § 191, which could be enforced *in rem;* reversing decision of district court. See *The J. L. Pendergast*, 29 Fed. Rep. 127.

James Parker, for appellants.
C. C. Burlingame, for appellee.

WALLACE, J. The libelant sues *in rem* to recover a balance of wages due him as master of the bark Pendergast, claiming a lien by the British "Merchant Shipping Act" of 1854 (section 191) upon the theory that the bark was a British vessel. The district court decreed in his favor, and the owners of the bark have appealed.

The libelant, who is a citizen of this country, made a contract, at the city of New York, to act as master of the bark, with J. L. Pendergast, who was also a citizen of this country residing at New York city. Pendergast was the real owner of the bark; the vessel having been built for him, and paid for by him, at Quebec. She was registered at that port in the name of James G. Ross as owner, and carried the British flag; but Ross had transferred her by bill of sale to one Adey, a British subject, who was in the employment of Pendergast, and Adey had executed a mortgage for her full value to Pendergast, with an irrevocable power of attorney, vesting in the latter power to sell and absolute control of the vessel. Pendergast was in possession as the real owner.

The libelant testifies that when he made the contract with Pendergast he supposed Pendergast to be acting as agent for Ross, the registered owner. The district judge gave credit to this testimony, and the decree of the district court proceeded upon the assumption that it was true. The evidence taken in this court shows that this testimony was untrue, and that the libelant did not know who was the owner of the bark until July 31, 1884, when he went to the British consul to have himself indorsed as master on the ship's register, and then for the first time saw the register, and saw by it that Ross was the owner. He had made the contract to serve as master with Pendergast over a fortnight before this. It is wholly improbable that he supposed Mr. Pendergast, whose name the vessel bore, was the agent for an unknown owner. The case must be decided upon the theory that he dealt with Pendergast as owner.

Although the bark was registered as a British vessel, and carried the

British flag, the libelant was not misled by this *prima facie* evidence of her nationality, but dealt with Pendergast as owner, at Pendergast's place of residence, supposing him to be the owner. As to the libelant, the bark was an American, and not a British, vessel. *The Alice Tainter*, 14 Blatchf. 41; *The Plymouth Rock*, 13 Blatchf. 505. The contract having been made here, and being one for services to be performed on a vessel which, as between the contracting parties, was an American vessel, has only those incidents which exist by the general maritime law as recognized in this country, and not those which are created by the law of Great Britain. Consequently the contract did not imply a lien upon the ship for the master's wages.

The decree of the district court is reversed, and the libel is dismissed, with costs of this court and of the district court.

LAZENSKY v. SUPREME LODGE KNIGHTS OF HONOR.

(*Circuit Court, S. D. New York.* August 20, 1887.)

REMOVAL OF CAUSES—JURISDICTIONAL AMOUNT.

An action for the recovery of $2,000, with interest, was commenced in the state court in December, 1886. On May 3, 1887, it was removed to the circuit court on petition of the defendant, and there tried, resulting in a verdict, June 21, 1887, in favor of the plaintiff. Defendant moved to remand on the ground that the amount in controversy did not *exceed, exclusive of interest and costs*, the sum of $2,000. *Held*, that under the amendatory removal act of March 3, 1887, limiting the right to removal in actions of this kind to cases where the amount in dispute *exceeds* $2,000, exclusive of interest and costs, the circuit court had no jurisdiction of the cause, and it should be remanded.

On Motion to Remand.

Chas. Steckler, for Lazensky.

Morris Goodhart, for Supreme Lodge.

LACOMBE, J. This action was originally brought in the city court of the city of New York, and was for the recovery of $2,000, with interest. Summons was served in December, 1886. On May 3, 1887, the cause was, on petition of defendant, removed into this court, where it was tried June 21, 1887, and judgment rendered for the plaintiff. The defendant now moves to remand said cause for the reason that the amount in controversy does not *exceed, exclusive of interest and costs*, the sum of $2,000. At the time application for removal of the cause was made, the amendatory act of 1887 (approved March 3d) was in force. Since the passage of that act actions of this kind may not be removed from the state courts except where the amount in dispute *exceeds* $2,000, exclusive of interest and costs. No jurisdiction to remove and dispose of controversies pending in the state courts (except as provided in the act) is conferred on the circuit courts. Inasmuch as there is in this case no mere irregularity, but a failure to show jurisdiction of the subject-matter, the motion to remand is granted.

FISK v. HENARIE and others, Ex'rs, etc.

(*Circuit Court, D. Oregon.* October 26, 1887.)

1. REMOVAL OF CAUSES—LOCAL PREJUDICE—AFFIDAVIT.

The provision in section 2 of the act of 1887, (24 St. 553,) authorizing the court to examine into the truth of an affidavit for removal of a case from a state court, on account of prejudice or local influence, applies only to cases removed before the passage of said act on the application of the plaintiff; and otherwise than this, such affidavit being not a matter of jurisdiction, but only a condition imposed of the party seeking the removal, it cannot be questioned or contradicted; nor is it necessary that the affiant should state the grounds of his belief.

2. SAME—LOCAL PREJUDICE—WHO ENTITLED TO REMOVAL.
Subsection 3 of section 639 of the Revised Statutes, as amended by section 2 of the act of 1887, gives the right to remove a suit "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state," to "any" defendant, being such citizen of another state, on account of prejudice or local influence, without reference to the citizenship of other persons who may be parties thereto.

3. SAME—JURISDICTION.
The judicial power of the United States extends to "controversies" between citizens of different states, which include a "case" in which such controversy exists without reference to the citizenship of the other parties therein; and congress may confer jurisdiction of such controversy, including the case in which it is involved, on the circuit courts, by removal or otherwise.

4. SAME—TIME OF APPLICATION.
An application for the removal of a case from a state court, if made while the case is pending for trial, is made "before the trial thereof," within the intent of the removal acts, although there may have been any number of mistrials, or trials in which the verdict was set aside or the jury disagreed.

(*Syllabus by the Court.*)

Action to Recover Damages. Motion to remand to state court.

George H. Williams, for plaintiff.

James K. Kelly and *John M. Gearin*, for defendants.

DEADY, J. This action was removed to this court from the state circuit court for the county of Multnomah, on the petition of the defendants, Daniel V. B. Henarie and Eleanor Martin and James M. Donahue, Annie Donahue, and Mary Ellen von Schroeder, the executors of the last will and testament of Peter Donahue, deceased, filed July 30, 1887, together with their bond, in form and effect as required by law, and the affidavit of said Henarie and Eleanor Martin to the effect that they and each of them have reason to and do believe "that, from prejudice and local influence," the affiants and said executors "will not be able to obtain justice in said state court, or in any other state court to which said defendants, under the laws of the state of Oregon, have the right to remove the same, on account of such prejudice and local influence." The plaintiff now moves to remand the case to the state court for substantially the reasons following: (1) The application for removal was not made in time, or before the trial in the state court. (2) The affidavit does not state the facts showing the existence of "local prejudice or influence." (3) The removal papers were not served on the plaintiff. (4) The petition and accompanying papers do not show a case for removal. The motion concludes with a denial of the existence of the alleged "prejudice and local influence," and asks the court to examine into the truth of the affidavit asserting the same and the grounds thereof; and to that end the plaintiff offers to read the affidavits of sundry persons who state that they do not believe in the existence of such prejudice or local influence.

It appears from the record that this action was commenced in Wasco county on November 30, 1883, against Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas S. Martin, Edward Martin, and John D. Wilcox, to recover a commission of 10 per centum, amounting to $60,000, on the alleged sale of a tract of land belonging to said parties,

known as the Dalles military road grant, containing about 600,000 acres, and situate in the counties of Wasco, Grant, and Baker, in Oregon. The first three of the defendants were then residents and citizens of California, and the latter three of Oregon. Service of the summons was had on the Oregon defendants, and they appeared and answered. Thereafter, on February 2, 1884, publication of the summons was ordered in the case of the California defendants, who, on August 21, 1884, appeared and answered. The answers of the defendants controvert the allegations on which the plaintiff bases his demand, and contests his right to recover anything from them or either of them on any sale of said lands.

On September 1, 1884, the plaintiff replied to the answers, and on the tenth of the same month, on the application of the defendants, the place of trial was changed to Multnomah county, it appearing that none of the parties lived in Wasco county, and that the Oregon defendants, as well as the plaintiff, lived in Multnomah county. Afterwards the case was tried with a jury in the circuit court for said county, who, on April 15, 1885, found a verdict, under the direction of the court, for the defendants, on which there was a judgment for costs in their favor; which judgment was, on January 11, 1886, reversed by the supreme court, and a new trial ordered, that resulted on May 21, 1886, in a verdict for the plaintiff for the sum of $60,000.

On May 18th, the death of the defendant Peter Donahue was suggested, and his executors, James M. Donahue, Annie Donahue, and Mary Ellen Schroeder, substituted as defendants. Afterwards, the case was heard on the motion of plaintiff for judgment, and the motions of the defendants for a new trial, and a judgment notwithstanding the verdict, and on June the 30th the first motion was denied and the latter allowed, on the ground that the complaint did not state facts sufficient to constitute a cause of action; and thereupon judgment was entered for costs in favor of the defendants; which judgment was, on October the 20th, reversed by the supreme court, and the case remanded for further proceedings according to law. On December the 18th the circuit court allowed the motion for a new trial, and set aside the verdict, from which order the plaintiff appealed to the supreme court, which appeal was, on April 18, 1887, dismissed, and thereafter the case was again submitted to a jury, who, being unable to agree, were, on July the 15th, discharged without finding a verdict.

The act of March 2, 1867, (14 St. 558,) gave right of removal of a suit from a state court to a national one, "in which there is a *controversy* between a citizen of the state in which the suit is brought and a citizen of another state," on the affidavit of the latter, "whether he be plaintiff or defendant," that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court; provided, he files a petition for such removal "at any time before the final hearing or trial of the suit." Section 639 of the Revised Statutes contains a compilation of the statutes on the subject of removals passed prior thereto. Subsection 3 thereof took the place of the act of 1867. In its compilation the word "controversy" was dropped, and the

right of removal limited to a "suit between a citizen of the state in which it is brought and a citizen of another state;" and the petition and affidavit were required to be filed at any time "before the trial or final hearing of the suit." By the act of March 3, 1875, (18 St. 470,) section 639 of the Revised Statutes was repealed, except subsection 3 thereof. The last two clauses of the section, regulating the manner of removal, were also held to remain in force for the purpose of removals under said subsection, the same not being provided for in the act of 1875. *Railway* v. *Bates*, 119 U. S. 467, 7 Sup. Ct. Rep. 285. The act of March 3, 1887, (24 St. 552,) purports to be amendatory of that of 1875, "and for other purposes."

Considering the importance of the subject, and the high character of the body that enacted it, to say the least, it is a very unskillful and slovenly piece of legislation. It contains (sections 5 and 6) a general repealing clause "of all laws and parts of laws in conflict" with itself, and several special ones, and sundry saving clauses in which no mention is made of section 639 of the Revised Statutes. But section 2 of the act contains subsection 3 of said section in a modified form, and so far repeals the latter by implication. It reads as follows:

"And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a *controversy* between a citizen of the state in which the suit is brought and a citizen of another state, *any* defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time *before the trial thereof*, when it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: provided, that, if it further appear that said suit can be fully and justly determined as to the other defendants in the state court without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein."

Then follows an independent temporary provision, intended to apply to suits pending in the circuit courts, which had then been removed from the state courts under subsection 3 of section 639 of the Revised Statutes, "on the affidavit of any party *plaintiff*" therein, on account of prejudice or local influence, which authorizes the circuit court, at any time before trial, on the application of the other party, to "examine into the truth of said affidavit and the grounds thereof," and to remand the case unless the statement appears to be true. Thus it appears that, by the act of 1887, the pendency of a suit in which there is a "controversy" between citizens of different states is again made the ground of removal, as in the act of 1876, in cases of prejudice or local influence, while the right to have such removal is confined to the "defendant." The clause concerning an examination into the truth of the affidavit for removal when made by the "plaintiff," has no application to a removal had under the act, and which did not take place before the passage of the same, under sub-

section 3 of section 639 of the Revised Statutes. In the case of a removal under this subsection, the party seeking it is required to make an affidavit to the effect that he believes he cannot obtain justice in the state court, on account of prejudice or local influence. The act of 1887, however, only provides that such fact "shall be made to appear" to the circuit court; but as to when or how it shall be made to appear, or how such removal may be effected, it is silent. This class of cases is expressly excepted from the operation of section 3 of the act prescribing the mode of removal thereunder, generally. It follows that so much of section 639 of the Revised Statutes as relates to the method of removal on account of prejudice or local influence, and the proof thereof, is not in conflict with the act of 1887, and is therefore still in force and applicable to such removal. And thus, in the mode provided by statute, it appears to the court, from the affidavits of the defendants Henarie and Eleanor Martin, that, from prejudice and local influence, the defendants will not be able to obtain justice in the state courts. It is sufficient that they have made oath that they so believe, without setting forth the facts or circumstances on which such belief is founded. *Meadow V. M. Co.* v. *Dodds*, 7 Nev. 147. See, also, *Bowen* v. *Chase*, 7 Blatchf. 255.

It was competent for congress to have authorized the removal of the case on the diverse citizenship of the parties alone. But it has seen proper to require in addition the oath of the applicant for removal that he *believes* he cannot obtain justice in the state tribunal, on account of prejudice or local influence. Any fact the existence of which is made a condition precedent to the removal of a case, and which is also necessary to the jurisdiction of the circuit court, may be controverted by the party against whom such removal is had. But the proper mode of doing this is not by affidavits, but by a dilatory plea in the nature of a plea to the jurisdiction, on which the question may be submitted to a jury for determination. *McDonald* v. *Flour Mills Co.*, 31 Fed. Rep. 578; *Coal* v. *Blatchford*, 11 Wall. 177. But the affidavit of the defendants concerning their belief as to their ability to obtain justice in the state tribunals is not a jurisdictional matter, but only a condition precedent to their right of removal, the same as the oath to a demurrer, required by the equity rule 34 as a condition precedent to filing the same, "that it is not interposed for delay." And in my judgment, when such affidavit is made and filed in the manner and terms prescribed by the statute, the condition is performed, and the truth of the matter is not open to question. No case has been found in which it has been allowed or even attempted; and the action of congress in providing specially in the act of 1887 for examining into the truth of the affidavit in pending cases, where the removal was had on the affidavit of the "plaintiff," is a legislative construction of the act to the same effect.

In a suit between a citizen of the state in which it is brought and a citizen of another state, subsection 3 of section 639 of the Revised Statutes gave the latter, whether he was plaintiff or defendant, the right of removal. The courts, following the narrow construction given to the same language in sections 11 and 12 of the judiciary act of 1789, (*Beards-*

ley v. *Torrey*, 4 Wash. C. C. 286; *Smith* v. *Rines*, 2 Sum. 338; *Hubbard* v. *Railroad Co.*, 3 Blatchf. 84; *Wood* v. *Davis*, 18 How. 467; *Coal* v. *Blatchford*, 11 Wall. 172,) held that, although the designation of the party plaintiff or defendant is in the singular number, it was intended to embrace all the persons who were on one side of the controversy, so that, if either of two or more parties plaintiff were citizens of the same state with either of two or more parties defendant, the case could not be removed. As the law then stood before the passage of the act of 1887, this action could not have been removed to this court by either of the defendants; for some of them are citizens of Oregon,—the same state as the plaintiff. But, by the act of 1887, the foundation of the right of removal is the mere pendency of a suit in a state court between a citizen of the state in which it is brought and a citizen of another state. It is enough if there is a suit pending in such court, "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state." And, while the right to remove such suit is in effect thereby denied to the plaintiff, it is not given to the defendant collectively, but to "any" one of them who "is a citizen of another state." These material changes in the language of the statute can only be considered, under the circumstances, as showing an intention on the part of congress to restore the act of 1867 in this respect, as it was before the compilation of the Revised Statutes. It is no longer necessary that the "suit" should be between persons of diverse citizenship. It is sufficient if there is a "controversy" involved in the suit between two such persons,—the one being a citizen of the state in which it is brought,—whatever may be the citizenship of the other plaintiffs or defendants. Nor can the right of removal thus given to "any" defendant having the prescribed citizenship, with any respect for the ordinary significance of language, be construed to include "all" the defendants, and so be denied to "any," unless "all" have such citizenship.

In support of the contrary view of the matter, it is urged that the act of 1887 is a piece of what may be called "confederate" legislation, in which there is a manifest purpose to restrain and limit the authority of the national courts, and therefore it is not likely that it was intended to enlarge their jurisdiction in this class of cases. That such appears to be the general character of the act may be admitted. But it appears to be a piece of patchwork, in which probably a number of hands were engaged, with doubtless somewhat diverse purposes. But be this as it may, no court would be warranted, on the strength of such a suggestion or circumstance, in construing the phrase "any" defendant to mean "all" the defendants, be they more or less.

Admitting this to be the proper construction of the statute, counsel for the plaintiff insists that it is unconstitutional. The question whether congress has the power to provide for the removal of a case from a state to a national court, in which some of the necessary parties defendant are citizens of the same state with the parties plaintiff, or some of them, has not been directly decided by the supreme court. It was argued before that tribunal with marked ability and research in the case of *The*

Sewing-Machine Cases, 18 Wall. 553. But, as the court held that congress had not then undertaken to confer such power on the circuit courts, it was not decided. Mr. Dillon (Rem. Causes, § 27) is clear that the judicial power of the United States includes such cases, and therefore congress may confer jurisdiction over them on the circuit courts, by the process of removal or otherwise. In *Lockhart* v *Horn*, 1 Woods, 628, Mr. Justice BRADLEY, in considering a case brought in the circuit court under section 11 of the judiciary act of 1789, said:

"Were this an original question, I should say that the fact of a common state citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper state, would not oust the court of jurisdiction. *It certainly would not under the constitution. The case would still be a controversy between citizens of different states.*"

The constitution (article 3, § 2) provides:

"The judicial power shall extend to all cases in law and equity, arising under the constitution of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; *between citizens of different states;* between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

The change in the language of this section from the use of the term "cases" to "controversies" is apparently deliberate and premeditated; and, in the case of an instrument so carefully prepared and considered as the constitution of the United States, cannot be regarded as fortuitous, or without special significance. In my judgment, it was intended by the use of the terms "cases" and "controversies" to distinguish between an ordinary action or suit, which may include many parties plaintiff or defendant, and involve the examination and consideration of more than one item of dispute or controversy, and so much or such part of such proceeding as may only constitute a controversy between two or more of said parties, who are citizens of different states. There may be a controversy in a case which is less than the whole of it. Both the act of 1875 and that of 1887 (section 2) make express provision for the removal of a case—the whole case—in which there is a separate controversy between citizens of different states.

A controversy between citizens of different states is none the less such a controversy because they are not the only parties to it. A controversy, in the contemplation of the constitution, is but a dispute concerning rights or wrongs cognizable by law, and which may therefore be the subject of an action or involved therein. To confine the operation of the words, "controversies between citizens of different states," to cases wherein the controversy is *exclusively* between citizens of different states, is to interpolate a word into the grant of judicial power which materially limits and restrains its operation. As well might it be claimed that the judicial power extends "to all cases affecting ambassadors, other public min-

isters, and consuls," *and them only*. Then a suit might be brought in a state court against or affecting a foreign minister, and congress would be powerless to authorize its removal, if the plaintiff took the precaution, as he doubtless would, to make some third person a co-defendant. What the effect of such a state of things would be on the relations of the United States with other governments may be easily imagined.

The extension of the judicial power over a controversy between citizens of different states is not to be rendered nugatory by the accidental circumstance that it forms a part of, or is involved in, a suit between citizens of the same state. On the contrary, the jurisdiction in such cases must be held to include all the incidents which inhere in or attach to the controversy "Congress has power to make all laws which shall be necessary and proper to carry into execution" the grant of judicial power, (Const. U. S. art. 1, § 8,) and thus make it equal to the great and beneficent purpose for which it was intended. And in so doing it may, in my judgment, confer jurisdiction on the circuit courts of a case involving a controversy, whether separable or not, between citizens of different states, by removal or otherwise; and this, although some of the parties plaintiff and defendant in the suit are citizens of the same state. The grant of judicial power is one of the most effective means by which the framers of the constitution undertook to "form a more perfect union" between the people of the several states, and to protect them in their interstate intercourse and business from the danger of injustice growing out of state prejudice and local influence. Hamilton, in the Federalist, (No. 80,) in discussing this subject, says:

"In order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens To secure the full effect of so fundamental a provision against all evasion or subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded."

The mere fact that there are parties defendant in this case who are citizens of the same state with the plaintiff ought not to weigh against this conclusion; for, so far as they are concerned, it ought not to be a matter of any moment in which tribunal the case is tried; for, as was said by Mr. Justice MILLER, in *Trust Co.* v. *Macquillan*, 3 Dill. 381, "the object in each case is to secure an impartial tribunal, and the federal courts are not courts for non-residents more than for residents." But to compel non-residents to litigate a controversy with a resident in a court of his state because other residents of such state are, either from policy or necessity, joined with him as defendants, is to compel him to submit to the judgment of a presumably partial tribunal. And if it was doubtful how this question ought to be decided, it would be proper to rule against the plaintiff. The act of 1887 allows a party moving to remand a cause the right to take the question to the supreme court, but denies it to his adversary.

Was the application to remove the case made in time? It will assist in the examination of the decisions on this question, to group together the language of the various acts on the subject. Under the act of 1866, (14 St. 356,) the application for removal was required to be made "before the trial or final hearing." In the act of 1867 the language was changed to "final hearing or trial." Section 639 of the Revised Statutes, which contains a compilation of these two acts, went back to the language of the act of 1866,—"before the trial or final hearing of the suit." The act of 1875 required the application to be made "before or at the term at which said cause could be first tried, and before the trial thereof." This cause was removed under subsection 3 of section 639, which requires the application to be made "before the trial or final hearing of the suit."

The following are the principal cases arising under these acts on the question of the time of removal:

Dart v. *McKinney*, 9 Blatchf. 359, was a case of removal under the act of 1866. A judgment was given in the state court on the report of a referee against the defendants, which was reversed, and a new trial granted; whereupon one of the defendants removed the cause; and, on a motion to remand, it was held that the act gave the right of removal "at any time before *the* trial or final hearing of the cause," and not "at any time before *a* trial or final hearing of the cause."

Insurance Co. v. *Dunn*, 19 Wall. 214, was removed under the act of 1867. The case was first tried in a court of the state of Ohio, where there was a verdict against the company. The law of the state gave the latter a right to a new trial on giving bond to abide by and perform the judgment of the court, which it did, and then removed the case to the circuit court. In the progress of the same, it was taken to the supreme court, on the question of whether the removal was taken in time, where it was decided in the affirmative. It was held that the adjective "final" applied to "trial" as well as "hearing," it being understood before the former; and some weight was given to this circumstance. The conclusion of the court was this: "It was intended to permit the removal at any time before a hearing *or trial* final in the cause as it stood when the application for the transfer was made." See, also, *Stevenson* v. *Williams*, 19 Wall. 575.

In *Vannever* v. *Bryant*, 21 Wall. 41, there was an application for removal under the act of 1867. The case was this: A trial and verdict was had in the state court. The defendants moved for a new trial, and, pending this motion, the non-resident defendants applied for a removal, which was refused, and on this ruling the case went to the supreme court. The ruling was affirmed on the authority of *The Sewing-Machine Cases*, 18 Wall. 553. In delivering the opinion of the court, the chief justice also said that the application was also properly refused, because the case was not then pending for trial, and added: "After one trial the right to a second must be perfected before a demand for the transfer can be properly made. Every trial of a cause is final until, in some form, it has been vacated."

Jifkins v. *Sweetzer*, 102 U. S. 177, was removed under the act of 1866,

and afterwards remanded to the state court. From the order remanding the case an appeal was taken to the supreme court, where the same was affirmed. This was a suit for an account of rents and profits, in which there was a decree in the common pleas dismissing the bill. On an appeal to the supreme court of the state, this decree was reversed, the bill reinstated, and the common pleas instructed to refer the case to a master to take an account, for the purpose of making "a final decree in the premises according to equity." Two years after the reference, but before any report was filed, the defendant applied to have the case removed to the circuit court. The supreme court held that the hearing in the state supreme court was a final one, and that nothing remained to be done but to continue the same "until the necessary accounts could be taken and the details of a final decree settled," and therefore the application was too late. In the course of the opinion, Mr. Justice MILLER said, (the hearing of the case was taken up by the supreme court on the appeal from the common pleas:) "If, on the appeal, the decree below had been reversed and the cause sent back for a rehearing, then the final hearing, for the purposes of the statute now under consideration, would not have begun until the court below had again entered upon the determination of the cause."

Alley v. *Nott*, 111 U. S. 472, 4 Sup. Ct. Rep. 495, was commenced in a state court of New York, and removed on the petition of Alley, one of the defendants, under the act of 1875, to the circuit court, where a motion to remand was allowed. From this ruling an appeal was taken to the supreme court, where the decision of the circuit court was affirmed, on the ground that the application for the removal came too late. The case was this: Alley and other defendants demurred to the complaint in the state court because it did not state facts sufficient to constitute a cause of action; which demurrers were overruled, with leave to the defendants to withdraw their demurrers and answer within a time prescribed, which was done, and on the day following the petition for removal was filed. The question argued before and decided by the court is that the trial of an issue of law, such as arises on a demurrer to a complaint for the cause specified, is "a trial of the action within the meaning of the act of 1875." In the course of his opinion the chief justice remarked that the state court, before entering a final judgment on the demurrer, granted a new trial with leave to amend the pleadings; and then said, *arguendo:*

"The situation of the case at this time, for the purpose of removal, was precisely the same as it would be if the trial, instead of being on an issue of law involving the merits, had been on an issue of fact to the jury, and the court had, in its discretion, allowed a new trial after verdict. *We can hardly believe it would be claimed that a removal could be had in the last case,* and, in our opinion, it cannot in the first."

Railroad v. *Bates*, 119 U. S. 464, 7 Sup. Ct. Rep. 285, was an action brought in a court of common pleas in Ohio against the railway company. A general demurrer to the petition was sustained by the court, and judgment given for the defendant. Afterwards this judgment was

reversed by the district court, and the case remanded to the common pleas for further proceedings. There the defendant filed a petition for removal under subsection 3 of section 639 of the Revised Statutes, on the ground of prejudice and local influence, and offered security, such as is prescribed by said section, rather than the act of 1875. For this reason the petition was denied, and the case went up the long ladder of appeals, with varying fortune, until it reached the supreme court of the state, where the refusal to allow the removal was affirmed. From there the case was taken to the supreme court of the United States, where the judgment of the state court was reversed. The argument of counsel for Bates appears to have been principally devoted to the sufficiency of the security, and the court held that it was properly given under section 639 of the Revised Statutes; but the question of whether the petition was filed in time was also presented and decided. The chief justice disposed of it as a matter scarcely open to argument, in these words: "This petition was filed after a new trial had actually been granted, and while the cause was pending in the trial court for that purpose. It was, therefore, *in time*, and no objection is made to its form." This is the latest case in the supreme court on this question to which my attention has been attracted. It expressly decides that, under subsection 3 of section 639 of the Revised Statutes, while a cause is pending for trial in the state court, a petition for its removal is in time, without reference to the number of trials or mistrials that may have been had in it before. The suggestion of the learned chief justice, to the contrary, in *Alley* v. *Nott*, *supra*, on which the plaintiff seems to rely, must yield to this direct decision of the court announced by himself.

There is no other authority that gives any countenance to the proposition that the phrase "before *the* trial," as used in any of these removal acts, means any proceeding other than that which results in a verdict or judgment, subsisting and in force when the application is made. Where the word "trial" is qualified by the word "final," as in the act of 1867, this conclusion is inevitable. But even in the acts of 1866 and 1875, and section 639 of the Revised Statutes, where the phrase used is simply "before the trial," the language fairly construed means, as Mr. Justice BLATCHFORD said, in *Dart* v. *McKinney*, *supra*, "*the* trial of the case, and not *a* trial of it." In the nature of things, *the* trial of the case is not any one, but the final one,—the one that stands as a thing accomplished in the case. Where a jury is discharged without a verdict, the proceeding is properly known as a mistrial; and where a verdict is set aside because it ought not to stand, the result is the same. The proceeding has miscarried, and the consequence is not a trial but a mistrial. And, in the case of a removal for prejudice or local influence, there is a good reason for giving the non-resident party a right to make the application after a mistrial, for, as was said by Mr. Justice MILLER, in *Hess* v. *Reynolds*, 113 U. S. 80, 5 Sup. Ct. Rep. 377, "the hostile local influence may not become known or developed at an earlier stage of the proceeding."

In Spear's Law of the Federal Judiciary, (468,) after an examination of the cases on the subject, the author says that, whenever a verdict is

set aside or the jury disagree, the weight of authority is that the case is restored to the *status* it had before any trial took place, and adds: "The theory on which this view rests is that the first trial, being wholly vacated, or resulting in a disagreement of the jury, was a nullity, and hence the case stands, as to the right of removal, just as it would have stood if no such trial had been had."

It does not appear that the resident defendants desire this case remanded as to them or at all. It would be so much additional expense and trouble to the plaintiff to try it in two parts in different courts.

The motion to remand is denied.

OREGON & TRANSCONTINENTAL CO. *v.* NORTHERN PAC. R. CO.

(*Circuit Court, S. D. New York.* August 20, 1887.)

EQUITY—PLEADING—SUPPLEMENTAL BILL.

Under the liberal practice in the circuit court touching applications, under the fifty-seventh rule of practice in equity, for leave to file supplemental bills, the court will not, on such an application, proceed to try the cause, and to determine questions which may more appropriately be raised by demurrer, but will grant such leave although, upon the facts set forth in the supplemental bill, there may be grave doubts as to the complainant's right to the relief prayed for therein.

In Equity. On motion for leave to file supplemental bill.

Joseph H. Blair, for Oregon & Transcontinental Co.

Henry Stanton, for Railway Co.

LACOMBE, J. The practice in this court touching applications, under the fifty-seventh rule, for leave to file supplemental bills, has always been liberal to the applicant. Rightly so, because the granting of such leave rests so largely in discretion that an unfavorable decision would practically debar the applicant from vindicating the sufficiency of his pleading, or the equity of his cause of action before the appellate court. This court will not, therefore, on such an application, proceed to try the cause, and to determine questions which may more appropriately be raised by demurrer. While in the case at bar, and upon the facts set forth in the supplemental bill, there may be grave doubts as to the complainant's right to the relief prayed for in such bill, that issue will not be tried on this motion.

Motion for leave to file supplemental bill granted.

CHEMICAL NAT. BANK *v.* KISSANE.

(*Circuit Court, N. D. California.* October 3, 1887.)

1. LIMITATION OF ACTIONS—ESTOPPEL TO PLEAD STATUTE—EQUITY.
   The fact that a debtor adds a name to his real name, removes to another state, and remains in such state under his assumed name until the cause of action against him on the demand is barred by the statute of limitations, affords no ground, under the statute of limitations of California, for enjoining the debtor from setting up the statute of limitations as a bar to an action at law to recover on the demand.
2. SAME—IN EQUITY.
   The statute of limitations of California applies to suits in equity as well as actions at law.
3. SAME.
   The statute of limitations of California provides for every exception to the running of the statute intended to be allowed, and every case wherein the time for the running of the statute is postponed beyond the time prescribed by the general provisions of the act. These exceptions are as available at law as in equity, and, the remedy at law being complete, there is no ground for equitable relief.

(*Syllabus by the Court.*)

E. D. Sawyer and *Mr. Burnett*, for complainant.
Garber, Thornton & Bishop and *T. I. Bergen*, for defendant.
Before SAWYER, J.

SAWYER, J., (*orally.*) This is a bill in equity to restrain the defendant from setting up a plea of the statute of limitations on a demand for money said to have been fraudulently obtained from the Chemical Bank, by Kissane and two other parties, more than 30 years ago,—as far back as 1855.

The complainant here files a bill to restrain the defendant from setting up the plea of the statute of limitations, Kissane having been a resident of this state for 30 years. The ground for relief is, that after defendant obtained this money, he went to Nicaragua, enlisted in Walker's army, and changed his name, or rather added to his name. His name being William Kissane, he took on the name of Rogers; so that the name he afterwards went by, was, William Kissane Rogers, or William K. Rogers, as he signed it. It is alleged in the bill, that it was publicly reported, or rumored, that Kissane was killed in Nicaragua; that complainant believed that report, and therefore did not hunt for him. Complainant now says, that this change of name is a fraud upon complainant, and is a good equitable ground for restraining defendant from setting up the statute of limitations in a suit upon the demand. Undoubtedly, the old equity doctrine before the cases were covered by statutes of limitations, was, that in a certain class of cases, a party could be restrained on a bill in equity from setting up the statute of limitations.

On examination of those authorities, it will be found in all of them, I think, that there was some *legal* obstacle interposed by the party himself, or by the law, which prevented the prosecution of the suit. They were

not mere matters of concealment of the person, or disguise, or anything of that sort. All of those cases are of the character indicated. Originally courts of equity would restrain the setting up of the statute of limitations in causes of action arising out of fraud, until the statute had run for the prescribed time after the facts constituting the fraud were discovered; because it was impossible to bring a suit, till the party discovered that he had a cause of action. Provisions of this kind were not in the original statutes of limitations; they were adopted from equity practice, where the principle was originally established. So, where an action was brought, a judgment obtained, and through error the party lost his suit, by a reversal of the judgment, and the suit had to be dismissed, and where in the mean time the statute had run against the original demand, courts of equity interfered because plaintiff was diligently pursuing his remedy, but by some mistake in the proceedings, or some error, had failed to maintain his action. He was active in maintaining his rights —in his endeavors to enforce them. But the defendant in such cases, by defending, interposed a legal obstruction to a recovery. It was thought that the plaintiff should not, in such case, be cut off from pursuing his remedy in the proper mode. Those, and others analogous to them, are all equitable grounds set up upon which courts of equity would restrain the setting up of the statute of limitations, the cases, although within the letter, being deemed not to be within the spirit and purpose of the statutes of limitations. So, also, the most common case, perhaps, for restraining the setting up of the statute of limitations, is where the defendant has enjoined the prosecution of a suit, until the statute of limitations has barred an action. In this case, the defendant himself has, also, interposed a legal obstruction, and courts of equity would not permit him to avail himself of advantages thus gained. He could not sue, because he was restrained in pursuance of law. He, therefore, should not lose his rights.

Every one of those cases depends upon equitable doctrines, and they have since been carried into the statute of limitations of California. All those cases are laid down in the books. I held in *Norris* v. *Haggin*, 28 Fed. Rep. 282, and I still adhere to that opinion, that our statute provides for every case where the statute of limitations can be made available, and for every case where the commencement of its operation will be postponed, or the time when it shall commence to run be delayed. It embodies certain exceptions to the general operation of its provisions, and these exceptions, so provided for, are all the exceptions intended by the legislature, and these exceptions are adopted from the equity practice. Our statute of limitations applies to courts of equity, as well as to courts of law, as is well settled by the supreme court of the state. See the authorities cited in *Norris* v. *Haggin*, *supra*.

The courts of equity in this state, therefore, are no more authorized to interpolate into the statute other exceptions than courts of law. This would be legislation. The same provisions as to limitations, and the same exceptions as to their general operation, or postponing their operation, or fixing the time when, in exceptional cases, they shall begin to

run, can be set up and made available in an action at law, as well as in an equity case; and the provisions and exceptions can be set up in equity in the same way as they can be at law. Hence there is no occasion to go into equity on that ground. The statute provides for all cases, and the remedy at law is complete. The statute provides for all cases, wherein the party is entitled to avail himself of an exception to the immediate operation of any provision of the statute of limitations, as will be seen by an examination of its various sections. The question of disabilities is provided for in section 352. So, also, when a party dies before the cause of action is barred, its operation is postponed. Section 353. Here is one: "When a person who is an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action."

A suspension of the running of the statute upon a demand already in suit, in which the judgment is reversed, and pending the suit the prescribed time has run, is covered by section 356. The most common case, perhaps, in which a court of equity interfered, and restrained the setting up of the statute, before the case was provided for by statutes, is provided for in section 356, in the following language: "When the commencement of an action is stayed by injunction, or statutory prohibition, the time of the continuance of the injunction, or prohibition, is not part of the time limited for the commencement of the action." There are other provisions. Thus it is clear, that the legislature intended to provide for every case, wherein an exception to the immediate operation of the statute is intended, and it covers perhaps all cases, where courts of equity would interfere, before the statute, to restrain the setting up of the statute. If it does not, it covers all cases intended to be covered, and the court is not authorized to add others. That would be legislation. And the statute applies equally at law and in equity. All of these cases in a court of equity, where the party would, formerly, be restrained, are cases where there is some legal obstacle, or some equivalent acts in the way of plaintiff's pursuing his remedy.

In this case, there was no legal obstacle in the way, at all. It is true the man, in a certain sense, disguised himself by assuming an additional name, and moved into another state; but there is no legal obstacle to instituting a suit. All complainant had to do was to find the defendant. It was well aware of the cause of action. It was its own fault, or misfortune, if it was unable to find its debtor. If defendant had come into this state, and gone into some of its most secluded corners, without adding a name to his own, it is not likely, he would have been found, within the time allowed by the statute. I apprehend, that no one in that case, would have set up the fact, that he could not be found till the action was barred, as an equitable ground for restraining him from availing himself of the statute of limitations. So, if being bald-headed, he should put on a wig, or cultivate his beard in such way, or wear false whiskers, or in some other way disguise himself, in addition to moving to another state, or while staying in some secluded spot in the state, where his obligation was incurred, that would be no legal obstacle to bringing a suit.

It would be simply throwing a difficulty in the way of finding, or recognizing, the man. So, taking on an additional name is only another element of the same kind of disguise. It interposed no legal impediment to the pursuing of the remedy, provided he should be found. It might make it more troublesome to find him. I think, therefore, it is not a case under our statute, or upon equitable principles established before the statutes, covering the points upon which the party can be restrained from setting up the statute of limitations. The taking on of another name is an act of disguise, and of secretion, but it interposes no legal impediment. Then, again, the bill, I think, does not allege any diligence in hunting him up. See *Norris* v. *Haggin*, *supra*. The bill states that it was rumored, or supposed, that defendant was killed in Nicaragua, and intimates that, perhaps, he caused the rumor to be spread. If complainant believed public rumor, without taking the trouble to verify its truth, and failed to pursue its rights for that reason, that is its misfortune, or its fault. The defendant has lived openly and publicly in one of the most frequented parts of the state for 30 years. It is scarcely possible that he has not met hundreds of people who knew him under the name of Kissane during the last 30 years.

Even imbecility of the creditor is stated by Story not to afford any excuse in equity for not commencing a suit within the time prescribed by the statute of limitations. Story, Eq. Jur. 1521*a*; *Norris* v. *Haggin*, 28 Fed. Rep. 282. Much less should a failure to hunt for a debtor by reason of belief in a public rumor that he is dead excuse neglect, and abrogate the statute.

Then, again, there is a technical ground against maintaining this bill. There is no allegation, that complainant has commenced a suit at law, or that defendant has attempted to set up the statute of limitations, or that he has even intended to set it up, should a suit be commenced. *Non constat* that he would set it up. Complainant cannot know that he will do it, until it commences a suit and ascertains. There is no allegation of a threat to set it up. The bill only alleges that complainant believes the statute would be set up. This is insufficient. I do not think that complainant's belief, or fears, without some facts indicating the purpose of defendant, can constitute equitable grounds for relief. But there is no equity in the bill, and the objection is radical, and cannot be obviated by amendment.

The demurrer must be sustained, and the bill dismissed; and it is so ordered.

HERKLOTZ and another v. CHASE.

(*Circuit Court, S. D. New York.* September 30, 1887.)

1. COURTS—PRACTICE IN FEDERAL COURTS—EQUITABLE DEFENSE AT LAW.
   The provisions of Rev. St. U. S. § 914, conforming the practice, pleadings, etc., in the federal courts, to such as are followed in the state courts, do not adopt the state law allowing equitable defenses in a legal action.
2. ACTION—EQUITABLE DEFENSE AT LAW—WHAT CONSTITUTES.
   In an action on a promissory note by the payee against the maker, one paragraph of the answer averred that the plaintiffs and defendant had had various dealings in the sale of produce; that, at the time of the delivery of the note, plaintiffs falsely represented that they had bought certain produce for defendant; that there had been a depreciation in the market, and that the defendant was indebted to them in the amount of the note which was made and delivered, relying upon said representations; that these representations were wholly untrue; and that there was not at the time of the making and delivery of the note any indebtedness from the maker to the payee. *Held*, on motion to strike out the paragraph on the grounds that it asked for equitable relief, and alleged no cause of action, that the defense set up was "no consideration," which, if established, was a valid defense at law.
3. PLEADING—MOTION TO MAKE MORE CERTAIN.
   A motion to make such paragraph more definite and certain will not be entertained as the failure of consideration is distinctly averred, the transactions out of which the indebtedness, if any, arose are as familiar to the plaintiffs as the defendant, and the production of the note would lay the burden of proving failure of consideration on the defendant.

At Law. On motion to strike out or make more definite certain paragraphs of the answer.

T. Henry Dewey, for plaintiffs.

F. W. Angel, for defendant.

LACOMBE, J. The separate defense and counter-claim set up in paragraph 7 of the answer asks for equitable relief. The cases from the state courts cited by the defendant do not apply, it being abundantly settled by authority that the provisions of section 914, Rev. St., conforming the practice, pleadings, etc., to such as are followed in the state courts, do not adopt the state law allowing equitable defenses in a legal action. *Montejo* v. *Owen*, 14 Blatchf. 324; *Myrick* v. *Roe*, 31 Fed. Rep. 97; *Church* v. *Spiegelburg*, Id. 601. The motion to strike out this defense and counter-claim is therefore granted.

The plaintiffs also move to strike out the separate defense set up in paragraph 9 of the answer, on the ground that it asks for equitable relief, and for the further reason that no cause of action is therein alleged, or that the same be made more definite and certain. The action is brought by the payee of a promissory note against the maker. The answer admits making and delivery of the note, avers that plaintiffs are not *bona fide* holders for value, but received the same with notice, and without parting with any consideration or value therefor. Then follows paragraph 9, the subject of this motion. It avers that plaintiffs and defendant had had various dealings in the sale of produce; that, at the time of the delivery of the note, plaintiffs falsely represented that they

had bought certain produce for defendant; that there had been a depreciation in the market, and that this defendant was indebted to them in the amount of the note, which was made and delivered relying upon said representations. These representations were, it is alleged, wholly untrue, and there was not at the time of the making and delivery of the note any indebtedness from the maker to the payee. This is neither more nor less than the defense of *no consideration* already pleaded. The paragraph states the defense in more detail, alleging that the assumed consideration was a prior indebtedness, which it avers did not in fact exist. This, if established, is a valid defense between the original parties, and it is a defense at law. The motion to strike out on the ground stated in the moving papers is therefore denied.

The motion to make more definite and certain is also denied. Defendant has distinctly averred that the failure of consideration on which he relies is to be shown by establishing to the satisfaction of the court and jury that there was not, when the note was given, anything due from defendant to plaintiffs. The transactions out of which the indebtedness, if any, arose, are as familiar to the plaintiffs as to the defendant, and, in view of the fact that the production of the note will lay the burden of proving failure of consideration on the defendant, plaintiffs are sufficiently notified as to the defense. Further detail would be a mere pleading of the evidence on which defendant relies.

CARPENTER *v.* WESTINGHOUSE AIR-BRAKE CO.

(*Circuit Court, S. D. Iowa, E. D.* 1887.)

1. FOREIGN CORPORATIONS—SERVICE UPON.
   The presence of the chief officers of a corporation in a state other than that of its creation does not change the residence of the corporation, nor does the fact that the officers carry into such state property of the corporation, for the purpose of exhibition and advertisement, bring the corporation into the state as an "inhabitant," or so that it can be said to be "found" there, within the meaning of the act of congress.
2. SAME.
   The operation of a train of its cars by a foreign corporation in Iowa, for the purpose of exhibition and advertisement, when neither passengers nor freight are transported, does not come within section 2582, authorizing suits to be brought against railway companies and the owners of lines, or persons operating the same, in any county through which the line or road passes or is operated; nor does it come within section 2585, which provides that when a corporation, company, or individual has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency may be brought in the county where the agency is located; and this is so, although the wrong complained of was the alleged infringement of a patent by such operation of a train of cars.

Suit for Infringement of Patent. Motion to vacate service.

Banning & Banning and *Anderson, Davis & Hagerman*, for complainant.

W. Bakewell, Geo. H. Christy, Nathl. French, and *J. Snowden Bell*, for defendant.

BREWER, J., (*orally.*) Motion to set aside service on the ground that the defendant corporation is not a citizen of this state, was not an inhabitant of the state, or found within the state, within the act of congress, so as to make the service which is attempted a valid service upon the corporation. The defendant is a corporation incorporated under the laws of the state of Pennsylvania, and therefore a citizen of that state. Its chief officers were present in this state, but the presence of the officers of the corporation in a state other than that of its creation does not change the residence of the corporation. They do not carry the corporation about with them when they themselves individually pass from state to state. It further appears in this case that the defendant corporation had within this state a train of cars, its personal property, to which was attached the brake which it manufactures and sells, which train of cars and brake were exhibited and used simply for the purpose of exhibition. It is not pretended that the train of cars was run for any purpose of carrying freight or passengers. The defendant did not engage in the business of transportation. It was showing its property. It appears affirmatively that it did not make any contracts for the sale of this brake, so that all that can be said is that it was having its property in this state on exhibition, and for that purpose only. Does the fact that the chief officers of the corporation come into the state with some of its property for advertisement and exhibition bring that corporation into the state as an inhabitant, or so that it can be said to be found within the state within the act of congress? Two sections of the Iowa statute are referred to as showing that the corporation was found within the state for purposes of suit. The first is section 2582, which reads that, "action may be brought against any railway corporations, the owners of mail stages, or other line of coaches or cars, including express companies, car companies, telegraph, and canal companies, and the lessees, companies, or persons operating the same, in any county through which the line or road thereof passes or is operated." And the argument is rested upon the letter of that statute that the defendant was the owner of this train of cars; that it operated that train of cars in counties of the state. But we do not think that that is the true meaning of that statute. It refers to cases in which the owner or the lessee or the party in charge of any vehicles of transportation operates them in this state for the purpose of transportation, for the carrying on of the business of transportation, and not to cases in which the vehicles are run for personal purposes or for mere advertisements. If the section demanded or justified the construction placed upon it by counsel, then every time the New York Central Railroad, a New York corporation, should permit its president to take one of its cars and go on a pleasure trip through the state, it would be introducing that New York corporation into this state for purposes of suit.

The other section is: "When a corporation, company, or individual has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located."

And the argument says that in the county in which Burlington is situated this defendant as a corporation had an agent there, its principal officers were there, and it was transacting business, engaged in the business of showing its manufactures for the purpose of advertisement. But that, we think, is not the true import of the section. It refers to cases in which a foreign corporation establishes an agency or office in any county in this state for the purpose of carrying on the business for which the corporation is organized. If the air-brake company, which is a manufacturer and seller of brakes, establish in any county in this state an agency or office for the selling of its brakes, or a place for the manufacture of its brakes, then it would be transplanting a portion of its business to this state, and might be said to be found within the state for the purpose of suit.

Take another illustration. Suppose there was a corporation in Illinois engaged in the breeding and selling of Norman horses, and it should send one of the principal officers to this state to attend the various county fairs with some of its fine animals. In one sense it is carrying on a business, that is it is engaged in advertising, but can it be said it is engaged in the business for which it is incorporated? Can it be said to have established an office or agency in this state for the carrying on of that business? If we say that the mere matter of advertising a business is the introduction of that business in the state, it would follow that every corporation located elsewhere that should send its circulars into the state, send newspapers with its advertisement, would be engaged in its business in that state, and to be found there for purposes of suit.

The true rule is that the corporation does not come into the state, is not found in any state, unless in some way it establishes an office or agency for the transaction of the business for which it is organized, and when that is done, it has no right to say it is not found within the state. Unless it goes to that extent it may say:, "I have not entered into or become a part of the citizenship or an inhabitant of that state." It was said in the argument that the very wrong complained of in this case was in the showing and operating of this air-brake upon defendant's train, and it was argued that if the corporation comes into this state for the purpose of doing a wrong, does it not also come into the state for the punishment of that wrong? And the inquiry was made by counsel, supposing this train of cars had run over a man, and killed him; if that corporation was in the state for the purpose of doing the wrong, was it not also in the state for the purpose of subjecting itself to suit for the wrong done? That does not follow by any means, neither as to a corporation or individual. An individual may be present in this state by an agent to make contracts, and yet he is not an inhabitant of or found within the state. I, living in Kansas, may send here an agent to make contracts, but it does not make me an inhabitant of this state; and, suppose I remain in Kansas, I am not found in this state. My agent may be here to make contracts, and yet not an agent upon whom process can be served. The same is true as to a corporation. It may have its agents for some purposes in the state, and yet, unless there be some statute

which compels the court to so hold, the mere fact that an agent is here, and does a wrong, does not transfer its citizenship or inhabitancy or presence so as to be considered as found within the state.

In the *Case of Telephone Co.*, 29 Fed. Rep. 17, which was before Judge JACKSON, and I believe Judge SAGE, in the lower district of Ohio, where the Bell Telephone Company, a corporation of Massachusetts, was sought to be sued in Ohio, the court lays down this: "In the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the state in which the court is held, viz.: (1) It must appear, as a matter of fact, that the corporation is carrying on its business in such foreign state or district." The Westinghouse Air-Brake Company is engaged in the manufacture and sale of brakes. That is its business, which was not carried on in this state. "(2) That such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there." As we have seen, the fair construction of these sections of the Iowa statute does not remove that corporation into this state by the mere fact that it was here with its property for the purpose of advertisement and exhibition.

Entertaining these views, we are all of the opinion that the motion should be sustained.

LOVE and SHIRAS, JJ., concur.

RICE v. WILLIAMS.

(*Circuit Court, E. D. Wisconsin.* August 5, 1887.)

1. PROPERTY—LETTERS—SALE.
   An advertising solicitor entered into a contract with a "specialist," to furnish him with 60,000 letters which were in the possession of the Voltaic Belt Company, of Marshall, Michigan, that had been written to that company in response to its advertisements of the curative qualities of the instruments and articles in which it dealt. The solicitor paid $500 to the company for such letters, and delivered them to the specialist, who agreed to pay him therefor $1,200, and did pay him $500, but refused to pay him the balance, claiming that the letters had already been used by other specialists, and were valueless. The solicitor sued to recover the balance. *Held*, that the receiver of private letters has not such an interest therein that they can be made the subject of a sale without the writer's consent, and that the contract in this case was void.
2. CONTRACT—VALIDITY—PUBLIC POLICY.
   A contract by an advertising solicitor to sell to a "specialist" letters written by persons afflicted with diseases, to another person who advertised articles and instruments that it was claimed would cure them, in order that such specialist might send his advertisements to them, is contrary to good morals, and void.

G. W. Hazelton, for plaintiff.
Markham & Noyes, for defendant.

DYER, J. At the conclusion of the plaintiff's testimony on the trial of this case, the court directed a verdict, which, in effect, was a dismissal of the suit. The plaintiff has moved for a new trial. The facts developed by the testimony were, in brief, these: The plaintiff testified that he was an "advertising solicitor," and that among other advertisements solicited by him were such as specialists furnished for the cure of so-called "private diseases." In 1885 he opened correspondence with the defendant, who was a "specialist," practicing his calling at Milwaukee, for the sale to him, for a pecuniary consideration, of 60,000 letters which were in the possession of the Voltaic Belt Company, of Marshall, Michigan. That company was engaged in furnishing electric belts, suspensories, and other electric appliances for the cure of various ailments and disorders. The letters in question were such as it had received from persons residing in different parts of the country, in response to advertisements of the curative qualities of the instruments and articles in which that company dealt. After considerable correspondence on the subject, the plaintiff agreed to furnish to the defendant the letters in question, and the defendant agreed to pay therefor, or for the use thereof in connection with his business, the sum of $1,200. The letters were shipped to the defendant, and received by him, and he paid to the plaintiff $500 on the purchase. The plaintiff testified that he paid the Voltaic Belt Company $500 for the letters, and, as a part of the transaction, was to furnish to that company other letters procured from "specialists." The defendant's purpose in procuring the letters in question was to obtain the names and post-office addresses of the writers, so that he might send to them circulars advertising *his* remedies for the various diseases which he professed to cure. It was claimed in argument that it was not, and could not have been, one of the objects of the parties engaged in this business, to enable the defendant to learn from the letters the nature of the maladies with which the writers were afflicted, because a perusal of the contents of the letters would be in the last degree dishonorable, and, of course, the parties contemplated only an honorable transaction! The court is, however, of the opinion that parties who would engage in such a traffic as this, would hardly refrain, on a point of honor, from a perusal of the letters, not only to obtain the names and post-office addresses of the writers, but also all the disclosures which the writers might make concerning the physical infirmities from which they were suffering. The court has no doubt that this was one of the objects sought in the sale and purchase of the use of these letters, because, obviously, it was quite as important to the defendant to know whether the writers of the letters stood in need of such restoratives to health as he could supply, as to know their names and post-office addresses.

The defendant refused to pay the balance of $700 yet due to the plaintiff on the sale, and this suit was brought to recover from the defendant

that sum. The defendant resisted payment, on the ground that the plaintiff represented to him, in making the sale, that the letters had never before been used, or, in the technical language of the profession, "circularized;" that this representation was false, and that the letters were valueless. Enough was disclosed in the testimony to show that the sale of the use of the letters in the manner described, is a branch of "industry" extensively pursued by certain "specialists" throughout the country. But it would seem that, in cases where the writers are made the repeated victims of advertising circulars, their better sense at last gets the advantage of their credulity, and they refuse longer to be baited by the remedies which might otherwise tempt them, and so their letters become valueless as articles of merchandise, or for further use. Thus it was, according to the theory of the defense, in the case at bar. The trial, however, did not proceed far enough to fully develop the facts in this regard.

To fitly characterize the contract in suit is to unreservedly condemn it as utterly unworthy of judicial countenance. It was *contra bonos mores*, and it would seem that, on grounds of public policy, the court might well refuse either to aid the plaintiff in enforcing it, or the defendant in recovering damages for the breach of it. Thus to traffic in the letters of third parties, without their knowledge or consent, and to make them articles of merchandise in the manner attempted here, was, to mildly characterize it, grossly disreputable business. It was said on the argument that the letters were not in evidence, and that the court could assume nothing with reference to their contents. But enough was indicated in the correspondence of the parties which preceded the making of the contract, which correspondence was in evidence, to point to the conclusion that the letters which were the subject of bargain and sale, were written by persons who sought medical aid for disorders with which they were afflicted. Counsel for defendant had in court a large number of the letters, and his statements were not controverted that they related to infirmities and maladies of which the writers sought to be cured. The very nature of the contract in suit presupposes such to have been the fact. Ought courts of justice to lend their sanction to such a traffic? Suppose a physician—trusted and confided in as such in the community—were so far to forget or abuse the obligations of his profession, as to make the confidential communications of his patients the subject of bargain and sale; would any court listen for a moment to his complaint of non-performance of the contract, and aid him to recover the purchase price? Presumptively, the letters here in question, were confidential,—at least they were personal as between the writers and the receiver; and though it be true, as was said in argument, that authority is wanting directly applicable to the question here presented, I would not hesitate, on grounds of morality, and upon considerations of common justice, to make an example of this case, by putting upon it the stamp of judicial reprobation.

But there is another ground upon which, applying to the case a principle sanctioned by high authority, the court may, it seems to me, well

refuse to lend its aid to give legal effect to this transaction. The writers of these letters retained such a proprietary interest in them that they could not properly be made the subject of sale without their consent. The receiver of the letters had only a qualified property in them, and legal authority to sell them for a pecuniary consideration could only be maintained upon the theory of an absolute property right. Such a right did not exist.

At an early day in the history of equity jurisprudence, the question arose as to the right of the receiver of letters to cause them to be published without the consent of the writer, and as to the power of a court of equity to restrain such publication. It would be ill-timed and superfluous to review in detail all the cases on the subject, since they have been so thoroughly reviewed and discussed by Justice STORY in the case of *Folsom* v. *Marsh*, 2 Story, 100, and by Judge DUER, in the case of *Woolsey* v. *Judd*, 4 Duer, 379.

The leading cases in England on the subject are *Pope* v. *Curl*, 2 Atk. 342; *Thompson* v. *Stanhope*, 2 Amb. 737; *Perceval* v. *Phipps*, 2 Ves. & B. 19; and *Gee* v. *Pritchard*, 2 Swanst. 402.

In the first-mentioned case, Pope had obtained an injunction restraining the defendant, a London bookseller, from vending a book entitled "Letters from Swift, Pope, and others," and a motion was made to dissolve it. Some unknown person had possessed himself of a large number of private and familiar letters which had passed between Pope and his friends, Swift, Gay, and others, and they had been secretly printed in the form of a book which the defendant had advertised for sale. The case was argued before Lord HARDWICKE, and he continued the injunction as to the letters written by Pope. It was objected that the sending of letters is in the nature of a gift to the receiver, and therefore that the writer retains no property in them. But Lord HARDWICKE said:

"I am of opinion that it is only a special property in the receiver. Possibly the property in the paper may belong to him, but this does not give license to any person whatsoever to publish them [the letters] to the world; for, at most, the receiver has only a joint property with the writer."

Thompson v. *Stanhope* was the case of the celebrated Chesterfield letters, in which Lord BATHURST continued an injunction which had been previously granted, restraining the publication of the letters, on a bill filed by the executors of Lord Chesterfield to enjoin the publication.

In *Perceval* v. *Phipps*, a bill was filed praying an injunction to restrain the publication of certain private letters which had been sent by Lady Percival to the defendant Phipps. Lord ELDON granted an injunction, but the vice-chancellor, Sir THOMAS PLUMER, dissolved it, and laid down the doctrine that it is only when letters "are stamped with the character of literary compositions," that their publication can be enjoined. And he sought to bring the decisions in *Pope* v. *Curl* and *Thompson* v. *Stanhope*, within the scope of that doctrine, thereby making them inapplicable to the case before him.

Then came *Gee* v. *Pritchard*, which was a case presented to Lord ELDON, on a motion to dissolve an injunction which he had previously

granted, forbidding the publication by the defendant of a number of private and confidential letters, which had been written to him by the plaintiff in the course of a long and friendly correspondence. The motion to dissolve the injunction was denied.

Following the authority of *Perceval* v. *Phipps*, maintaining that the cases of *Pope* v. *Curl*, *Thompson* v. *Stanhope*, and *Gee* v. *Pritchard* involved only the principle of literary property, Vice Chancellor McCOUN in *Wetmore* v. *Scovell*, 3 Edw. Ch. 543, held that the publication of private letters would not be restrained, except on the ground of copyright, or that they possessed the attributes of literary composition, or on the ground of a property in the paper on which they were written. This view of the question received the sanction of Chancellor WALWORTH, in *Hoyt* v. *Mackenzie*, 3 Barb. Ch. 320; but these two cases stand in antagonism to the views expressed by Story in his work on Equity Jurisprudence, (volume 2, §§ 944–948,) and to the judgment of the same learned jurist in *Folsom* v. *Marsh*, *supra*. The opinion of Judge DUER in *Woolsey* v. *Judd*, *supra*, is an exhaustive and able review of the subject, and analysis of the cases; and he very satisfactorily shows that the decisions in *Pope* v. *Curl*, *Thompson* v. *Stanhope*, and *Gee* v. *Pritchard* proceeded upon the principle of a right of property retained by the writer in the letters written and sent by him to his correspondent, without regard to literary attributes or character. The case was one involving the right of the receiver of a private letter to publish it; and it is there clearly shown that the proposition settled as law by Lord ELDON in *Gee* v. *Pritchard*, was that "the writer of letters, though written without any purpose of publication or profit, or any idea of literary property, possessed such a right of property in them that they can never be published without his consent, unless the purposes of justice, civil or criminal, require the publication." Commenting on *Pope* v. *Curl*, the learned judge made the very just observation, that not only was there no intimation in the judgment of Lord HARDWICKE "that there is any distinction between different kinds or classes of letters, limiting the protection of the court to a particular class, but the distinctions that were attempted to be made, and which seem to be all the subject admits, were expressly rejected as groundless." Again, in discussing the effect of the decision in *Gee* v. *Pritchard*, Judge DUER observed:

"Two questions were raised and fully argued by the most eminent counsel then at the chancery bar: *First*, whether the plaintiff had such a property in the letters as entitled her to forbid their publication,—it being fully admitted that they had no value whatever as literary compositions, and that she never meant to publish them; and, *second*, whether her conduct towards the defendant had been such as had given him a right to publish the letters in his own justification or defense. These questions were properly argued as entirely distinct, and each was explicitly determined by the lord chancellor in favor of the plaintiff. The motion to dissolve the injunction was accordingly denied, with costs. It has been said that it was through considerable doubts that Lord ELDON struggled to this decision; but the doubts which he expressed related solely to the question whether it ought originally to have been held that the writer of letters has any property in them after their trans-

mission. He had no doubts whatever that such was the established law, and that he was bound to follow the decisions of his predecessors. He expressly says that he would not attempt to unsettle doctrines which had prevailed in his court for more than 40 years, and could not, therefore, depart from the opinion which Lord HARDWICKE and Lord APSLEY had pronounced in cases (*Pope* v. *Curl*, *Thompson* v. *Stanhope*,) which he was unable to distinguish from that which was before him. Subsequently, in support of his opinion that the plaintiff had a sufficient property in the original letters to authorize an injunction, he refers to the language of Lord HARDWICKE (quoting the exact words in *Pope* v. *Curl*) as proving the doctrine that the receiver of letters, although he has a joint property with the writer, is not at liberty to publish them without the consent of the writer; which is equivalent to saying that the latter retains an exclusive right to control publication. He then adverts to the decision in *Thompson* v. *Stanhope*, as following the same doctrine, and declares that he could not abandon a jurisdiction which his predecessors had exercised, by refusing to forbid a publication in a case to which the principle they had laid down directly applied. He then says: 'Such is my opinion, and it is not shaken by the case of *Perceval* v. *Phipps*;' and significantly adds: 'I think it will be extremely difficult to say where the distinction is to be found between private letters of one nature and private letters of another nature.' "

Such, also, was the view of Story; for he says, (sections 947, 948, Eq. Jur.,) speaking of private letters on business, or on family concerns, or on matters of personal friendship:

"It would be a sad reproach to English and American jurisprudence, if courts of equity could not interpose in such cases, and if the rights of property of the writers should be deemed to exist only when the letters were literary compositions. If the mere sending of letters to third persons is not to be deemed, in cases of literary composition, an utter abandonment of the right of property therein by the sender, *a fortiori*, the act of sending them cannot be presumed to be an abandonment thereof, in cases where the very nature of the letters imports, as matter of business, or friendship, or advice, or family or personal confidence, the implied or necessary intention and duty of privacy and secrecy. Fortunately for public, as well as for private peace and morals, the learned doubts on this subject have been overruled, and it is now held that there is no distinction between private letters of one nature and private letters of another;" citing *Gee* v. *Pritchard*.

In *Folsom* v. *Marsh*, *supra*, a case decided in the circuit court of the United States for the First circuit, Justice STORY held that an author of letters or papers of whatever kind, whether they be letters of business or private letters, or literary compositions, has a property therein, unless he has unequivocally dedicated them to the public, or to some private person; and no person has any right to publish them without his consent, unless such publication be required to establish a personal right or claim, or to vindicate character. "The general property," he says, "and general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the correspondence remains in the writer and his representatives; * * * *a fortiori*, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion. If the case of *Percival* v. *Phipps*, 2 Ves. & B. 21–28, before the then vice-

chancellor, (Sir THOMAS PLUMER,) contains a different doctrine, all I can say is that I do not accede to its authority; and I fall back upon the more intelligible and reasonable doctrine of Lord HARDWICKE in *Pope* v. *Curl*, 2 Atk. 342, and Lord APSLEY in the case of *Thompson* v. *Stanhope*, 2 Amb. 737, and of Lord Keeper HENLEY EDEN in the case of *Duke of Queensberry* v. *Shebbeare*, 2 Eden, 329, which Lord ELDON has not scrupled to hold to be binding authorities upon the point in *Gee* v. *Pritchard*, 2 Swanst. 403."

If this be the law, where the right of publication is in question, assuredly it is not less so in a case where third persons, having obtained possession of private letters, are seeking to make them the subject of sale and purchase, without the consent of the writers. Nor do I think the court should hesitate to apply the principle here, although the writers are not themselves interposing for equitable relief, since, if the property right is yet retained by the writers, no lawful sale of the letters can be made. In *Eyre* v. *Higbee*, 22 How. Pr. 198,—decided by Judges GOULD, MULLIN, and INGRAHAM, all concurring,—it was adjudged that letters in regard to matters of business or friendship, although they pass to an executor or administrator, are not assets in their hands, and cannot be made the subject of sale or assignment by them. This judgment of the court was made expressly to rest upon the principle that "the property which the receiver of letters acquires in them is not such a property as the holder must have in order to make them assets."

Motion for a new trial overruled.

UNSELL *v.* HARTFORD LIFE & ANNUITY INS. CO.

(*Circuit Court, E. D. Missouri, E. D.* October 14, 1887.)

1. INSURANCE—FORFEITURE—WAIVER.
   When a policy of life insurance provides that payments of premiums should be made on a given day or days, and that, in default of such payment at the time specified, the policy should be void, but the company issuing such policy afterwards pursues a practice of accepting premiums after the time of payment specified in the policy, without insisting upon the forfeiture, then such practice of receiving premiums overdue operates as a waiver of the right of forfeiture.
2. SAME.
   A receipt of an insurance company for an overdue premium contained the following condition: "It being understood that the receipt by this company of payments after date due is only on condition that the member is alive, and in good health, at the date of such receipts." *Held*, that such receipt, even though it be for an assessment paid after it was due, does not tend to show a waiver by the company of its right of forfeiture for non-payment of dues at maturity, except in the event that the assured is alive and in good health when payment is tendered.
3. INSURANCE—PROOF OF DEATH—WAIVER.
   Plaintiff, in an action on a policy of insurance, was under no obligations to make out formal proofs of death of her intestate after the insurance company had advised her that they did not recognize the policy as being in force, and had refused payment on that ground.

4. INTEREST—ON INSURANCE POLICY.
In estimating damages in an action on a policy of insurance, interest may be computed on the face of the policy from the time it was payable.

Geo. D. Reynolds, for plaintiff.
Krum & Jonas, for defendant.

THAYER, J., (*charging jury orally.*) This case lies within a very narrow compass, under the view which the court takes of it, and has taken from the beginning. The suit is on six policies, or, as they are termed, "certificates of membership," issued by the Hartford Life & Annuity Insurance Company to E. J. Unsell. It seems that these policies contemplated payments of three kinds, to be made by the holder of the same.

(1) He was required to pay $10 on each $1,000 of insurance taken out, to make up what is known as a trust or guaranty fund. With that class of payments you have nothing to do, as no charge of a default in such payments has been made.

(2) As losses occurred, the holder of these policies of insurance was required to stand his *pro rata* assessment, to make up a fund to pay such losses. You have nothing whatever to do with that class of payments. For aught that appears, those payments were all duly made.

The policy also required the assured to pay $3 per annum for each thousand dollars of insurance, which went to make up a fund to pay the operating expenses of the company, and those payments were to be made in advance. The policy contemplated that those annual dues, as they are called, should be paid for the full year in advance, or paid monthly in advance, or quarterly in advance, just as the parties might agree. The controversy here is over the payment of those annual dues. One condition of the policies is as follows:

"The holder of this certificate further agrees and accepts the same upon the express condition that if either the monthly dues, assessments, or the payment of the $10 towards the safety fund as hereinbefore required, are not paid to said company on the date due, then this certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force, either from said company or the trustees of the safety fund."

Now, the answer in this case states that the annual dues were all paid up to and including the thirty-first of December, 1885; that the annual dues which matured on the following day—that is, January 1, 1886,—were not paid, and were not paid during that month; and that the assured died on the twenty-eighth of January, 1886; and that, by virtue of the provision of the policy above stated, the policy was null and void, and of no effect when he died.

That is a perfectly good defense to this action, if it is true, and it is conceded by the plaintiff that the dues that matured on January 1, 1886, were not paid. But the plaintiff seeks to escape from the forfeiture of the policy under that condition, by saying that the particular provision of the policy which I have just read to you had been waived by the defendant company, and for that reason the non-payment of the

dues on January 1, 1886, did not work a forfeiture of the policy, and the sole question that you must determine is whether there was or was not such a waiver. There is a rule of law applicable to cases of this kind, and it is, in substance, as follows:

When a policy of life insurance provides that payments of premiums shall be made on a given day or days, and further provides that, in default of the payment of such premium on the day or days specified, the policy shall thereupon become void, or null and void, and the company issuing such policy afterwards pursues a practice of accepting premiums after the time of payment specified in the policy, without insisting upon the forfeiture, then such practice on the part of the company, of receiving premiums which are overdue, operates as a waiver of the right of forfeiture.

This rule rests upon the ground that the company by its conduct, in accepting premiums after they are due, has led the insured to believe that it will not insist on a forfeiture if the premium is not paid on the day that it is due, and that it does not intend to exercise that right, and, for that reason, that it would be unjust, under such circumstances, to insist upon a forfeiture for non-payment of the premiums, after the assured, by the practice of the company, has been lulled into a state of fancied security. It is that rule which the plaintiff invokes to recover on these policies, and she must stand or fall according as she brings her case within that rule.

She has offered in evidence a number of receipts for annual dues under the policies in suit, covering a period from October 10, 1881, down to December 31, 1885. The purpose of this proof is to satisfy you that the defendant received annual dues from the deceased after they were due, on so many occasions, or under such circumstances, as to warrant you in finding, according to rule last stated, that it waived its right to forfeit the policies in suit for the non-payment of annual dues at maturity. These, then, are the questions which you will have to determine: (1) Did the defendant receive annual dues after they fell due? and (2) did the defendant receive annual dues on so many occasions, or under such circumstances, as would fairly warrant the assured in believing that the defendant had abandoned, or did not intend to insist upon, a forfeiture of the policy, even though annual dues were not paid at maturity?

To warrant you in finding that the defendant waived its right of forfeiture for non-payment of dues at maturity, the plaintiff must satisfy you (and the burden is upon her to show) that the defendant received annual dues after maturity on so many occasions, or under such circumstances, as would fairly and reasonably induce the deceased to believe that the company did not intend to insist upon its right of forfeiture, even though the annual dues were not paid at maturity. If the plaintiff has succeeded in satisfying you that such was the case, then you must find in her favor. If she has failed to satisfy you of such fact, then you should find for the defendant.

There is a class of receipts before you, gentlemen, being receipts for dues that were paid apparently after maturity, which cannot, in any view of the case, be regarded in themselves as establishing an absolute

waiver, and you will not so regard them. I refer to a class of receipts which contain a certain condition. I will read you one of the receipts as a sample. It is as follows:

"HARTFORD, CONN., January 12, 1884.

"Received of E. J. Unsell monthly dues on certificates 24,981 to 24,985, five dollars; dues January 1, 1884, to May 1, 1884, in the safety fund department of this company."

This is the clause to which I direct your attention:

"It being understood that the receipt by this company of payments after date due is only on condition that the member is alive, and in good health, at the date of such receipts. [Signed] "STEPHEN BALL, Secretary."

Now, gentlemen, a receipt of that kind, even though it be for dues paid after they were due, (and it purports to be for such dues,) does not tend to show an absolute waiver by the company of its right of forfeiture, and these receipts were not admitted by the court on that theory. Receipts in this form only tend to show that the company would accept payments after due, and after a right of forfeiture had accrued to it, in the event that the member was alive and in good health. They were admitted by the court because I deemed it to be the fairest course to lay all the receipts before you, (those of this form as well as those in other forms,) in order that you might see the whole course of dealing between the parties, with reference to the payment of annual dues, and be the better able to determine intelligently the question of waiver which is hereby submitted to you.

Now, gentlemen, if on the testimony in the case you are of the opinion that the plaintiff has failed to make out a waiver by the company of the right of forfeiture, and you will apply to the determination of that question the principles I have defined, then you will find a verdict for the defendant. If the plaintiff has established such waiver to your satisfaction, then you will find in her favor. If you find in her favor, you will have to assess her damages. It has transpired on the trial that after the death of her husband she communicated with the company, and asked for forms to make out proofs of loss, and was informed that the company did not recognize any liability to her. In estimating the damages in the case, you may compute interest on the face of the policies from a date 90 days after the date of the communication which she received from the company, to the effect that they did not recognize any liability under these policies, as the policies were payable 90 days after the receipt of proofs of loss. Plaintiff was under no obligations to make out formal proofs of death after the company had advised her that they did not recognize the policy as being in force, and had refused payment on that ground. There are two counts in the petition, and you will have to assess the damages under each separately, and state the damages separately in your verdict.

In my judgment, under the proof in this case, if you find for the plaintiff, she will be entitled to recover $5,000 under the first count, and $5,000 under the second, together with interest, computed in the man-

ner I have directed. There is no evidence in this case to warrant you in imposing 10 per cent. damages as a penalty for a vexatious refusal to pay the policy, and you will not award any such penalty, even though you should be of the opinion the plaintiff is entitled to recover.

BLOCH *v.* PRICE and others.

(*Circuit Court, E. D. Missouri, E. D.* October 14, 1887.)

JUDGMENT—IN FAVOR OF CO-DEFENDANT—RES ADJUDICATA.

In an action brought in a Missouri state court against four defendants, judgment was rendered in favor of one of them and against the others, as is permitted by Code Proc. Mo. § 3673. The latter made a motion for a new trial, and in arrest of judgment, which was overruled in the court below, but sustained on appeal on the ground of insufficient evidence. The action was subsequently dismissed in the state court, but recommenced in the federal court against all four defendants on the same cause of action. *Held*, that the former judgment, as far as it related to the defendant in whose favor it was rendered, not having been appealed from, was a bar to the action against him in the federal court.

Mills & Flitcraft, for plaintiff.
C. M. Napton, for defendants.

THAYER, J., (*orally.*) In the case of *A. Bloch* against *William M. Price, Stephen G. Price, Darwin W. Marmaduke, and Leslie Marmaduke*, composing the alleged firm of Price, Marmaduke & Co., Darwin W. Marmaduke has filed a plea of former adjudication, and the testimony relied upon to support the same was submitted the other day for the purpose of having the court determine, in advance of the trial, whether the testimony was sufficient to support the plea. I have looked into the record of the former case, and I find that it was a suit in which the four defendants last named were sued on what was alleged to be a joint contract; that, on the trial of the case in the state court, a judgment was entered in favor of the defendant Darwin W. Marmaduke, and against the other defendants; that it was so entered in accordance with section 3673 of the Missouri Code of Procedure, which permits judgment to be given "*for or against one or more of several plaintiffs, and for or against one or more of several defendants.*"

I find from an examination of the record that no motion for a new trial, or in arrest of judgment, was filed with respect to the judgment in favor of Darwin W. Marmaduke, and no appeal was taken from the judgment in his favor. The record shows that a motion for a new trial and in arrest of judgment was filed with respect to the judgment against the other defendants, and, the same having been overruled, that an appeal was taken by said other defendants from the judgment rendered against them, and that the judgment was reversed by the appellate court. But

it was not reversed, because the judgment was erroneously entered as against only three of the four defendants, when it should have been entered against all. It was reversed solely upon the ground that there was no evidence in the opinion of the court to warrant a judgment even as against the three defendants as to whom the lower court awarded judgment. Subsequently, there was a dismissal of the suit in the state court, and an action has since been brought on the same cause of action against all four of the defendants in the federal court.

Upon this state of facts I am of the opinion that the judgment in the state court in favor of D. W. Marmaduke is a bar to any further proceeding as against him on the same cause of action. The record of the suit in the state court, in my judgment, amply supports the plea of former adjudication. There has been one full and fair trial of the issue, so far as he is concerned, in the state court, and a separate judgment entered in his favor in accordance with a rule of practice that is expressly sanctioned by a statute of the state. No substantial reason has been given or can be given why the reversal of the judgment obtained against three of the defendants should operate as a reversal of the judgment entered in favor of D. W. Marmaduke. If the plaintiff desired to contest the judgment in favor of D. W. Marmaduke, he should have taken an appeal therefrom. Not having done so, that judgment is now a bar to any further proceeding on the same cause of action. There are some decisions in the state of Missouri to the effect that a judgment in a suit at law is a unit, and if reversed as to one defendant is necessarily reversed as to all. *Smith* v. *Rollins*, 25 Mo. 408; *Dickerson* v. *Chrisman*, 28 Mo. 135; *Pomeroy* v. *Betts*, 31 Mo. 419; *Insurance Co.* v. *Clover*, 36 Mo. 392. These decisions, however, have no just application to a case like the present, in which two judgments were entered in a suit at law, one in favor of a certain defendant, and the other against certain defendants, pursuant to a statute that expressly authorized such practice.

CENTRAL TRUST CO. OF NEW YORK *v.* TEXAS & ST. L. RY. CO.

(*Circuit Court, E. D. Missouri, E. D.* October 10, 1887.)

1. MASTER AND SERVANT—DEFECTIVE MACHINERY—KNOWLEDGE.
   Plaintiff, while assisting as a brakeman in making up a train by the direction or with the consent of the yard-master, who had authority to employ necessary assistants in his department, was thrown violently from the end of the train by the sudden slack of the train caused by the engineer reversing the engine to arrest the speed of the train as it was running down grade, such reversal being rendered necessary because of a defect in a brake which had existed for four or five months, and was known to the foreman of the round-house, whose duty it was to repair the defect, but was not known to plaintiff. *Held*, that plaintiff was entitled to recover for the injuries caused by the fall.
2. SAME—LIABILITY FOR NEGLIGENCE—VOLUNTEER—TRESPASSER.
   A person who without pay assists as a brakeman in making up a railroad train by the direction or with the express permission of a yard-master, who

has authority to employ necessary assistants in his department, is not a trespasser on the train, but a servant of the company, and it will be liable to him for an injury resulting from the use of a defective brake.

3. EQUITY—MASTER'S REPORT—FINDING OF FACT.

When a claim preferred by intervening petition against receivers appointed in an equitable proceeding is referred to a master for hearing, and is of such nature as would ordinarily be tried by a jury, the court will not, on exceptions to the master's report, set aside his finding on an issue of fact, unless the testimony returned produces a firm conviction in the mind of the court that the master's finding is erroneous, and that there is not sufficient testimony to sustain it.

On Exceptions to Master's Report.

Eleneious Smith, for Central Trust Co.

Phillips & Stewart, for Texas & St. L. Ry. Co.

C. G. B. Drummond and *James P. Dawson*, for intervenor.

THAYER, J., (*orally.*) We have examined the report of the master on the intervening petition of Edward Kennedy in the case of the Central Trust Company against the Texas & St. Louis Railway Company in Missouri and Arkansas, and we have also examined the exceptions taken to that report. From an examination of the master's report it appears that he has made the following findings of fact: That the intervenor, at the time he sustained the injury complained of, was lawfully on board of a train that was being operated by the receivers at Birds Point, Missouri, and was serving them in the capacity of a brakeman; that the brakes of the engine attached to the train upon which he was working were out of repair and in a defective condition,—the defect being of such a character that, as the train was backing into the depot yard, on a down grade, the engineer found it necessary to reverse the engine in order to arrest the backward motion of the train, (within the desired space;) that by reason of the reversal of the engine, when the slack of the train was taken up, a sudden shock or jerk was communicated to the rear car of the train on which the intervenor was standing, which precipitated him from the end of the car to the track, and led to the loss of one of his limbs. The master has further found that the defect in the brake of the engine had existed for a period of four to five months; that it was known to the foreman of the round-house, whose duty it was to repair the defect, but that the particular defect in the brake was not known to the intervenor, and he has accordingly recommended an allowance in favor of the intervenor in the sum of $3,500. The report contains several other findings of fact confirmatory of other charges of negligence made in the intervening petition, but it is unnecessary to allude to any other finding, as the findings I have just stated, if they are supported by the testimony, are sufficient to warrant the recommendation of the master.

The legal conclusion to be deduced from the findings of the master, as before stated, is that the receivers violated their duty to the intervenor in failing to supply machinery and appliances that were ordinarily safe and suitable for the work in hand, which neglect of duty was the proximate cause of the injury sustained. In other words, the findings of the master bring the case clearly within the rule that an employer is liable

to an employe for injuries sustained by reason of defects in machinery, tools, or appliances which render them unsafe for the particular uses to which they are applied, provided the defect is known to the employer, or might have been known by the exercise of ordinary care. *Hough* v. *Railway Co.*, 100 U. S. 213; *Railway Co.* v. *McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 932.

Turning, now, to the question whether the master's findings were warranted by the evidence, it may be remarked, in the first instance, that there is no reason whatever to doubt the accuracy of the master's finding that the brakes upon the engine were out of repair, and that they had been out of repair for some months, and that the fact was known to the foreman of the round-house, whose duty it was to repair the brake; nor is there any reason to question the accuracy of the master's finding that the intervenor was thrown from the train by a sudden shock communicated to the car on which he was standing, by suddenly stopping the motion of the train. There is a conflict of evidence upon the point whether on the occasion of the injury the engineer reversed his engine to stop the backward motion of the train, in consequence of the brake being defective, and whether such reversal caused a greater shock than would have been occasioned if the brake had been in order, and the train had been stopped in the usual manner by the use of the brake alone. In other words, there is a controversy as to whether the defect in the brake was the proximate cause of the injury. The master discusses the evidence on that point, and concludes that it is established by a preponderance of evidence that the engineer reversed the engine on the occasion of the accident. We have reviewed the evidence on that issue, and while we are not prepared to say with the master that there is a preponderance of evidence, yet we are clearly of the opinion that there is such a conflict in the testimony on that issue that the court would not be authorized to overrule the master's finding. In this connection it is proper to say that in this class of cases, which present issues that are ordinarily triable by a jury, we will not set aside the finding of a master on an issue of fact, unless the testimony on which the finding is based is of such character as to produce a firm conviction in our minds that the finding is erroneous. In the present case we have no such conviction after reading the testimony.

Objection is also made to that part of the master's report which finds that intervenor at the time of the injury was lawfully on the train, serving the receivers in the capacity of brakeman. The receivers' counsel contends, in effect, that intervenor was a trespasser on the train, and that the receivers owed him no duty. We have also examined the evidence on that point, and cannot agree with the receivers' counsel. The evidence shows, in our judgment, that the intervenor was either directed by the yard-master to assist him in the capacity of brakeman in making up the train in question, or that intervenor volunteered to render such assistance, and that the yard-master accepted his services, and gave him permission to so assist. Inasmuch as the yard-master was shown to have authority to employ necessary assistants in his department, it makes no

difference in our estimation whether intervenor was a mere volunteer serving with the express permission of the yard-master, or whether he was expressly ordered to assist in the work undertaken. In either event he was not a trespasser on the train. He stood in the relation of a servant of the receivers, and they owed him the same duty that they owed to any other employe. Whart. Neg. § 201, and cases cited.

The result is that the exceptions to the master's report will be overruled, and the report will be confirmed.

SOUTHERN PAC. R. Co. *v.* POOLE and others.

SAME *v.* DAVIS and others.

(Circuit Court, N. D. California. August 22, 1887.)

1. PUBLIC LANDS—RAILROAD GRANTS—SOUTHERN PACIFIC RAILROAD COMPANY.
The land grant to the Southern Pacific Railroad Company of California under the act of congress of March 3, 1871, incorporating the Texas Pacific Railroad Company, is valid; and a road having been completed from Tehachapi pass, along the line provided for, to the Colorado river, as required by the act, the title to the lands granted has fully vested in the Southern Pacific Railroad Company of California.

2. SAME.
The twenty-third section of said act (16 St. 579) grants to the Southern Pacific Railroad Company of California "the same rights, grants, and privileges as were granted to the same company by the act of July 27, 1866, incorporating the Atlantic & Pacific Railroad Company." And those "rights, grants, and privileges" were the same, along its authorized line, as were granted to the Atlantic & Pacific Railroad Company. 14 St. 299, § 18.

3. SAME—AMENDING ARTICLES OF INCORPORATION.
The original articles of association of the Southern Pacific Railroad Company of California did not specify, as one of the objects of the incorporation, the construction of a line of railroad from Tehachapi pass to the Colorado river, in the south-eastern part of the state; but, at the time of the passage of the act of congress of 1871, incorporating the Texas Pacific Railroad Company, there was in force the act of the legislature of California of March 1, 1870, authorizing any corporation then existing, or thereafter to be formed, to amend its articles of association, by making and filing amended articles in the same office where the originals were filed; also, a statute authorizing railroad corporations to consolidate with each other. And the articles of association of said company were amended immediately after the passage of the Texas Pacific act, so as to embrace the road therein provided for in the objects of the corporation, and the company consolidated with other companies in pursuance of the statute. The road constructed as provided for in the Texas Pacific act was thereafter completed in accordance with the provisions of the act. *Held*, that the proceedings were valid, and the road afterwards built was constructed in pursuance both of the laws of California and of the acts of congress, and that the title to the lands granted vested in the Southern Pacific Railroad Company of California, as it existed after the amendment of its articles of association, and its consolidation with other roads.

4. SAME—EFFECT OF FILING MAP OF GENERAL LOCATION.
The filing of the map of general location of the line of the road, by the Southern Pacific Railroad Company of California, in pursuance of the act of congress, inured to the benefit of the Southern Pacific Railroad Company of

California, as it existed after its consolidation, and the amendment of its articles of association, as the successor in interest of the corporation, as it existed at the time of the passage of the act of congress, and of the filing of said map, even if the two corporations cannot be considered as, technically, the same corporation.

(*Syllabus by the Court.*)

In Equity.

Joseph D. Redding, for complainant.

J. P. Meux, (*Edwin Baxter* and *G. Wiley Wells*, of counsel,) for respondents.

Before SAWYER, Circuit Judge.

SAWYER, J. The case of *Railroad Co.* v. *Orton*, 6 Sawy. 157, [*post*, 457,] involved the validity of the land grant to the Southern Pacific Railroad Company, from San Jose to the intersection of the road with the Atlantic & Pacific road at the Needles, on the Colorado river, under the act of congress of July 27, 1866, incorporating the Atlantic & Pacific Railroad Company. The law was elaborately examined and discussed in that case. The decision was rendered in 1879, some eight years ago; and as the supreme court has never been called upon to review the law as then laid down, although vast interests were involved, and the litigation was by no means conducted without acrimony, the conclusions reached seem to have been acquiesced in. Some other cases were soon after tried in this court, in which the law, as adopted in that case, after further discussion by eminent counsel, was adhered to. I shall, therefore, regard that decision as the settled law of the land, so far as it applies to the land grant under the act incorporating the Atlantic & Pacific Railroad Company, and so far as the principles therein adopted are applicable to railroad land grants under other acts of congress of a similar character.

The present case involves the validity of the land grant under the act of congress of March 3, 1871, incorporating the Texas Pacific Railroad Company; by the twenty-third section of which the Southern Pacific Railroad Company of California is authorized to build a railroad from Tehachapi pass, by the way of Los Angeles, to connect with the Texas Pacific Railroad on the Colorado river, at the south-eastern corner of the state. The twenty-third section of this act (16 St. 579, § 23) grants to the company in aid of the work "the same rights, grants, and privileges as were granted to the Southern Pacific Railroad Company of California by the act of July 27, 1866," incorporating the Atlantic & Pacific Railroad Company. And those "rights, grants, and privileges" were the same along its authorized line as were granted to the main road—the Atlantic & Pacific Railroad. 14 St. 299, § 18. Substituting the words "Southern Pacific Railroad Company of California" for the words "Atlantic & Pacific Railroad Company," in section 3 of the act of 1866, incorporating the Atlantic & Pacific Railroad Company, and striking out the words inapplicable, we have what the act of 1871, incorporating the Texas Pacific Railroad Company, granted to the Southern Pacific Rail-

road Company of California, for constructing the line from Tehachapi pass, by way of Los Angeles, to Fort Yuma. It will then read as follows:

"And be it further enacted, that there be, and hereby is, granted to the Southern Pacific Railroad Company of California, *its successors and assigns*, for the purpose of aiding in the construction of said railroad and telegraph line * * * and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of * * * ten alternate sections of land per mile on each side of said railroad line * * * wherever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land-office." 14 St. 294, § 3.

See *Railroad Co.* v. *Dull*, 10 Sawy. 511, 22 Fed. Rep. 489, and cases cited on this point, and on the character of the grant.

The original articles of incorporation of the Southern Pacific Railroad Company of California, filed before the passage of either the Texas Pacific act of 1871, or the Atlantic & Pacific act of 1866, stated that it was formed—

"For the purpose of constructing, owning and maintaining a railroad from some point on the bay of San Francisco, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, *to the town of San Diego*, in said state; thence eastward, through the county of San Diego, to the eastern line of the state of California, there to connect with a contemplated railroad from the eastern line of the state of California to the Mississippi river."

As neither the act of 1866 nor of 1871 had then been passed, although one or both were in contemplation, it could not be known at what point on the eastern line of the state a road could connect; hence, the line of a road like the contemplated one, intended to connect with a road to the Mississippi, and its terminus on the eastern line of the state, could not be definitely located, and it was, necessarily, left indefinite. It will be seen that a direct line of road from Tehachapi pass, through Los Angeles, thence on to the Colorado river, could not pass through San Luis Obispo county, to the city of San Diego, although it would pass through the other counties named and through the eastern part of San Diego county.

After thus filing articles of association, the Atlantic & Pacific act was passed in 1866, and the Texas Pacific act on *March 3, 1871*, whereby the point of connection of both roads on the eastern line of the state could be, proximately, located. On March 1, 1870, the legislature of California passed a general act, authorizing any corporation already formed, or thereafter to be formed, to amend its articles of association, by making and filing amended articles in the same office where the originals were filed. St. 1869–70, 107. And the general statutes providing for incorporation of railroad companies authorized any one or more of such corporations to consolidate into one, carrying with them all the assets, rights, etc., to the consolidated corporation. As we have seen, the Texas Pacific act was passed *March 3, 1871*. The Southern Pacific Rail-

road Company of California, in order to secure the grant to it made by this act, promptly, within a month afterwards, filed its map of general location with the commissioner of the general land-office. And as the line of the road, as set out in the original articles of association, would not run from Tehachapi pass through Los Angeles, and thence by direct line to the Colorado river, or from San Jose by direct route to the Needles, the point of intersection with the Atlantic & Pacific Railroad, in order to remove all question as to its authority under the laws of California, as well as the acts of congress, to build roads on the lines specified in the two acts of congress, and to avail themselves without question of these respective grants, on April 15, 1871, within a month after the passage of the Texas Pacific act, in pursuance of the said general act of California of 1870, authorizing any corporation to amend its articles of association, filed, in all respects as prescribed by the act, amended articles of association, and articles of consolidation with sundry other roads, in which the object and purpose of the corporation, as expressed in the amended articles, are as follows:

"Art. 2. The object and purpose of said new corporation shall be to purchase, construct, own, maintain, and operate a continuous line of railroad from the city of San Francisco, in the state of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego, to some point on the Colorado river, in the south-eastern part of the state of California, a distance of seven hundred and twenty miles, as near as may be; also, a line of railroad from a point at or near Tehachapi pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, a distance of three hundred and twenty-four miles, as near as may be; also, a line of railroad from the town of Gilroy, in the county of Santa Clara, in said state, passing through said county, and the counties of Santa Cruz and Monterey, to a point at or near Salinas city, in said last named county, a distance of forty-five miles, as near as may be; also, such branches to said lines as the board of directors of said new corporation may hereafter consider advantageous to said corporation, and direct to be established." 6 Sawy. 169, *post*, 464.

Thus, under the amended articles, the company, whatever its powers might have been under the old articles, was fully authorized and empowered to build both the lines from San Jose, to connect with the Atlantic & Pacific at the Needles, and the line from Tehachapi pass, through Los Angeles, on a direct line to Fort Yuma, and there to connect with the Texas Pacific. The very purpose of the amendment was to remove all doubt as to its right, under the state law, to construct those lines, and to enable the company to build the road, strictly in accordance with the laws of California, as it is insisted by the defendant that the recent act requires, and it was adopted immediately after the passage of the Texas Pacific act, when it could for the first time be known, proximately, where the point of connection must be. Very soon after this amendment of the articles of association, the Southern Pacific Railroad Company formally passed a resolution accepting the grant, and directed it to be forwarded to the secretary of the interior at Washington.

The road was, subsequently, within the time prescribed by the statute, fully completed, put in operation, and accepted by the president,

as prescribed in the act. It has ever since been in operation, in all respects as required by the law, and the land grant, if valid, has become fully vested under the acts of congress.

The defendant demurs to the second amended bill, stating, with others, substantially, the foregoing facts, and insists, that, upon this state of facts, the grant is invalid. The ground of invalidity asserted, and relied on, is, that at the date of the passage of the act of congress, March 3, 1871, the Southern Pacific Railroad Company was not authorized by its charter to build the line of road from Tehachapi through Los Angeles, to connect with the Texas Pacific road, and as by the twenty-third section of the act, that company was "only authorized, *subject to the laws of California*, to construct a line of railroad from a point at or near Techachapi pass," etc., the grant was, necessarily, inoperative and void. It does not appear to us that there is even plausibility in this point. It may be conceded, for the purposes of the argument, that the company did not, at the moment of the passage of the act, have a legal capacity, by the laws of California, to construct the road on that line. There were laws in force at that moment, however, that enabled the corporation, by its own voluntary act alone, without any further legislation, to qualify itself to construct the road strictly in all particulars "subject to the laws of California." It was authorized by its own act to amend its articles of incorporation, so as to enlarge the scope of its objects to such an extent as to embrace this road, if not before included within its specified purposes, and it, immediately, did so. The road was constructed in all respects in strict conformity to the laws of California, as they then existed. The act of filing a map of the general location was an act performed, not under the laws of California, but under the provisions of the act of congress, by the corporation designated in the act, as fixing the time when the right should attach, as against other parties seeking to acquire an interest in the lands, and we have no doubt that it was effectual for the purpose.

It is also urged, that upon the amendment of the articles of association and the consolidation with other corporations, but under the same name, a new corporation was created; and that the corporation that built the road is, therefore, not the same corporation as that to which the grant was made. Concede this to be so, technically considered, for the purposes of the argument, it does not follow that the grant fails. Even on that theory, the corporation which built the road is the successor in interest of the corporation named in the act of congress. So far as the amendment is concerned, the corporation is really the same, with enlarged powers, or larger scope in its purposes; else it would not be an amendment, but a dissolution and creation of another independent corporation.

It is, certainly, contemplated by the statute that the corporation, with amended articles, shall continue to hold and to administer the property and assets, succeed to all the rights and franchises of the former corporation, and be charged with all its liabilities. So the consolidated corporation was designed to merge all the property, assets, rights, fran-

chises, and liabilities of the former corporations, which are the constituents of the new one.

Besides, section 2 of the Atlantic & Pacific act, imported into the Texas Pacific act, by virtue of section 23 of the latter, and section 18 of the former, giving to the Southern Pacific Railroad Company of California "the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions" prescribed in the former act, expressly says that the lands are granted to the company, "*its successors and assigns.*"

If the consolidated company, with amended articles of incorporation, is not, technically, the same corporation referred to in the Texas Pacific act, it is, substantially and practically, so. If not, it is, certainly, its successor, or assign, and is thus within the express provisions of the grant.

The Central Pacific and Western Pacific companies have also consolidated, and all these companies that have built roads under these land grants have been treated both by the United States government, and the state of California, as having acted in pursuance of the laws both of congress, and of the state. The roads constructed by them have been duly accepted by the president, in the mode prescribed by law, as having been properly constructed by the congressional grantees, under the several acts of congress.

The Central Pacific Railroad Company had no authority at all, under its certificate of incorporation, to construct all that part of its road from the east line of the state of California to Ogden,—over 600 miles. *Sinking Fund Cases*, 99 U. S. 728. Yet its road has been completed and accepted, and the lands granted by the act of congress to a large extent patented.

Notwithstanding the fact, that the building of the Central Pacific Railroad from the state line to Ogden, is not mentioned in the articles of incorporation of the company, the supreme court of the United States, in the Sinking Fund and other cases, has, repeatedly, recognized the capacity of the Central Pacific Railroad Company to lawfully construct this part of its road, and receive the aid provided; and has held the corporation to all its responsibilities under the acts of congress, which it could not have, lawfully, done, if all these acts were void, for want of a legal capacity in the company to do the work, accept the bonds and lands granted, and incur the liabilities thereby imposed. If this land grant in question is void upon the grounds stated, are all the grants to the Central Pacific, Western Pacific, and Southern Pacific, and such of the eastern roads receiving grants as have amended their charters and consolidated, also void, for similar reasons?

If the position urged be correct, are the purchasers and present owners of the many millions of acres of land so granted, and sold, by these several companies wholly without title? These grants should not be nullified, and the vast interests that have grown up under them, should not be destroyed, or disturbed, except upon grounds less purely technical, and far more substantial, than those urged to show the invalidity

of the land grant now under consideration. But this is not a question that can be raised by the defendant. Whether the Southern Pacific Railroad Company has transcended its powers, and received a grant of land to which it was not entitled; whether it has abused, misused, or exceeded its corporate powers,—is a question between it and the state. The state has not complained. The United States, and the state, being satisfied, strangers cannot complain. See *Railroad Co.* v. *Orton*, 6 Sawy. 180, (*post*, 470,) where this question is fully discussed, and the numerous authorities sustaining the position cited.

In our judgment, there is no merit in the demurrer, and it must be overruled. It is so ordered, with leave to answer on the usual terms.

SOUTHERN PAC. R. CO. *v.* ORTON.[1]

(*Circuit Court, D. California.* December 15, 1879.)

1. SOUTHERN PACIFIC RAILROAD GRANT.
   The road, to aid the construction of which a land grant was made to the Southern Pacific Railroad Company by the act of congress of July 27, 1866, incorporating the Atlantic & Pacific Railroad Company, was intended by congress to be a road connecting with the contemplated Atlantic & Pacific Road at such point on said road, near the intersection of the thirty-fifth parallel of latitude and the eastern line of the state, as the Southern Pacific Railroad Company should deem most suitable for a railroad line from said point of connection to San Francisco; the said point of connection, and the line of road thence to San Francisco, to be determined and located by the Southern Pacific Railroad Company.

2. LOCATION OF ROAD.
   The line of the road designated on the plat thereof, filed by the Southern Pacific Railroad Company in the office of the commissioner of the general land-office on January 3, 1867, is located in pursuance of the terms of said act of congress, and is properly located under said act.

3. EFFECT OF GRANT AND FILING PLAT.
   The grant made by said act is a *present general* grant of the quantity of land specified in the act; and immediately upon filing the plat, the *general* grant became *specific*, and attached to all the odd sections of land situate within the prescribed limits on each side of the designated line, then owned by the government, to which no other right had attached prior to the filing of said plat.

4. WITHDRAWAL FROM PRE-EMPTION.
   Immediately upon the filing of the plat, the odd sections designated were withdrawn from pre-emption or other disposition, by force of the act itself, *proprio vigore*, without any order of the secretary of the interior, or notice other than that afforded by the filing of the plat itself.

5. SAME.
   The lands having been set apart to aid in the construction of a railroad, and absolutely and unconditionally withdrawn from pre-emption, no pre-emption right could be acquired in them while so situated, even if the grantee at the time was unauthorized under the state law to take a perfect title.

6. POWER OF SECRETARY TO RESTORE LANDS WITHDRAWN FROM PRE-EMPTION.
   The withdrawal of the lands from pre-emption by the statute being absolute and without conditions, the secretary of the interior had no power to repeal or modify the statute, or restore the lands to their former condition. The withdrawal being unconditional by force of the statute, they could only be reopened to pre-emption by statutory authority.

[1] This opinion was filed before commencement of publication of the Federal Reporter, and is now published in connection with the case of Southern Pac. R. Co. v. Poole, *ante*, 451.

7. TITLE OF CORPORATION TO LANDS—TRESPASSERS.
Where a corporation, authorized to receive grants of land for the purposes of the corporation, brings an action against a trespasser to recover possession of lands granted to it, such trespasser will not be heard to question the title of the corporation, on the ground that it had no authority to take them. This is a question between the state and the corporation.

8. MISUSE OF CORPORATE FRANCHISE.
Whether a corporation has misused or abused its franchise is a question between the state and the corporation, which cannot be raised or litigated in an action between the corporation and private parties.

9. ACT OF APRIL 4, 1870, CONSTITUTIONAL.
The act passed by the legislature of California, April 4, 1870, authorizing the Southern Pacific Railroad Company to change the line of its road, accept the congressional grant of land, and construct its roads as provided in the act of congress incorporating the Atlantic & Pacific Railroad Company, was not passed in violation of section 31, art. 4, Const. Cal., providing that corporations "shall not be *created* by special act, except for municipal purposes."

10. CONSTRUCTION OF STATE CONSTITUTIONS.
The settled rule of construction of state constitutions is that they are not special grants of powers to legislative bodies, but *general* grants of all legislative powers not actually prohibited or expressly excepted. It is equally well settled that the *exception* must be *strictly* construed. The construction is *strict* against those who stand on the *exception*, and *liberal* in favor of the government itself.

11. SAME.
Under the established rule of strict construction, applicable to state constitutions, an act of the legislature should never be declared unconstitutional, unless there is a clear repugnance between the statute and the organic law.

12. ESSENTIAL ATTRIBUTES OF A CORPORATION.
The essence of a corporation consists only of a capacity to have perpetual succession under a special denomination, and an artificial form; and to take, hold, and grant property, contract obligations, and sue and be sued, by its corporate name; and a capacity by its corporate name to receive, and enjoy in common, grants of privileges and immunities.

13. CORPORATION A FRANCHISE.
The right to be a corporation is a distinct, independent franchise, complete within itself, having no necessary connection with other distinct franchises, which are the subjects of legislative grant, and which may or may not be given to corporations once created, as well as to natural persons, as to the legislature may seem advisable.

14. CORPORATE POWERS.
Corporate powers, strictly speaking, are such as are peculiar to corporations, and essential to their being, and not such powers as are usually, or may be, possessed and enjoyed indifferently by corporations and natural persons.

15. CREATION OF CORPORATION.
The creation of a corporation is the bringing into being of an artificial person having the essential attributes of a corporation,—the creation of the distinct and independent franchise called a corporation,—which, when created, has a capacity, among other things, by its corporate name, to receive and enjoy such other franchises, privileges, and immunities, property and rights, as the legislature itself, or other persons, with its permission, may grant to it.

16. FRANCHISES, ETC., GRANTED TO A CORPORATION.
The granting of independent franchises, other than the specific franchise constituting a corporation, and of other privileges and powers, to a pre-existing corporation, are not acts creative of a corporation, but acts regulating the conduct of the existing corporation in its relation to and intercourse with the public and other persons, natural and artificial.

17. CREATION OF CORPORATION.
The giving of authority to change the line of its road to the Southern Pacific Railroad Company, a pre-existing corporation, by the act of April 4, 1870, is not an act creating a corporation, in whole or in part, and is not the creation of a new corporate power.

18. STATE CONSTITUTIONS—SETTLED CONSTRUCTION.
The settled construction of the provisions of a state constitution by the highest court of the state, when not in conflict with any provision of the constitution of the United States, will be adopted and followed by the national courts, whatever their opinion may be as to the correctness of such settled construction.

19. CONFLICTING CONSTRUCTIONS.
In 1863, the supreme court of California construed a provision of the state constitution, which construction remained unquestioned by the courts for 11 years, during which time much legislation of a similar character to that in question, and among it that involved in this case, was had, under which important rights had become vested. In 1874, the supreme court, being differently constituted, overruled the prior decision; three of the six justices who sat in the two cases having taken one view, and three the other. The supreme court is now to be again reorganized, with seven members, only one of whom has considered the question as a member of the court of last resort. *Held*, that the construction is *not settled* within the rule, and the national courts are at liberty to adopt the view which appears to them correct.

20. SOUTHERN PACIFIC RAILROAD COMPANY—AMENDMENT OF ARTICLES OF ASSOCIATION.
Amended articles of association were filed by the Southern Pacific Railroad Company, in pursuance of the provisions of a general act of the legislature of California, passed March 1, 1870, applicable to all corporations before created, or to be thereafter created. *Held*, that if the act of April 4, 1870, is void, the plaintiff had full authority to build the road under said act of March 1st, and the amended articles of association, filed in pursuance of its provisions.

21. JOINT RESOLUTION CONSTRUED.
The "actual settlers," whose rights are directed to be saved by the joint resolution of congress, passed June 28, 1870, are those who had settled before, and who had existing vested rights at the date of the filing of the plat, and not those who afterwards settled upon the land. The latter could acquire no rights. The grant being a present grant, which attached to the specific lands at the date of the filing of the plat, congress could not divest the rights of the plaintiff, which had once vested, under the act, upon the filing of the plat, except by proper proceedings upon failure of defendant to perform the conditions subsequent.

22. CASES DISTINGUISHED.
Telegraph Co. v. *Telegraph Co.*, 22 Cal. 398, and *San Francisco* v. *Water-Works*, 48 Cal. 493, considered, and the former approved.

This is an action to recover possession of certain lands situate in Tulare county. The plaintiff claims title under a congressional grant made to aid in the construction of the Southern Pacific Railroad, and a patent issued in pursuance of the grant; and the defendant claims as a pre-emptioner.

The Southern Pacific Railroad Company became duly incorporated under the general statute of the state of California of 1861, providing for the incorporation of railroad companies, (St. 1861, 607,) by filing its articles of association in the office of the secretary of state on December 2, 1865. The act requires, among other things, the articles of association to state "the place from and to which the proposed road is to be constructed, and the counties into and through which it is intended to pass, and its length as near as may be." Id. 608, § 2. It also provides, that, upon filing the articles, the parties named therein "shall be a body politic and corporate, by the name stated in such articles of association, and shall be capable in law to make all contracts, acquire real and personal property, purchase, hold, convey any and all real and personal property whatever, necessary for the construction, completion, and maintenance of such railroad, and for the erection of all necessary buildings and yards, or places and appurtenances, for the use of the same, and be capable of suing and being sued, and have a common or corporate seal, and make and alter the same at pleasure, and generally to possess all the powers and privileges for the purpose of carrying on the business of the corporation that private individuals and natural persons now enjoy." Id. § 3. Section 17, pt. 1, authorizes "such examinations and surveys for the proposed railroad to be made as may be necessary to the selection of the most advantageous route for the railroad." Part 2: "To receive, hold, take, and convey, by deed or otherwise, the same as a natural person might, or could, do, such voluntary grants and donations of real estate, and other property of every description, as shall be made to it, to aid and encourage the construction, maintenance, and accommodation of such railroad." Part 6: "To cross, join, and unite its

railroad with any other railroad, either before or after construction, at any point upon its route," etc. Part 7: "To change the line of its road, in whole or in part, whenever a majority of the directors shall so determine, as is provided hereinafter; but no such change shall vary the general route of such road, as contemplated in the articles of association of such company." Part 8: "To receive by purchase, donation, or otherwise, any lands or other property of any description, and to hold and convey the same in any manner the directors may think proper, the same as natural persons might, or could, do, that may be necessary for the construction and maintenance of its road, or for the erection of depots, turn-outs, workshops, warehouses, or for any other purposes necessary for the convenience of such companies, in order to transact the business usual for such railroad companies." Section 18 is as follows: "If, at any time after the location of the line of such railroad, in whole or in part, and the filing of the map thereof, as provided by this act, it shall appear to the directors of such company that the same may be improved, such directors may, from time to time, alter or change the line in any manner they may think proper, and cause a new map to be filed in the office where the map showing the first location is filed, and may thereupon take possession of the land embraced in such new location, that may be required for the construction and maintenance of such road on such new line, either by agreement with the owner, or owners, of such lands, or by such proceedings as are authorized under the provisions of this act, and use and enjoy the same in place of the line for which the new is substituted; but nothing in this act shall be so construed as to confer any powers on such companies to so change their road as to avoid any point named in their articles of association, except as provided in section 17, subd. 7, of this act."

The said articles of association, filed December 2, 1865, set forth that the corporation was formed "for the purpose of constructing, owning, and maintaining a railroad from *some point on the bay of San Francisco*, in the state of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, *to the town of San Diego*, in said state; thence eastward, *through the said county of San Diego*, to the eastern line of the state of California, there to connect with a contemplated railroad from the eastern line of the state of California to the Mississippi river." At the time of the formation of this corporation, Kern county did not exist; it having been created out of the southern part of Tulare and the northern part of Los Angeles counties on April 2, 1866. St. 1865-66, 796. So that a road running through the western portion of Kern county, as it now is, would on December 2, 1865, have run through Tulare and Los Angeles counties; and the Southern Pacific railroad, as now located and constructed, in fact runs through Tulare and Los Angeles counties, as they existed at the time of the filing of said articles of association, and that part of it in the present Kern county at no great distance from the line then contemplated, as, according to the articles, it was to pass out of San Luis Obispo into Tulare and Los Angeles before reaching Santa Barbara, which is not named in the articles, and left to the westward. At this time, also, no authority had been given by congress for the construction of any railroad from the Mississippi river to the eastern line of the state of California; although the thirty-third and thirty-fifth parallels of latitude had been publicly discussed as probable lines of future railroads, and it was, therefore, uncertain at what point of the line any road to be projected and constructed would intersect the eastern line of the state.

This being the condition of things, congress, on July 27, 1866, passed "An act granting lands to aid in the construction of a railroad and telegraph line from the state of Missouri to the Pacific coast." 14 St. 294. By the first section, the Atlantic & Pacific Railroad Company was incorporated and author-

ized to construct a railroad from the town of Springfield, in the state of Missouri, to the western boundary line of the state; thence "to the head-waters of the Colorado Chiquito, and thence along the *thirty-fifth parallel of latitude*, as near as may be found suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific." Section 3 provides as follows: "And be it further enacted that there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state; and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, *at the time the line of said road is designated by a plat thereof*, filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers." 14 St. 295. Section 4 provides that when 25 miles of the road have been completed according to the act, inspected by commissioners, and verified by them to the president, "patents of lands as aforesaid shall be issued to said company, *confirming* to said company the right and title to said lands, situated opposite to and coterminous with said completed section of said road." Section 6 is as follows: "And be it further enacted that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the *odd* sections of land hereby granted *shall not be liable to sale or entry, or pre-emption before or after they are surveyed except by said company, as provided in this act;* but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, *shall be*, and the same are hereby, extended, *to all other lands* on the line of said road, when surveyed, *excepting those hereby granted to said company.*" And section 18 is as follows: "And be it further enacted that the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad, herein provided for."

In pursuance of the third section of the said act of congress, the Southern Pacific Railroad Company filed a plat of the line of railroad adopted by it in the office of the commissioner of the general land-office on the third day of

January, 1867. The line as laid down on the plat filed, commences at a point near the southern end of the bay of San Francisco, and passes through the counties of Santa Clara, Monterey, Fresno, Tulare, Los Angeles, (as the counties of Tulare and Los Angeles were constituted when the company was incorporated,) and San Bernardino to the Colorado river, to a point on the river near where the thirty-fifth parallel of latitude crosses said river; thus passing through all the counties named in the certificate of incorporation except San Luis Obispo, which was avoided by a deflection to the eastward, and San Diego, which the line did not go far enough south to reach. The deflection carried the line through Fresno and San Bernardino, instead of San Luis Obispo and San Diego counties, but it passes through all the other counties named in the articles of incorporation. The northern portion of Los Angeles county through which the line passed, as the county was constituted at the date of filing the articles of association, is now the southern part of Kern county. Before the filing of said plat the road had not been finally located, and no map or profile thereof had been filed in the office of the secretary of state of the state of California, as provided by section 43 of the act under which it was incorporated, (St. 1861, 623;) the only designation at the time being that indicated in the articles of incorporation hereinbefore set out.

On March 22, 1867, an order was issued from the general land-office withdrawing from market the odd sections of land lying along the route indicated by said map, filed January 3, 1867. On July 14, 1868, the secretary of the interior revoked the order of withdrawal. On August 14, 1868, the secretary suspended said revoking order of July 14th. On November 2, 1869, he revoked said suspension of August 20th. On November 11, 1869, he confirmed his order of November 2d, and ordered the lands restored to market after 60 days' notice. On December 15, 1869, he again ordered that this restoration should be suspended, which last order has never been revoked. Under these various orders of the secretary, the lands have never been actually restored to the public lands, as the order issued for such restoration was in every instance revoked before the expiration of the time when it was to take effect.

On July 25, 1868, congress passed an act extending the time within which the Southern Pacific Railroad Company should be required to complete the first 30 miles of its road, and requiring it thereafter to complete 20 miles each year till the completion of the road within the time required. 15 St. 187. On June 28, 1870, congress passed a joint resolution, as follows, to-wit: "That the Southern Pacific Railroad Company of California may construct its road and telegraph lines, as near as may be, on the route indicated by the map filed by said company, in the department of the interior, on the third day of January, 1867; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the secretary of the interior, he shall direct an examination of each such section by commissioners to be appointed by the president, as provided in the act making a grant of land to said company, approved July 27, 1866, and upon the report of the commissioners to the secretary of the interior, that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said secretary of the interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act." 16 St. 382.

On March 3, 1871, congress passed the act to incorporate the Texas Pacific Railroad Company, in which it authorized the plaintiff, the Southern Pacific Railroad Company, to construct a line of railroad from a point at or near Te-

bachapa pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, with the *same rights, etc., as given to it by the act organizing the Atlantic & Pacific Railroad Company.* 16 St. 573.

On March 1, 1870, the legislature of California passed a general act authorizing any corporation organized or to be organized under the laws of the state to amend its articles of association, by making and filing amended articles in the same office where the originals are to be filed. St. 1869-70, 107.

On April 4, 1870, the legislature of California passed an act as follows: "Whereas, by the provisions of a certain act of congress of the United States of America, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the state of California,' approved July 27, 1866, certain grants were made to, and certain rights, privileges, powers, and authority were vested in and conferred upon, the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the state of California; therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions, and conditions of the said act of congress, and all other acts of congress now in force or which may hereafter be enacted, the state of California hereby consents to said act; and the said company, its successors and assigns are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the state of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association; and the right, power, and privilege is hereby granted to, conferred upon, and vested in them, to construct, maintain, and operate, by steam or other power, the said railroad and telegraph line mentioned in said acts of congress, hereby confirming to and vesting in the said company, its successors and assigns, all the rights, privileges and franchises, power and authority conferred upon, granted to, or vested in said company by the said acts of congress, and any act of congress which may be hereafter enacted."

Subsequent to the filing of said plat, on January 3, 1867, and prior to the issue of the patent to the land in question, the legislature of California passed various other acts recognizing and granting rights to the Southern Pacific Railroad Company. Under section 40 of the act under which plaintiff was incorporated, it was authorized to consolidate with any other railroad corporation. St. 1861, 622.

On October 12, 1870, in pursuance of the general statute, the San Francisco & San Jose Railroad Company, then owning and operating a road from San Francisco through San Mateo county to San Jose, in Santa Clara county, together with other companies, consolidated with the said Southern Pacific Railroad Company, taking the name of the main and principal company, the Southern Pacific Railroad Company, by which consolidation the Southern Pacific Railroad Company acquired the railroad extending from San Jose to San Francisco; thereby connecting its line as laid down on the plat filed with the commissioner of the general land-office with the city of San Francisco.

On April 15, 1871, in pursuance of the said general act of the legislature of California, approved March 1, 1870, the said Southern Pacific Railroad Company filed amended articles of association, which articles, among others, contained the following recitals: "Whereas, by an act of the legislature of the state of California, entitled 'An act relating to certificates of incorporation,' approved March 1, 1870, any corporation then organized, or thereafter to be organized, under the laws of the state of California, is authorized and empowered to amend its articles of association, or certificate of incorporation, by a majority vote of the board of directors or trustees, and by a vote or written assent of the stockholders representing, at least, two-thirds of the capital stock of such corporation; and, whereas, by a certain other act of the legislature of

the state of California, entitled 'An act to aid in giving effect to an act of congress, relating to the Southern Pacific Railroad Company,' approved April 4, 1870, to enable the said company to more fully and completely comply with and perform the provisions, requirements, and conditions of an act of congress of the United States of America, entitled 'An act granting land to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the state of California,' approved July 27, 1866, and of all other acts of congress then in force, or which might thereafter be enacted, the said Southern Pacific Railroad Company, its successors and assigns, were authorized and empowered to change the line of its railroad, so as to reach the eastern boundary line of the state of California, by such route as said company might determine to be most practicable, and to file new and amendatory articles of association: * * * now, therefore, the board of directors of said Southern Pacific Railroad Company do order and direct that the articles of association of said company be amended so as to read as follows," etc. The object of the corporation as expressed in its amended articles is as follows: "Art. 2. The object and purpose of said new corporation shall be to purchase, construct, own, maintain, and operate a continuous line of railroad from the city of San Francisco, in the state of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego, to some point on the Colorado river, in the south-eastern part of the state of California, a distance of seven hundred and twenty miles, as near as may be; also, a line of railroad from a point at or near Tabeechaypah pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, a distance of three hundred and twenty-four miles, as near as may be; also, a line of railroad from the town of Gilroy, in the county of Santa Clara, in said state, passing through said county, and the counties of Santa Cruz and Monterey, to a point at or near Salinas City, in said last-named county, a distance of forty-five miles, as near as may be; also, such branches to said lines as the board of directors of said new corporation may hereafter consider advantageous to said corporation, and direct to be established."

The road having been constructed through the county of Tulare on the line designated in said plat filed with the commissioner of the general land-office, January 3, 1867, and on the line described in said amended articles of association, a patent to the lands in question was issued to said plaintiff, the Southern Pacific Railroad Company, in the usual form in such cases, on October 20, 1877, but said patent did not contain any clause "expressly saving and reserving all the rights of actual settlers," prescribed in said joint resolution of congress, passed June 28, 1870. The said lands are situated in the county of Tulare, within the 20-mile limit as the line is designated on said plat filed with the commissioner of the general land-office, and adjacent to the completed portion of the road.

The defendant, Orton, who possessed all the statutory qualifications required to entitle him to pre-empt a portion of the public lands, with his family, settled upon the tract in question, with a view to pre-empt it, on November 1, 1869, where he has ever since resided and cultivated the same, performing the requisite acts to acquire a pre-emption right, if said land was at the time of his entry, or at any time afterwards, subject to pre-emption. On June 5, 1870, he offered to file a pre-emption claim on the land, but his offer was rejected by the officers of the land-office. On September 5, 1878, since the issue of plaintiff's patent, he repeated his offer, and a hearing having been had by order of the secretary of the interior, the register and receiver rendered a decision in his favor, from which plaintiff appealed, and the appeal is still pending.

Lake & McKoon, for plaintiff.

J. Jacobs, Jr., and *L. H. Van Schaick*, for defendant.
Before SAWYER, Circuit Judge.

SAWYER, J., (*after stating the facts.*) This case has been argued with great ability by the counsel on both sides. It presents a question of great importance, as upon the decision of the points raised by defendant apparently depends the validity of the entire land grant made by congress to aid in the construction of the Southern Pacific Railroad under the act of 1866. If some of the points made are tenable, then, the legislature of California, and the United States congress, both in their original and subsequent legislative action; the officers of the Southern Pacific Railroad Company, and those who have purchased the granted lands from the company, and those who have purchased the bonds of the company secured by these lands,—have all been mistaken as to the rights of the plaintiff derived under these various acts. Under the circumstances, there, certainly, ought to be a very clear case to justify a court in annulling all the rights hitherto supposed to have been acquired by the plaintiff, and those claiming under it in these lands.

The points relied upon by defendant's counsel, as stated in their own language, are as follows: (1) "That the grant was confined to lands along the line of its lawful route [the lawful route of the road] as fixed by its articles of association (articles incorporating the company) and the laws of California." (2) "That the route indicated by the map filed in the general land-office on January 3, 1867, and upon which the road is thus far constructed, is without authority of law, and that the grant has not, and cannot attach to lands along that route." (3) "Conceding, for the purposes of the argument, that the route of January 3, 1867, at first unlawful, was subsequently made lawful by the act of the legislature of California of April 4, 1870, and the grant was floated to such new route by the joint resolution of congress of June 28, 1870; yet, by that joint resolution the land in question was excepted from the grant, and that the patent, failing to save or reserve the defendant's rights to this land, is issued contrary to the provisions of the joint resolution, and is therefore void."

The first point, then, is, that the land in question does not lie on the line intended by the act of congress making the grant, and is, therefore, not within the grant. In the development and argument of this point it is said, in substance, that congress found a corporation existing under the laws of California, which had adopted in its articles of association a certain line on which it was authorized to construct a road; that it had authority to construct a road on that line, and no other; that its rights must be presumed to have been known to congress, and it must be presumed that congress intended to make its grant along the line indicated in its articles of association, and no other; that the route generally indicated was from a point on the bay of San Francisco, "through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, to the town of San Diego; thence, through the said county of San Diego, to the eastern line of the state of California, there to connect with a contemplated railroad from the said eastern line of the state of California to the Mississippi river;" that this was the line upon which the Southern Pacific Railroad Company was, at the time of the passage of the act, authorized to build a road under the laws of California, and of its organization; and that congress contemplated, and could have contemplated, no other line. I agree with counsel, that congress must be presumed to have passed the act in question with full knowledge of the laws of California under which the Southern Pacific Railroad Company was organized, and of the extent of the authority of the company under its organization. And the intention of congress in making the grant must be ascertained from the language of the act in view of this presumption; that is to say, we must construe the

act in the light of the circumstances existing at the date of its passage relating to the subject-matter of the act; but the intention must be derived at last from the language of the act itself, thus considered. There was but one Southern Pacific Railroad Company to which the grant was made; and the *grantee* named in the act of congress is "the *company* incorporated under the laws of the state of California," not the *road*, or the *line of road* to be built by the company. And it was "authorized to connect with the Atlantic & Pacific Railroad, formed under this act, at such point near the boundary line of the state of California as they shall *deem most suitable for a railroad to San Francisco.*"

Now, what was the manifest intent of this provision? Obviously to have a road from the point of connection to San Francisco, and the point of connection most suitable for constructing a road therefrom to San Francisco was left to the judgment and discretion of the company,—"such point * * * *as they shall deem* most suitable for a railroad line to San Francisco." It was left to the company, then, by this provision of the statute, to designate the *point* of connection within the limits, and the *line also;* but another provision to be referred to is more specific on the latter point. It is manifestly the intention from this language, if taken by itself, to have a road from the point of connection to San Francisco by the route stated. This intention becomes more apparent by considering other provisions. The Atlantic & Pacific road, by section 1 of the act, was to run "along the *thirty-fifth parallel of latitude*, as near as may be found most suitable for a railway route to the *Colorado* river at such point as may be selected by said *company for crossing;* thence by the most practicable and eligible route *to the Pacific*,"—not to San Francisco. Congress could not have intended the Southern Pacific Railroad Company to build a road to the Pacific merely, as the Atlantic & Pacific was authorized to do that by a direct route; but a road to connect the Atlantic & Pacific road at some point near the place of crossing the Colorado river, which is the eastern line of the state, by the most suitable line with San Francisco. It would be absurd to suppose, in view of the language used, and the provision for extending the Atlantic & Pacific Railroad directly to the Pacific, that congress contemplated the building by the Southern Pacific Company a railroad from the point of connection near the thirty-fifth parallel, a hundred miles south, and some two hundred or more miles to San Diego, at which point, when reached, the road would be as far from San Francisco as from the point of connection whence it started.

San Francisco being the objective point, it could be reached from many points on the Atlantic & Pacific road by lines several hundred miles shorter than from the point of connection near the intersection of the thirty-fifth parallel of latitude and the Colorado river, by the way of San Diego. So, also, upon defendant's own theory, this construction of the language is inadmissible, for it is insisted that congress could not have intended to grant lands along a line not specified in the articles of incorporation of the Southern Pacific Railroad Company. If this be so, then congress could not have intended to make any grant at all, for the general line specified in the articles would not touch either point mentioned in the act,—either the point of intersection near the Colorado river, or San Francisco. The line specified in the articles of association is through the county of "San Diego to the town of San Diego in said state; *thence eastward through the said county of San Diego*, to the eastern line of the state of California." The town of San Diego is in the south-western angle of the state, and a line from the town of San Diego "eastward through the said county of San Diego" would strike the Colorado river in the extreme south-eastern corner of the state, where the Texas Pacific Railroad is now to cross the river, and more than two degrees of latitude south from the point of connection named in the act, near the point where

the thirty-fifth parallel of latitude crosses the state line. The county of San Diego embraces about the same extent of territory as the three states of Massachusetts, Connecticut, and Rhode Island, and the county of San Bernardino is considerably larger, yet there is no point of the county of San Diego that is within less than a degree of latitude of the point of connection named in said act of congress near the intersection of the eastern line of the state and the thirty-fifth parallel of latitude; the said point being in the county of San Bernardino, through which it would be necessary for a line of road to run many miles away from San Francisco before it could possibly touch the county of San Diego at all; and the articles of association do not mention the county of San Bernardino as one through which the proposed road is to extend. A line of road from any point on the bay of San Francisco, following the route indicated in the articles of association, through Los Angeles and San Diego counties to the town of San Diego, thence *easterly* through the latter county to the Colorado river, could not at any point be within two degrees of latitude of the point near the intersection of the thirty-fifth parallel of latitude and the Colorado river, or eastern line of the state.

So, also, to reach San Francisco a road would necessarily pass from Santa Clara county through the county of San Mateo and the city and county of San Francisco, or the county of Alameda; neither of which counties is mentioned in the articles of association, nor is San Francisco mentioned in the articles as a point to or from which the road is to extend. The Southern Pacific Railroad Company thus far had no better authority under its articles of association for constructing its road from the designated point of intersection to San Francisco by the route which defendant's counsel insisted it should have followed, than by the route adopted in the plat filed. There would be quite as great a deviation from the route claimed by defendant to be the only one that could be pursued, and quite as much unauthorized road to be constructed, as by the route actually adopted. In fact, upon defendant's theory, the Southern Pacific Railroad Company could have constructed no road at all which would have entitled it to the benefit of the grant, and the grant was entirely nugatory. The object of the grant undoubtedly was to secure a line of railroad from a point on the Atlantic & Pacific Railroad, designated as near the line of the state of California, and which road was to cross the state line as near as practicable to the thirty-fifth parallel of latitude to San Francisco, and, upon defendant's theory, the grantee was not authorized to build any road for a long distance on each end of the line which congress desired to have built, and the construction and use of which formed the sole consideration of the grant.

The fact, then, that the line adopted does not pass through San Luis Obispo and San Diego counties, to the town of San Diego, and thence easterly through San Diego county to the Colorado river, affords no reason for supposing that congress intended to adopt the absurd route of running a hundred miles or more south and away from San Francisco, then by a roundabout way return, in order to secure a railroad line to San Francisco from the point of intersection designated in the act; especially when it made the grant along the line from the point indicated, which the grantee itself "shall deem most suitable for a railroad to San Francisco." There can be no reasonable doubt, therefore, whatever the effect upon the rights of the parties, or whether the purpose was accomplished or not, that congress intended the Southern Pacific Railroad Company to construct a line of road from the Atlantic & Pacific Railroad line, as indicated in the act, at a point in California near the point of intersection of the thirty-fifth parallel of latitude with the eastern line of the state, by the most direct and feasible route to San Francisco; that the question as to which is the most direct and feasible route was left to the company; and that the lands granted are lands lying along said route to be so determined. That the grantee was to locate the line between the points des-

ignated is also provided for in section 3 of the act of congress; which section, and all others of the act specifying the rights granted, is applicable to the Southern Pacific Railroad Company as well as to the one created by the act, and is to be read with reference to this part of the line as though the words "Southern Pacific Railroad Company" were substituted for "Atlantic & Pacific Railroad Company" in the section. It grants the odd sections "on each side of said railroad line as *said company may adopt*, * * * whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time *the line of said road is designated by a plat thereof*, filed in the office of the commissioner of the general land-office." On January 3, 1867, the Southern Pacific Railroad Company filed its plat in pursuance of these several provisions of the act, and the line laid down on the plat ran in a nearly direct line—as direct, doubtless, as practicable—from the supposed point of intersection near the eastern boundary of the state towards San Francisco, to Santa Clara county, where it intersected the San Francisco & San Jose Railroad, which extended to San Francisco, and along the route deemed most suitable by the company.

There can be no doubt, therefore, that the line adopted is the one contemplated by the act of congress, and the odd sections on each side of it are the lands actually contemplated by the congressional grant. If the grant was not effectual, then, it was because of an incapacity then, or at any future time, in the company to receive a grant which should in fact vest the legal title; and if the incapacity to receive a grant along this line existed then, as we have seen, for the same reason, it was incapable of receiving any grant under this act as it actually passed, along any line it might have adopted, and the grant was futile. At the date of filing the plat no pre-emption or other right had attached to the lands in question, and they were, therefore, subject to grant, and were impressed with every right, restriction, or effect which resulted from the operation of the act, whatever they might be. In section 6 it is provided "that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road *after the general route shall be fixed*, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, entry, or *pre-emption before or after* they are surveyed, *except by said company as provided in this act;* but the provisions of the act of September, 1841, granting pre-emption rights, and acts amendatory thereof, and of said act entitled, 'An act to secure homesteads to actual settlers on the public domain,' * * * shall be, and the same are hereby, extended to *all other* lands on the line of said road *when surveyed*, EXCEPTING *those hereby granted to said company.*" Instantly upon the filing of the plat, the odd sections within the prescribed limits on each side of the line indicated became affected by these provisions; and the statute itself, *proprio vigore*, withdrew them from sale, entry, or *pre-emption except by the company.* From that time forth to the present time, no man could acquire a pre-emption right, because it was expressly prohibited by the statute, and these provisions of the statute have never yet been repealed or modified. And this is so, whether the grantee was capable of receiving title or not.

The withdrawal is not made to depend upon the capacity of the grantee to take, or upon the grantee's performance of the conditions subsequent, so as to perfect the title, but it is absolute, without conditions, upon the performance of certain designated acts, which were in fact actually performed. The reason for withdrawal, doubtless, was to secure the construction of the road, but there was no provision for restoration of the lands to their former condition in case the object failed. That was left for future consideration by congress. In this act there is not even the provision usual in other acts granting

lands for public improvements, that in case of failure to perform the conditions subsequent the lands shall revert to the United States; but the subject is not overlooked, as there is a substitute for such provision in the ninth section, which provides "that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the road." It does not provide that the lands shall be open to sale or pre-emption in case of a failure to complete the road. The United States by the act has devoted these odd sections to a construction of the contemplated road; and if the grantee fails to complete it for any cause, whether through incapacity to do it or otherwise, the government reserves to itself the right to take such other action as it may, upon consideration of the circumstances, deem needful to accomplish the purpose. If the title did not pass to the intended grantee, it might grant the land to other parties for performing the same service. At all events, they have been devoted to that object, and withdrawn absolutely and without conditions from any other disposition. There is no provision requiring the secretary of the interior to issue any order withdrawing them; the act itself has that operation by its own force. The order was, doubtless, proper as a matter of information to those seeking pre-emption locations, so that they might not ignorantly or recklessly settle upon these lands, in which they could acquire no rights, but it is without legal effect. Mr. Justice MILLER in *Knevals* v. *Hyde*, 20 Alb. Law J 371.

So there is no authority anywhere in the act for the secretary of the interior to revoke the withdrawal, or restore the lands to market, or subject them to pre-emption. His various orders were nullities, as he had no authority whatever to repeal or modify the act of congress, expressly withdrawing these lands from pre-emption, or other disposition. Besides, his orders never took effect, for each was revoked or suspended before the time appointed for it to go into operation arrived. As the defendant entered upon these lands after the filing of the plat, and the statutory withdrawal, he was a naked trespasser without right, and without the ability to acquire any right from that day to the present, whether the grantee in the act had the capacity to acquire any right or not, and the question may be considered without feeling any embarrassment on account of any right of his, for he is wholly without any, whatever the rights of the railroad company may be. He is a total stranger to the title. But as the plaintiff must recover, if at all, upon its own right, and not on the want of any right in the defendant, it is still necessary to determine whether it is in a position to maintain this action, notwithstanding the total absence of any right to the land in defendant.

This brings us to the second point made by defendant,—that the grant along the line indicated in the plat is without authority of law, and did not, and could not, attach to the lands there situated; that is to say, that by the laws of California the grant could not attach to the lands, whatever the intent of congress, as the company was not authorized, by the statute under which it was organized, to construct a road along that line, for the reason that it was not indicated in its articles of association.

The Southern Pacific Railroad Company was a corporation duly organized. It was a railroad corporation organized expressly to build a railroad, and a railroad extending from the bay of San Francisco in a south-eastern direction to the eastern boundary of the state, intended ultimately to connect with some transcontinental road which it was supposed would be built at no distant day; but at what point it would enter the state was unknown, and, consequently, the point of the state line which the company desired to reach could not be definitely fixed. It was authorized to receive lands by gift, grant, purchase, or otherwise, for the purposes of its road, and to aid in its construction, with-

out limitation as to amount or location. These facts are undisputed. Congress found this corporation thus organized for the purposes, and with the powers, indicated, and made a grant of land to it for the purposes, and on consideration that it should accept the terms, and build a road along the line before indicated; which grant and the conditions were actually accepted, and the road was in fact built according to the conditions of the grant, to entitle it to a patent for the land in question, provided it was capable of receiving the grant. The line of the road adopted, also, started at the point indicated in the articles of association, and ran in a south-easterly direction through the state to its eastern line, to connect with a road to the Mississippi river, the general line of which latter road had in the mean time been fixed, and it ran in the general direction through all the counties, including the one in which the lands are situated, named in the articles of association, except San Luis Obispo, which was left to westward, and the county of San Diego, which was further south, and the line adopted turned to the eastward before reaching it; the general object and purpose of the line finally definitely located and adopted being the same as that expressed in the articles of association.

The question in this case, as in many others, to place it in the strongest light for defendant, is one of doubt as to whether the corporation exceeded its original powers, or abused its *corporate* franchise. It was empowered to receive grants of lands for proper purposes, and the question is, whether the building of the road, as actually built, is the proper purpose. It is not like a corporation without capacity, and positively forbidden by the statute to take lands at all for any purpose. It was competent to take and hold lands for some purposes, and the settled rule in cases like this, is that strangers cannot litigate the question. It is a matter between the state and the corporation. The company had the physical capacity to perform, and it has performed, in fact, whether rightfully or not, its part of the contract, and the United States is satisfied, and has issued its patent in pursuance of the terms of the act. The United States has done all in its power to vest the title in the company. The state has not complained of any misuse or abuse of the corporate powers of the company All parties in interest being satisfied, strangers cannot complain. The authorities settle this question.

In *Mining Co.* v. *Virginia & G. H. W. Co.*, 1 Sawy. 478, I had occasion to consider an analogous question, and said: "By express provisions of statutes, corporations are usually limited in their purchases of real estate; for instance, to such as are actually necessary to the exigencies of their business. But suppose a much larger amount should be conveyed to a corporation than it was authorized to take, it would not be contended, I apprehend, that a trespasser, who had taken possession of a portion of such *excess* of land, could successfully set up a want of capacity in the corporation to take, as a defense to an action of ejectment by the corporation. As between the party despoiled and the wrongdoer, the courts will not enter upon the inquiry." And I cited the following authorities which sustain the position: *Bank* v. *Railroad Co.*, 17 Wis. 372; *Glass Co.* v. *Dewey*, 16 Mass. 94, 102; *Mining Co.* v. *Baker*, 3 Nev. 391; *Mining Co.* v. *Clarkin*, 14 Cal. 552. The court says, in 3 Nev. 391, after discussing the question: "A deed then, to a mining corporation is not void upon its face. If they have violated the law, in taking a greater quantity of land than is allowable, then they have committed a wrong, not against any particular individual, but against the whole community, and this wrong can only be inquired into by a proceeding on the part of the state. Their deed to the land, if they buy from one having title, or their possession, if they only derive title from occupation, *gives them a right to hold against all the world except the state.*" In *Mining Co.* v. *Clarkin*, 14 Cal. 552, Mr. Chief Justice FIELD, speaking for the court, says: "Whether or not the premises in controversy are necessary for these purposes, [of the corporation,] it is not

material to inquire; that is a matter between the government and the corporation, and is no concern of the defendants. 'It would lead to infinite inconveniences and embarrassments, if, in suits by corporations to recover the possession of property, inquiries were permitted as to the necessity of such property for the purposes of their corporation, and the title made to rest upon the existence of such necessity. See *Bank* v. *Poitiaux*, 3 Rand. (Va.) 136, and Ang. & A. Corp. §§ 113–121."[1] To the same effect are *Telegraph Co.* v. *Telegraph Co.*, 22 Cal. 429, 430; *Railroad Co.* v. *Proctor*, 29 Vt. 93; *Bissell* v. *Railroad Co.*, 22 N. Y. 259; *People* v. *Society*, 1 Paine, 653; *Bank* v. *North*, 4 Johns. Ch. 371; *Terrett* v. *Taylor*, 9 Cranch, 51, 52; *Knevals* v. *Hyde*, 20 Alb. Law J. 371.

Numerous other cases might be cited to show that whether a corporation has violated its charter by misuse or abuse of its corporate franchise by usurpation of powers, is a question between it and the state alone, to be inquired into on a direct proceeding for that purpose. The same principle is recognized by the United States supreme court in *Schulenberg* v. *Harriman*, 21 Wall. 62. In discussing the mode by which a present grant to land by the government to the state of Wisconsin to aid the construction of a railroad, becomes attached to specific land by a location of the road, Mr. Justice FIELD, speaking for the court, said: "No individual can call in question the validity of the proceedings by which precision is thus given to the title, when the United States are satisfied with them." Again, on page 63, speaking of failure of title for breach of condition subsequent: "And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the condition annexed." See, also, *U. S.* v. *Repentigny*, 5 Wall. 267, 268.

The state of California and the United States being satisfied with the acts of the plaintiff in respect to the use of its franchise, the grant, and construction of the road, the defendant, a mere stranger, without any interest whatever, cannot raise the question relied on in this point.

But by holding that defendant is not in a position to attack the validity of the grant on this point, I do not mean to cast any suspicion upon the validity of plaintiff's title upon the facts herein stated, even if the question could be raised by defendant and determined in this action. Considering the vast interests involved, and the number of persons who must have become interested as purchasers from the plaintiff, and in securities resting on the plaintiff's title, I do not feel at liberty to leave the case on that point alone. I may be wrong in the conclusion reached; and the point made on the validity of the title is presented by the record, and must be determined if the defendant turns out to be entitled to urge it; and it has been fully argued and relied on by counsel for the defense. I shall, therefore, proceed to decide it as one of the points in the case.

In my judgment, the title of the plaintiff is valid, and, so far as it can be done in this action, the question ought to be determined and finally set at rest. As before stated, the object of congress in making the grant was to secure a railroad from a point in Missouri already having eastern connections, through the states of Missouri and northern Texas, the territorities of the United States, and the state of California to the Pacific ocean, with a branch extending from the point designated near the eastern line of the state of California to San Francisco, which road could be used by the government for the purposes and upon the terms specified in the act, among which were that it was to be a postal and military road. The act authorizes the corporation created by it

[1] Affirmed in Cowell v. Springs Co., 100 U. S. 60, 61, decided since the decision of this case; also Christian Union v. Yount, 101 U. S. 361.

to construct portions of its road through three different states, without any provision for procuring authority from, or the consent of, the respective states. If congress has power to create a corporation with such authority, it is, doubtless, found in those provisions of the constitution relating to the regulation of commerce among the states, its war power, its control over postal matters, and other cognate powers. If congress can create an instrument and confer upon it such authority without consent of the states, it would seem that it might select an instrument already created by a state, and confer upon it such additional powers and authority, if any are required, as may be necessary to effect the same objects. If it could confer the authority upon a corporation of its own creation, it could confer it upon a natural person, and why not upon a state railroad corporation? However this may be, congress in making this grant must be presumed to have been familiar with the organization and powers of the Southern Pacific Railroad Company, and to have made the grant in question with full knowledge of the situation, and the grants were made upon the condition subsequent of building the road. To ultimately perfect the title, it was necessary for the grantee to do everything necessary to complete the road, and, if the procurement of additional powers from the state was essential to that object, then it was as necessary to procure those powers in some proper mode, as to do any other essential act; and, whether necessary or not, the legislature of California did in fact pass the act of April 4, 1870, mentioned in the statement of facts, authorizing said company to change the line of its road if necessary, and authorizing it to construct and maintain the road provided for in said act of congress. If, therefore, there was before a want of such authority, it was given by this act, provided the act itself in these particulars is constitutional.

But it is insisted that this act was passed in violation of the provisions of section 31 of article 4 of the constitution of California, which reads: "Corporations may be *formed* under general laws, but shall not be *created* by special act, except for municipal purposes." After a careful consideration of the question, I am myself unable to perceive wherein that portion of the act, at least, which authorizes the company to change the line of its road, and to accept the grant made by and to build the road provided for in the act of congress, is in contravention of this provision of the constitution. It is unnecessary to consider the provision of this act authorizing the corporation to file amended articles of association, for, if that be conceded to be in excess of the legislative power, it can be separated from the others, and does not vitiate the other provisions. I do not perceive that any amendment of the articles was necessary, for the corporation was already formed or created,—was already in existence, with all the essential faculties that go to make up a corporation for building a railroad; and the act authorizing the change of line and acceptance of the congressional grant, with its conditions, only granted to an existing person permission to do a thing which had no necessary relation to the *corporate* grantee, and was not at all essential to the existence of the legal entry created by law, or to any other person, natural or artificial. But if an amendment to the articles was necessary, it was already authorized and provided for by the prior act of March 1, 1870; and it was not necessary to repeat the authority in this act; and the act of March 1 is a *general* act, and, therefore, not obnoxious to the objection urged against the said act of April 4, 1870. The settled rule of construction of state constitutions is that they are not special grants of power to legislative bodies, like the constitution of the United States; but general grants of all the usually recognized powers of legislation not actually prohibited or expressly excepted. In the language of Mr. Justice SHAFTER in *Bourland* v. *Hildreth*, 26 Cal. 183: "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 implication; and the delicate office of declaring an act of the legislature unconstitutional and void, should never be exercised unless there be a clear repugnancy between the statute and the organic law." See, also, Id. 215, 225, *et seq.; People* v. *Sassovich*, 29 Cal. 482; *Railroad Co.* v. *City of Stockton*, 41 Cal. 161. And it is equally well settled that the *exception* must be *strictly* construed. In the language of Mr. Chief Justice WALLACE in the last case cited: "The construction is '*strict* against those who *stand upon the exception;* and *liberal in favor of the government itself.*'" Id. 162. And in *Sharpless* v. *Mayor of Philadelphia*, 21 Pa. St. 160, Mr. Chief Justice BLACK said upon the same subject: "The federal constitution confers powers expressly enumerated; that of the state contains *a general grant of all* powers *not excepted.* The construction of the former instrument is strict against those who claim under it; the interpretation of the latter is strict *against* those who *stand upon the exceptions*, and liberal *in favor of the government itself;* the federal government can do nothing but what is authorized expressly, or by clear implication; the state *may do whatever is not prohibited.*"

The authorities establishing this canon of construction are numerous, and, so far as I know, uniform. Bearing this rule of construction in mind, what does the constitutional prohibition relied on mean? The only prohibitory words are, that corporations of the class in question "shall not be *created* by special act." The word "create," has a clear, well-settled, and well-understood signification. It means to bring into being; to cause to exist; to produce; to make, etc. To my apprehension, it appears to be one thing to create, or bring into being, a corporation, and quite another to deal with it as an existing entity, a person, after it is created by regulating its intercourse, relations, and acts as to other existing persons, natural and artificial. "A corporation is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual." 2 Kent, Comm. (9th Ed.) 306; *Railroad Co.* v. *Commissioners*, 112 U. S. 609, 5 Sup. Ct. Rep. 299. The ordinary incidents to a corporation are to have perpetual succession, and the power of electing or otherwise providing members in the place of those removed by death or otherwise; to sue and be sued; to grant and receive and to purchase and hold lands and chattels by their *corporate name;* to have a common seal; to make by-laws for the government of the corporation; and sometimes the power of amotion or removal of members. "The essence of a corporation consists only of a capacity to have perpetual succession under a special denomination, and an artificial form, and to take and grant property, contract obligations, and sue and be sued by its corporate name, and to *receive and enjoy in common* grants of privileges and immunities." Id. 325.

The creative act necessarily extends only to the bringing into being of an artificial person, with the capacities stated, among which is "a *capacity* to receive and enjoy in common grants and privileges and immunities;" that is to say, a capacity to receive and enjoy such grants, privileges, and immunities as may be made either at the time of the creation or any other time. The creation of the being with the capacity to receive grants is one thing; the granting of other privileges and immunities, which it has the capacity to receive when created, is another. When such a being is brought into existence, a corporation has been created. A legal entity, a person, has been created, with a capacity to do by its corporate name such things as the legislative power may permit, and receive such grants of such rights and privileges, and of such property, as the legislature itself or private persons with the legislative permission may give. But I do not understand that every

right, privilege, or grant that can be conferred upon a corporation, must be given simultaneously with the creative act of incorporation. On the contrary, I suppose the artificial being must be created with a capacity to receive before anything can be received. The right to be a corporation is itself a separate, distinct, and independent franchise, complete within itself. And a corporation having been created, enjoying this franchise, may receive a grant and enjoy other distinct and independent franchises, such as may be granted to and enjoyed by natural persons; but because it enjoys the latter franchises, they do not, therefore, constitute a part of the distinct and independent essential franchise,—the right to be a corporation. They are additional franchises given to the corporation, and not parts of the corporation itself,—not of the essence of the corporation. Natural persons, with certain physical capacities, being brought into existence through the processes appointed by nature, may be prohibited by law from doing one thing, and permitted to do another; may enjoy one franchise, and be excluded from the enjoyment of another; but these permissions and prohibitions constitute no part of the person, and were in no manner connected with the creative act. So, with reference to corporations, being once created, they have the physical capacity, through their officers, to do anything that a natural person may do; such as building a church, a steamship, or a railroad. But, being created, they may be prohibited from doing one thing and permitted to do another, like natural persons; but this permission or prohibition is not a creative act, but an act regulating the conduct of the corporation, and determining its rights and relations to the public, and to other existing persons, natural and artificial. *Corporate* powers, strictly speaking, I suppose, are those peculiar and essential to a corporation,—not those which are or may be possessed in common with natural persons; and they are very few in number, embracing those which pertain to the essence of the corporation. The term is, undoubtedly, often and conveniently used in a broader sense, but it is not found in the constitutional provision in question. Section 33, art. 4, defines the term "corporation," as used in the constitution, and says it "shall be construed to include all associations and joint-stock companies having *any of the powers of corporations not possessed by individuals or partnerships.*" Of course, it excludes all associations that do not have any powers other than those possessed by individuals and partnerships. And this provision is a recognition of the idea that *corporate* powers are only such as are not possessed in common with individuals and partnerships,—or natural persons. The power to create a corporation, as the terms are used in section 33, extends, therefore, to the bringing into being of a legal entity, having powers and privileges not possessed by individuals; that is to say, possessing the powers, which, as before stated, constitute the essence of a corporation, or corporate powers, strictly speaking, and has no reference to the legislative dealings with that artificial person after its creation. I suppose the constitution might have devolved the power of creating a corporation on some other body, as the supreme court, and the power to deal with it after its creation—to regulate its conduct and relations to the public, and to prescribe its rights, powers, and duties, other than those strictly corporate, to the legislature. Had it been so provided, there can be no doubt that such powers would have been wholly distinct and independent. I do not perceive that they are any the less so, because exercised by the same body. The act of creating a corporation by conferring upon an association of individuals certain strictly corporate powers, embracing only powers and privileges not possessed by individuals and partnerships, and then granting to it other privileges, enlarging or restricting its right to the enjoyment of other franchises that may be possessed in common with natural persons, and regulating its external relations, are, to my mind, distinct and independent, and I find nothing in the constitution prohibiting the latter power to the legislature. There are numerous distinct, independent franchises, any one or more of

which may be granted indifferently either to natural persons or existing corporations, and, in my judgment, the constitution no more prohibits the granting of any one of those franchises, except such as are expressly prohibited to corporations by special act, than to individuals. It only prohibits the *creation* of a corporation by special act; that is to say, that the creating or granting of the *particular franchise constituting* a corporation shall not be by special act. The prohibition applies to no other of the numerous franchises which are subjects of legislative grant.

In this case there was a corporation,—a railroad corporation,—duly created under the general act, for the purpose of building a railroad in a south-eastern direction through the state of California to the eastern line of the state, to intersect with a road which it was supposed would soon be built to the eastern states, the route of which was still undetermined and uncertain. It had all the faculties physically necessary to enable it to build any railroad. Afterwards congress authorized the building of a road across the continent on or near the thirty-fifth parallel of latitude to intersect the line of the state at a point different from that designated in the articles of association of said corporation, and made a grant to the corporation on condition that it should build a road from a point of intersection with said transcontinental road, near the eastern line of the state, to San Francisco, and the legislature, by special act, authorized the said corporation already in existence with authority and capacity to build a railroad, to build its road upon said line, and accept and receive said grant. In my judgment this is in no sense an act creating a corporation, or a new corporate power, or new corporate franchise within the proper meaning of the term, but a dealing with a corporation already in existence authorized to build a road in the same general direction, with the same object in view; that the change of line was a matter of detail only, and if not, but on the contrary, the grant of an independent right, and an additional privilege or franchise, it was still one entirely competent for the legislature to confer upon the existing corporation, as well as on any natural person, and in no way obnoxious to the provision prohibiting the creation of a corporation for such purpose by special act. To reach any other conclusion would be to violate the canon of constitutional construction before stated; to disregard the plain meaning of the terms used in the constitution, and upon imaginary grounds interpolate into that instrument language which the people have not seen fit to place there themselves. As said, in substance, by Mr. Justice CROCKER in *Telegraph Co.* v. *Telegraph Co.*, 22 Cal. 425, to give the constitution any such construction as claimed, we would have to make it read thus: "Corporations may be formed, *and other franchises and special privileges granted*, under general laws, but shall not be created, nor shall *other franchises or special privileges* be granted by special act, except for municipal purposes." He well remarks: "If such had been the meaning intended by the framers of the constitution, they could easily have expressed it in apt words. The language used by them is clear, and they well knew that it included *but one* of the numerous class of franchises the subject of legislative grant, and that a regulation of *one* could not by any reasonable implication be extended to others *not mentioned*."

The constitution descends to particulars when it is necessary to express the intent of its framers, as in section 34, which reads as follows: "The legislature shall have no power to pass any act granting any charter for banking purposes; but associations may be formed, under general laws, for the deposit of gold and silver; but no such association shall make, issue, or put in circulation any bill, check, ticket, certificate, promissory note, or other paper, or the paper of any bank, to circulate as money." There is no restriction upon the legislative power to grant the right to build railroads and other privileges and franchises to natural persons, and our statutes are full of such grants.

As examples, see railroad grants, St. 1862, pp. 97, 295, and St. 1878–79, 698, 841. There would seem to be no good reason for a prohibition of such grants to railroad companies once duly organized, when the same character of grants can be made *ad libitum* to natural persons.

The United States supreme court sustains these views in the recent case of *Wallace* v. *Loomis*, 97 U. S. 154, arising under a provision of the constitution of Alabama in the identical words of our constitution under consideration. A special statute of Alabama "authorized the Mills Valley Railroad Company, a pre-existing corporation, to purchase the railroad and franchises of the Northeast & Southwestern Railroad Company, another pre-existing corporation; and, after doing so, to change its own name to that of the Alabama & Chattanooga Railroad Company." This act was claimed to be in violation of the constitutional provision referred to, and Mr. Justice BRADLEY, speaking for the court, in overruling the point, says: "We are unable to see anything in this legislation repugnant to the constitutional provision referred to. That provision cannot simply be construed to prohibit the legislature from changing the name of the corporation, or from *giving it power to purchase additional property, and this was all it did in this case. No new corporate powers or franchises were created.*" See, also, *Bank* v. *De Ro*, 37 Cal. 540. The court must necessarily have taken the view as to what constitutes corporate powers and franchises maintained in this opinion. For it will not be denied that the power to purchase and own a railroad which a company was not before authorized to do, is a highly important one, and embraces highly important franchises; and, in fact, all the powers and franchises necessary to enable a corporation to build and own a railroad; and, if the power was not possessed before, it must be *new*. If they are not *corporate* powers and franchises when held and exercised by a corporation, it is because they are not peculiar to corporations, but such as may be granted to, possessed, and enjoyed by natural persons in common with corporations, or else that the granting of corporate powers and franchises to an existing corporation is not the creation of a corporation or a corporate power. This case clearly covers the case in hand; for if this right to purchase and enjoy another wholly different and independent road, and to change the name of the corporation, does not create a new corporate power, much less would the right to change the line of a road only generally indicated and not definitely located.

I should have contented myself with a simple reference to this authority, without any discussion of the question, but for the fact that defendant has cited the case of *San Francisco* v. *Water-Works*, 48 Cal. 493, decided by the supreme court of the state, in which it is held that corporations can exercise no powers except such as are conferred by the general laws under which they are formed, and that the legislature cannot confer on such corporations any powers, or grant them any privileges, by special act; which decision they claim to be controlling in this court, notwithstanding the decision of the United States supreme court upon a like provision in the constitution of another state to the contrary. It is true that the *settled* construction of the provision of a state constitution by the highest court of the state, not in conflict with any provision of the constitution of the United States, will be adopted and followed by the national courts, whatever their opinion as to the correctness of the settled construction may be. It becomes necessary, therefore, to consider whether the decision cited is within the rule invoked. In my opinion, it is not. In 1863, the same question arose in *Telegraph Co.* v. *Telegraph Co.*, 22 Cal. 398, and was elaborately considered. It was then held that the legislature might confer upon existing corporations by special act, a direct grant of special privileges and franchises; and that there was no restriction upon the power imposed by the constitution, except as to the particular privileges therein specified. The court was then composed of three justices, but

only two of them appear to have participated in the decision. This construction does not appear to have ever been questioned till the case of *San Francisco* v. *Water-Works*, which arose in 1874, 11 years afterwards. This case was vigorously and persistently contested on every point that the ingenuity of able counsel could suggest, yet, upon the *first* appeal, and upon the *first* hearing of the *second* appeal, the point was not even made, doubtless for the reason that the construction of the constitution was supposed to be finally settled. But, failing upon all other points, counsel obtained a rehearing, then raising and urging for the first time, seemingly as a forlorn hope, the constitutional point under consideration with the result before stated. At this time the supreme court was composed of five justices, of whom the chief justice, having been interested, took no part in the decision. Of the other four, three concurred, while the fourth delivered a vigorous dissenting opinion. Thus, of the six justices of the supreme court, who have considered the question, three took one view and three the other, so they stand in number equally balanced. The able and eminent justice who delivered the opinion of the court in the last case, for whose opinion I entertain profound respect, very ably presented the same views adopted in his opinion, in his argument as counsel in the former case, so that the court in the first case did not overlook, but on the contrary, fully considered, them. Had the justices who have passed upon the question in the two cases sat as one court, there would have been no decision of the question. Thus the matter stands equally balanced, the only difference as authority being that the decision against the constitutionality of the power is last.

The supreme court, as it will be hereafter organized, consists of seven members,—six justices and a chief justice,—who may be called upon to decide the point, only one of whom was a member when the former cases were decided. What view the new court may take of the question, of course, cannot now be known; but probably, under the circumstances, the justices will feel at liberty to consider the question as still unsettled, and upon further consideration to give effect to their own views, whatever they may turn out to be; especially so as the view adopted in the last case must invalidate a large amount of legislation, under which important rights must have become vested, had before the promulgation of the decision, if not some of the legislation since that time. Upon the strict doctrine of the last case, it would seem to be impossible to legislate at all by special act, so as to affect in any way any existing corporation; because, under the view of the court, any legislation at all must add to or take from its corporate powers and privileges, and to that extent modify its charter and create a new corporation. A construction resulting in so numerous and manifest inconveniences should not be adopted unless the language of the constitution clearly and imperatively requires it, and, unless clearly apparent, cannot be adopted without violation of the canon of construction before stated. If the construction given in the first case cited, acquiesced in for 11 years, did not become "settled," the second decision, under the circumstances, certainly cannot be regarded as setting the question at rest.

For these reasons, under the following authorities, I feel at liberty to adopt my own, and the views of the United States supreme court, which accord with the first case decided by the supreme court of California, and not with the second. *Insurance Co.* v. *Debolt*, 16 How. 431, 432; *Gelpcke* v. *City of Dubuque*, 1 Wall. 206. But this case falls within the principle decided in the two cases cited, as well as others, in another particular. The act in question was passed and acted upon by the railroad company four years before the decision in *San Francisco* v. *Water-Works*, and rights have become vested under it. During all that time it was the settled construction of the constitutional provision in question that such legislation was valid. The act, therefore, became a contract between the state and the company, under which the latter

entered upon the construction of its road in pursuance of the terms of the several statutes mentioned.

In the last case cited, the court, quoting from the opinion in the next preceding case, says: "The sound and true rule is, that if the contract, when made, was valid by the laws of the state, *as then expounded* by all the departments of the government and *administered in its courts of justice*, its validity and obligation cannot be impaired by any subsequent legislation, *or decision of its courts altering the construction of the law.* The same principle applies when *there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule we adhere. It is the law of this court. It rests upon the plainest principles of justice.* To hold otherwise would be as unjust as to hold that rights acquired under statutes may be lost by repeal. The rule embraces this case." 1 Wall. 206. And so it does the case now in hand.

The settled judicial construction of a constitutional provision, as well as of a statute, is regarded as incorporated into and becoming a part of the instrument itself. Says the supreme court of the United States: "The exposition of both [constitution and statute] belongs to the judicial department of the government of the state, and its decision is final and binding upon all other departments of that government, and upon the people themselves until they see fit to change their constitution, and this court receives such settled *construction as a part of the* FUNDAMENTAL *law of the state.*" *Webster* v. *Cooper*, 14 How. 504.

Upon the principle established by these cases, and many others that might be cited, the construction of the constitutional provision in question adopted in the *Telegraph Case*, in 22 Cal., became and continued a part of the fundamental law of the state for 11 years, till what in effect became, under these authorities, the judicial amendment in *Water-Works Case*, in 1874; and the act in question was valid at the time it was passed, and the rights acquired under it are not vitiated by the change in the *personnel* of the court, and the consequent change in the construction of the constitution. I, therefore, hold the act of April 4, 1870, authorizing the defendant to build its road upon the line indicated in the plat filed with the commissioner of the general land-office, and to accept the congressional grant, was a valid act, and at the time of its passage conferred the rights and powers indicated upon the Southern Pacific Railroad Company.

But, if mistaken in these views, the rights contemplated by the act vested in the company upon still another ground. We have seen by the preceding statement of facts, that on March 1, 1870, the legislature of California passed a *general* act authorizing "any corporation now or hereafter organized under the laws of this state" to amend its articles of association by filing new and amended articles in the same office in which the originals are filed. This power of amendment is unlimited except as provided in the act, none of which limitations affect the questions involved in this case. This is not a special, but a general act, and is applicable to all corporations. It has not even been suggested that there is any constitutional objection to this act, or that it is in any particular invalid. In pursuance of the provisions of this act, the Southern Pacific Railroad Company, on April 15, 1871, filed amended articles of association reciting the act, and also the said act of April 4, 1870, in which it declared its objects to be "to purchase, construct, own, maintain, and operate a continuous line of railroad from the city of San Francisco, in the state of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernandino, and San Diego, to some point on the Colorado river," etc.; also a line from Tahuchapa pass by way of Los Angeles to the Texas Pacific Railroad, and such branches as the board of directors might afterwards deem advantageous. These articles

cover the line embraced in the plat contiguous to the lands in question, and also a continuation from Tahuchapa pass to connect with the Texas Pacific Railroad, which in the mean time had been authorized by congress. So that the rights of the Southern Pacific Railroad Company, along the line contiguous to the lands in question, were perfected under this general act, and the amended articles of association, if not under the other act considered of April 4, 1870.

It only remains to consider the last point made upon the effect of the joint resolution passed by congress mentioned in the statement of facts. It is insisted that the closing paragraph of the resolution directing the issue of patents, "expressly saving and reserving all rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act," extended the exceptions of the grant which only embraced rights vested at the date of the filing of the plat, and protected all parties entering with intent to pre-empt after as well as before the filing of the plat, at least down to the date of the passage of the joint resolution, or to the date of the passage of the said act of April 4, 1870, authorizing the building of the road on the line indicated in the plat. I do not think the saving clause was intended to refer to any other settlers than those who were actual settlers before and at the time of the filing of the plat. Those settling subsequently could acquire no rights. Whatever may be the proper construction of this clause of the joint resolution, it cannot affect the rights of the parties. So far as the rights of the United States are concerned, the words of grant in the act of congress, "there be and hereby is granted," are words of present grant, and pass the title out of the United States—at least the equitable title—only to be defeated by failure to perform the conditions subsequent. The right to so much land vested at the date of the passage of the act, and attached to the specific land at the moment of filing the plat as provided in the act. This is thoroughly settled by a long line of decisions. *Schulenberg* v. *Harriman*, 21 Wall. 60; *Railroad Co.* v. *U. S.*, 92 U. S. 741; *Railroad* v. *Smith*, 9 Wall. 95; *Ryan* v. *Railroad Co.*, 5 Sawy. 262, 99 U. S. 383; *Railroad Co.* v. *Dyer*, 1 Sawy. 641; *Knevals* v. *Hyde*, 20 Alb. Law J. 370; *Van Wyck* v. *Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336.

After the right vested, congress itself could not affect it by legislation. It could only be divested by failure to perform the conditions and proper proceedings to revest the title in the government. These lands were absolutely and unconditionally withdrawn from pre-emption by the act of congress itself, *proprio vigore*, without any other act or notice, upon filing the plat, and the right to the land vested in defendant before the passage of the resolution. *Knevals* v. *Hyde*, *supra*. So, also, the act making the grant provided for the issue of patents "confirming" the title to the grantees without those conditions, and it was not in the power of congress by joint resolution to annex other conditions. Even if the right to the lands did not become perfect until the right to build the road was perfected by the said acts of the legislature of California, and the amendments of the articles of association, as before stated, the lands were protected from pre-emption claimants by the sixth section of the act of congress, so that the defendant could acquire no rights whatever upon which the saving clause could operate. The joint resolution, therefore, did not divest the title which had vested under the act of congress, and did not affect the rights of the parties. The object of the resolution seems to have been to relieve the doubts of the secretary of the interior as to what the rights of the company were,—a formal expression of congressional opinion. But if the clause be regarded as prescribed by law, its omission does not affect the patent so far as it is otherwise valid. The most that can be said is, that its omission does not vitiate any rights that ought to have been protected by its insertion. Those, like the defendant, who have no rights to protect, cannot complain of the omission.

It follows that the title to the lands in question is in the plaintiff, and the defendant has no title, and his possession is wrongful. There must be findings and judgment for the plaintiff, and it is so ordered.

UNITED STATES TRUST CO. OF NEW YORK *v.* WABASH, ST. L. & P. RY. CO. and others.

(*Circuit Court, S. D. Iowa, W. D.* September 28, 1887.)

RAILROAD COMPANIES—MORTGAGE OF PROPERTY—RAILWAY HOTEL—RECEIVERS—INSURANCE.

The St. Louis, Kansas City & Northern Railway Company executed a mortgage to the United States Trust Company, covering the line from Pattonsburg, Missouri, to Council Bluffs, Iowa, "as said road is or may be hereafter constructed, maintained, operated, or acquired, together with all privileges, rights, franchises, real estate, right of way, depots, depot grounds, side tracks, water-tanks, engines, cars, and other appurtenances thereto belonging." Subsequently the line to Council Bluffs became part of the Wabash system, being known as the "Omaha Division." After the consolidation the Wabash Company purchased a lot in Stanberry, Missouri, and built a hotel thereon to afford accommodation for their employes and passengers. The title to the lot was taken in the name of a trustee, in order that the company might sell the hotel if proper arrangements could be made, and to prevent the mortgage from becoming a lien on the property. The trustee in the mortgage had no knowledge of this arrangement. The receivers of the Wabash system, who had been previously appointed, insured all the property in their hands, including the hotel, for the benefit of all parties interested therein. The hotel was leased and kept for the benefit, not only of the employes and passengers of the Wabash system, but of all persons desiring to stop thereat, until it was entirely destroyed by fire. After the fire, a receiver of the Omaha division was appointed, and the receivers of the Wabash system turned over to him said division, and the property appurtenant thereto. *Held*, that the hotel was to be deemed appurtenant to the railway, and that the insurance thereon was payable to the receiver of the Omaha division for the benefit of the mortgagees holding under the mortgage, and not to the receivers of the Wabash system, representing the general creditors of the Wabash, St. Louis & Pacific Railroad Company.

In Equity.

W. A. W. Stewart, for petitioner.

Wells H. Blodgett and *H. S. Priest*, for Wabash receivers.

SHIRAS, J. By exceptions to the report of Special Master Hunter, the question is presented whether McKissock, receiver of the Omaha division, is entitled to the proceeds of a policy of insurance issued upon a hotel erected at Stanberry, Missouri, for the benefit of the mortgagees claiming under the mortgage executed February 15, 1879, by the St. Louis, Kansas City & Northern Railway Company, or whether such proceeds should go to the general creditors of the Wabash, St. Louis & Pacific Railway Company, represented by the receivers Tutt and Humphrey. The mortgage executed by the St. Louis, Kansas City & Northern Railway Company to the United States Trust Company covered the line

from Pattonsburg, Missouri, to Council Bluffs, Iowa, "as said railroad now is or may be hereafter constructed, maintained, operated, or acquired, together with all the privileges, rights, franchises, real estate, right of way, depots, depot grounds, side tracks, water-tanks, engines, cars, and other appurtenances thereunto belonging."

Subsequently the line to Council Bluffs became part of the Wabash system, being known as the "Omaha Division." After the consolidation in January, 1880, the Wabash company purchased a lot in Stanberry, Missouri, for the sum of $2,100, and erected a hotel building thereon. The lot was separated from the depot by a street. The hotel was built for the reason that Stanberry was a new town, without accommodations for the employes of the railway, or for passengers, and to afford needed accommodations for the employes and passengers. The title to the lot was taken in the name of J. W. Blanchard, as trustee, the purpose of this being that the company might sell the hotel, if proper and satisfactory arrangements could be made, and it was deemed desirable by the company to put the title in the name of a third party, so that such sale might be effected without the question of the lien of the mortgage coming up. It does not appear that the trustee in the mortgage had knowledge of this arrangement, or in any manner consented thereto.

On the thirteenth of June, 1885, Messrs. Tutt and Humphreys, who had been previously appointed receivers of the Wabash road for the benefit of all parties interested therein, took out a policy of insurance upon the property coming into their hands as receivers, including the hotel building at Stanberry, Missouri. This building had been leased to different parties, who kept the same as a hotel for the use and benefit not alone of the employes and passengers on the Wabash railway, but of all others desiring to stop thereat. On the twenty-fifth of February, 1886, the building was destroyed by fire, the amount of the insurance being $5,000, and the loss a total one. March 7, 1886, Thomas McKissock was appointed receiver of the Omaha division, and Messrs. Tutt and Humphreys were directed to turn over to him the said division, and property appurtenant thereto. If, under the facts of the case, the mortgagees under the mortgage executed February 15, 1879, by the St. Louis, Kansas City & Northern Railway Company, are entitled to the proceeds of the insurance upon the hotel, then the amount should be paid to Thomas McKissock, receiver, otherwise the same belongs to the receivers Tutt and Humphreys, representing the general creditors of the Wabash, St. Louis & Pacific Railway Company.

If the question had arisen between the mortgagees and a purchaser of the hotel property, holding a title derived from the trustee, Blanchard, it would then be necessary to determine whether such purchaser was chargeable with knowledge of the rights of the mortgagees; but this question does not arise. The point to be determined is whether, between the mortgagor and the mortgagees, this property is covered by the terms of the mortgage. The evidence shows that the lot was purchased, and the building was erected, for the benefit of the railway company, in furtherance of its business, and for the accommodation of its employes

and passengers. If, in erecting a depot at Stanberry, the company had included in the same building an eating-house and sleeping rooms, for the accommodation of its employes and patrons, I do not think it could be questioned but what the eating-house and lodging rooms would be deemed to be appurtenant to the railway. If the company, instead of including the hotel as part of the depot, erect a separate building therefor, this does not in my judgment change the rule, even if the building is not immediately contiguous to the depot, but separated therefrom by a public street. So as long as the evidence shows that the object and purpose of the company, in the erection of the building, was to use the same for the convenience and comfort of its employes and passengers, and thereby directly contribute to the proper carrying on of its business of a common carrier, I see no good reason for holding that a building so erected and used is not to be deemed appurtenant to the railway.

Furthermore, the mortgage expressly embraced, not only the depots and depot grounds, but also the "real estate" owned by the company. Under the facts of this case, it seems to me that, as between the mortgagor and the mortgagees, the property in question comes within the terms of the mortgage, and that the mortgagees are entitled to the benefit thereof. The insurance was taken out for the benefit of the parties interested, and was not an insurance on the interest of the mortgagor, as separate from that of the mortgagees, and hence the proceeds of the policy belong to the parties entitled to the property.

The order should be that the amount due on the policy should be paid to McKissock, for the benefit of the mortgagees holding under the mortgage of February 15, 1879.

UNITED STATES *v.* JONES.

(*District Court, D. South Carolina.* October, 1887.)

CLAIMS AGAINST THE UNITED STATES—INDICTMENT FOR FRAUD.

One is guilty, under section 5438, Rev. St., who presents a claim which he believes to be true and just, but which he seeks to substantiate by affidavits, certificates, or depositions of persons who to his knowledge depose or certify to material facts of which they know nothing.

(*Syllabus by the Court.*)

Moultrie Gourdin, for defendant.
H. A. De Saussure, Asst. Dist. Atty., for the State.

SIMONTON, J., (*charging the jury.*) The defendant is indicted before you under section 5438, Rev. St. The offense charged, in substance, is making, or causing to be made, presenting, or causing to be presented, a claim against the government, knowing such claim to be false, fictitious,

or fraudulent; and also, for the purpose of obtaining, or aiding to obtain, payment of such claim, using, or causing to be used, a false certificate, affidavit, or deposition.

The undisputed facts are these: One John Jones, a private in Company F, Twenty-fifth regiment U. S. C. T., died at Fort Snelling, Minnesota, in 1883. In his pocket was a letter purporting to be from his brother, William Jones, Charleston, South Carolina. A letter was addressed to William Jones, 9 Burns lane, Charleston, South Carolina, giving information of the death of John Jones. It came into the hands of defendant. After retaining it for some months, he met with one Nelson, a claim agent, and showed him the letter. Under the advice of Nelson, he made out a claim for the back pay, etc., of the deceased soldier, alleging himself to be his only surviving brother and heir at law. His claim was fortified, as required by law, by the affidavits of two persons swearing to the knowledge of the facts stated in the application, Gibbs and Brown. The claim was allowed. Before it was paid, one John Jones claimed the property of the deceased soldier, alleging that he was the father of the soldier, and of another son, William, and that the defendant was in nowise related to or known to him. Thereupon the claim of defendant was suspended and this prosecution begun.

Full testimony has been produced before you. The defendant has made his statement in person, and insists that he did have a brother named John Jones, and that he honestly believed that he and the dead soldier were the same person. Gibbs, one of the witnesses used to substantiate his claim under oath, now swears that he knew nothing of the relationship between the defendant and the dead soldier; in other words, he says now that his affidavit was false. You have heard Nelson, the claim agent. To reach your verdict, you must first inquire whether the statement and claim of the defendant that the deceased soldier, John Jones, was his brother, are true in fact. If you come to the conclusion that the deceased soldier was not his brother, then you must inquire whether the statement and claim made by the defendant, that he was his brother, were fraudulent as well as untrue. The claim was fraudulent as well as untrue if the defendant knew that it was untrue, or, perhaps I should say, if defendant did not believe it to be true. And even if he honestly believed the claim to be true, and that the dead soldier was his brother, nevertheless the claim and presentation of it would be fraudulent if, in presenting it, he used, or caused to be used, a false certificate, affidavit, or deposition, knowing it to be false.

All the circumstances attending the preparation and presentation of the claim have been detailed before you by the witnesses, and have been commented upon by the counsel. You have heard Gibbs, one of the persons whose affidavits sustained the claim, declare that he really knew nothing of the facts he swore to. Is this true? Did the defendant know that the affidavit of Gibbs was false? Did he know this at the time it was made, or did it come to his knowledge before it was presented with his claim to the department? Did he induce Gibbs to make the affidavit? Did he do this knowing that Gibbs really knew nothing of the

facts stated in it? Or, on the other hand, was the defendant the dupe of the claim agent, acting blindly under his dictation, not knowing the means employed in preparing, substantiating, and presenting the claim? The answer to these questions you must find in the evidence. If the defendant knew, before it was sent on, that the affidavit of Gibbs was false,—that is, that Gibbs swore to facts which were not within his knowledge,—and, notwithstanding, directed or suffered his claim to be presented, he is guilty under this indictment, even if you believe that he really was the brother of the deceased soldier, or if he was honestly convinced that the dead John Jones was his brother. Of course, if he made the application knowing that he was not the brother of the dead soldier, he is guilty.

The defendant is an illiterate colored man. If you believe, from the evidence, that he was acting wholly under the advice and control of Nelson, the claim agent, not knowing or understanding what was being done, then give him the benefit of the reasonable doubt, and acquit him.

The jury found the defendant guilty, and recommended him to mercy.

WESTINGHOUSE AIR-BRAKE CO. *v.* CARPENTER.

(Circuit Court, S. D. Iowa, E. D. October 22, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION—EXPIRATION OF PATENT.

There being little doubt as to the validity of the claims of the reissued patent which are embraced in the moving papers, and as to the infringement thereof by defendant, a preliminary injunction is ordered, even though the patent will soon expire. The last years or months of a patent are often the most valuable, and the patentee is entitled to the benefit thereof.

Motion for Preliminary Injunction to restrain defendant from infringing the fifth, sixth, seventh, and eighth claims of reissue No. 8,291, to George Westinghouse, Jr., for improvements in pipe couplings. The motion was resisted, on the ground, among others, that certain claims, which were not embraced in the moving papers, were expanded and void, and should have been disclaimed before suit brought.

W. Bakewell, *Geo. H. Christy*, *Nathl. French*, and *J. Snowden Bell*, for complainant.

Banning & Banning and *Anderson, Davis & Hagerman*, for defendant.

BREWER, J., (*orally.*) We shall not attempt to discuss the various questions which were argued with such signal ability and care by counsel in the case, but simply state our conclusions. On an application for a preliminary injunction the court considers always the relative situation of the parties, and the injury or benefit which may result to either from the granting or the refusing of the injunction. Such an order is spoken

of sometimes as an execution before judgment, though that is not accurate. It is simply the tying up of the affairs of the respective parties, and holding them in the present state until there can be a full determination. The court will not do that, where there is no probability that a final injunction will be given, nor unless it is apparent that some serious injury may result to the complainant unless it be granted, and it will compare, as stated, the relative benefits and injuries to the different parties. We have little doubt that the Westinghouse air-brake patent is a valid patent, at least so far as the claims which are presented in this motion. Whether the reissue as to some of the other claims is valid or not is a matter which we do not need to inquire into at present. Neither have we any doubt that it is a valuable patent. The extent to which this air-brake has been introduced, the protection which has resulted to life and property from its introduction, make it apparent that it was really a very valuable invention, and as such it commends itself to the attention and judgment of the courts. So far as this coupler, which is the immediate matter of consideration, is concerned, it is a combination patent. The various elements of it were old, but the combination constituted the invention and its value. Of course, any party has a right to use any one or more of those elements because the patent does not cover them separately. But he may not use that combination, or anything which, taking the various elements, by a mere change in form of one or the other, works out the same result in the same way, and by substantially the same process. This being a preliminary matter, we do not mean to commit ourselves to any definite conclusion. We think it probable that the defendant's electric air-brake coupler is an infringement on this Westinghouse patent. We have examined it in our own rooms, the various parts of it, the manner in which the combination works, and it seems to us that it will probably have to be held on final hearing that it is an infringement.

The complainant's patent expires next spring. The defendant has not, so far as the testimony shows, engaged in the manufacture or sale of his electric brake in this country. He had it here on exhibition, and that is the direct matter complained of. It is undoubtedly true that a party may, before the expiration of another's patent, make all his arrangements of machinery, buildings, and everything of that kind for going into the business of manufacturing the patented article at the time the patent expires. There are but a few months before the expiration of the patent, and we have hesitated a good deal upon that, whether in view of this fact there was any propriety in granting a preliminary injunction, and yet it may be, and oftentimes is, as is stated by counsel, true that the last years or months of a patent are the most valuable to the patentee by reason of the fact that the widespread information in respect to its value and general introduction into use has created the largest demand for it.

Taking that into account, also, the fact that if defendant means to introduce the electric brake into this country it must take him some time before he can be in position to put it largely before the railroad world,

(indeed it would be doubtful whether he could much before the time of the expiration of this patent, and yet possibly he might, to some extent,) it would be no more than fair to issue a preliminary injunction in favor of the complainant. This, of course, will operate but a brief time; but still, whatever of value this patent may have during these months to the complainant, few though they may be, he is entitled to. The order will be therefore that the preliminary injunction issue on the giving of a bond in the sum of $20,000. Judge SHIRAS reminds me to say that we do not construe the issue of this injunction to operate against the erecting of buildings or anything of that kind; only against the manufacture and sale of his coupler.

LOVE and SHIRAS, JJ., concur.

THE PIRATE.

THE KENILWORTH.

BAKER WHITELY COAL CO. *v.* THE PIRATE.

SAME *v.* THE KENILWORTH.

(*District Court, D. Maryland.* July 2, 1887.)

1. MARITIME LIENS—REPAIRS—HOME PORT.
   Held, that there was no lien in favor of material-men for repairs and supplies furnished in the port of Baltimore to two British steamers upon the orders of charterers, who were owners *pro hac vice*, and who were well-known residents of Baltimore.
2. SAME—PILOT'S SERVICES.
   Held, that there was a lien in favor of the pilots rendering services to the steamers on their inward and outward voyages.

(*Syllabus by the Court.*)

In Admiralty.

E. C. Williams and *Wm. Pinkney Whyte*, for libelant.

John H. Thomas, for respondents.

Sebastian Brown and *B. W. Mister*, for petitioners.

MORRIS, J. These are claims of various kinds asserted *in rem* by libels and petitions against the British steamers Pirate and Kenilworth of Glasgow, Scotland, for coal, repairs to machinery and boilers, sails, and provisions furnished to the steamers in the port of Baltimore, and for pilotage services rendered during a period when they were chartered by the owners, residents of Glasgow, to Hart & Co., residents of Baltimore, who were merchants engaged in the importation of foreign fruits into that port. The steamers were chartered in Glasgow to Hart & Co. on

the eighteenth September, 1885, for two years, to be employed by them in such lawful trade as they might direct, between the United States and the West Indies or South America, and were brought to Baltimore by them, and put into their regular line of vessels plying out of the port of Baltimore in the foreign fruit business; each one making a voyage to some West India port and back every two or three weeks. They remained continuously in that service from about October, 1885, until Hart and Co. failed in business, about the first of May, 1887. The charter-parties required that Hart & Co. should pay for the hire of the steamers a stipulated sum per month, to be remitted to the owners in sterling drafts, in two payments in advance each month; and stipulated that the charterers, in addition to the hire, should provide the masters and crews, and pay their wages, and provide and pay for all the provisions, coal, port charges, pilotages, and all other charges whatsoever, (except insurance,) and pay all repairs to engine and hull, and maintain the hull and machinery in a thoroughly efficient state, and redeliver the engine, boiler, and hull upon expiration of the charter in the same condition as received, fair wear and tear excepted. It was provided, however, that the charterers were not to pay for repairs to the engines or hull costing over £120 on any separate repair of damage, and it appears that repairs over that sum for any one damage were covered by policies of insurance in owner's favor. The questions raised by the pleadings, and considered in argument, are as to whether the several bills for supplies, repairs, and services now sued for were contracted under circumstances which give these creditors a privilege against the steamers, or whether their remedy is solely against the charterers.

In the first place it is obvious from the charter-parties, and from the acts done in pursuance of them, that the owners delivered these steamers fully into the possession and control of the charterers. The charterers took them from Glasgow, and brought them to Baltimore. There they put out the former masters, and put in command others of their own choosing, and used the vessels thereafter on their own account upon such voyages within the ports named in the charter-parties as they desired, without the control in any way of the owners. It is beyond doubt that the charterers were owners *pro hac vice*. *Thorp* v. *Hammond*, 12 Wall. 416. The owners had parted with their possession of the vessels, and with all control over every one on board. It was a demise of the vessels for a stipulated hire, not dependent in any way upon the transportation of goods or the earning of freight. It is urged that because it was stipulated that the owners should have a lien upon all cargoes and subfreights for the charter money,—a lien which they would not have if they parted with the possession of the vessel,—that therefore the court must find as a fact that they did not part with possession, and the charterers were not owners *pro hac vice*. But this is impossible. The owners contracted to surrender possession, and did in fact surrender possession and control, and no stipulation for a lien usually dependent upon their retaining possession could alter that fact. It is also suggested that the stipulation that the owners should have the privilege of selecting the

chief engineers of the steamers—they, however, to be paid by the charterers—was sufficient to retain possession; but the contrary of this has been often decided. 1 Pars. Shipp. & Adm. 279, 280.

The case presented is one of vessels demised for two years to charterers, and delivered into their possession, and of supplies and repairs furnished in the port where the charterers resided, and where they were well-known merchants, in good credit; the charterers, by the terms of the charter-parties, having bound themselves to pay for the supplies and repairs. It is to be considered, then, by whom, and under what circumstances, the supplies and repairs were ordered, and what knowledge the material-men had of the actual terms of the charters.

It is proved that it was a matter of general notoriety in the port of Baltimore that Hart & Co. had chartered these British steamers for the fruit trade upon time charters. Hart's initials were put upon their funnels, and they carried his flags, and were constantly noted in the newspapers as arriving and departing, with comments upon their cargoes of fruit. This went on for over a year, and everything indicated that they could not be vessels employed by Hart & Co. upon ordinary cargo-carrying charters. It must have been quite generally known among the people who supply ships that the masters had been changed by Hart & Co., and that they had put in command of one of these steamers an American master, and in command of the other a master long resident here. Then, as to the character of the repairs and supplies, (except the sails,) they were not required by a vessel which has met with disaster, to enable her to complete an interrupted voyage, but were those which a steamer making short regular trips in and out of a port would require for its ordinary maintenance, and were mostly supplied by these creditors at regular intervals; the repair bills of Reeder & Son to the Pirate running from March, 1886, to March, 1887. With regard to the ordering of these materials and supplies, it appears that although in some cases the quantity and character was indicated by some officer of the steamers, as is quite unavoidable, they were not ordered by the master. The persons who were to furnish the supplies were selected by the charterers, and the terms of the purchase agreed to by them, and the bills invariably sent to them. No one ever thought of presenting a bill to any officer of the ship, or to any foreign owner. For the amount of the claims of Charles Reeder & Sons they had taken a promissory note made by Hart & Co., in which was included a sum due for work on an ice-machine on shore. The facts proven show, in almost every case, a continuous dealing with known charterers, in the port of their residence, for the ordinary requirements of vessels.

The cases of *The City of New York*, 3 Blatchf. 187; *The India*, 14 Fed. Rep. 476, 16 Fed. Rep. 262; *The Sydney L. Wright*, 5 Hughes, 474,—which are relied upon by counsel for the creditors, and in which claims of material-men were held to be entitled to a privilege against the ship,—were all cases in which the supplies were furnished to chartered vessels in ports in which the charterers were non-residents. In those cases the vessels were in all respects foreign; foreign in respect to the general own-

ers, and foreign in respect to the charterers who were the owners *pro hac vice*. But in the cases of *The Golden Gate*, 1 Newb. Adm. 308; *The Secret*, 3 Fed. Rep. 665, 15 Fed. Rep. 480; *The Norman*, 6 Fed. Rep. 406, 28 Fed. Rep. 383; and *Stephenson* v. *The Francis*, 21 Fed. Rep. 715,—all these were cases in which the supplies were ordered by the charterers in the port of their own residence, and, although the vessels were foreign in respect to their general owners, it was held that no maritime privilege arose; there being no implication that the ship's necessities could only be relieved by pledging her, when the charterer who was bound to supply these necessities was present in the place of his residence, and himself contracted for the supplies. *The Cumberland*, 30 Fed. Rep. 449, decides nothing to the contrary of this. It was there held that for supplies furnished in a foreign port upon the order of the master, he being also owner *pro hac vice*, and a resident of the port, a maritime privilege arose if the creditor had not been informed of the charter and its terms; because a material-man who deals with one who is actually master of a foreign ship is presumed to deal with him in his character of master, and is not affected by other relations he may have with the owner unless notified of them, nor is he affected by the residence or non-residence of such a master. But in *The Cumberland* it is also held, after the charterer had ceased to be master, and had put another in command, and procured the supplies, there was no lien.

These considerations, it seems to me, dispose of most of the claims upon which I am required to pass, without the necessity of entering upon the question of explicit notice of the terms of the charters, of which there is evidence in respect to some of the creditors, or at least sufficient information to have affected them with notice.

The claims for pilotage are, however, distinguishable from the claims of the material-men. These were for services performed by Chesapeake bay pilots in piloting the ships in and out of the bay on their ocean voyages. As to the inward pilotages, the employment was not in any port, but by the master himself taking the pilot aboard upon the high seas. The service was a necessary one to a ship then upon a voyage, and the state law requires the master of the ship to accept the offered service, or to pay the same charge as if it was accepted. The law regulates the employment, and it takes no account of the residence or non-residence of owners or charterers or their credit. The pilot is compelled to be in readiness to render the service, and the vessel cannot refuse it. The objections applicable to the claims of the other petitioners are not, it seems to me, applicable to these claims for pilotage. It is urged, however, that by delay in enforcing their privilege the pilots have lost their lien, and that by the action of their collector or treasurer they have agreed to look solely to the charterers. None of the claims are older than December, 1886, and the libels were filed about the first of May, 1887. I know of no case, unless there has been a change of ownership, or a loss to the owners attributable to the delay, where so short a period of delay has been held to destroy a lien of this kind. The treasurer of the pilots did take the note of Hart & Co. for a portion of the claims, payable in 60

days, which is now overdue, and is produced; but it was with the express understanding that he would not receipt the bills, and would not give up the lien, unless the note was paid. It has been suggested that the pilot fees belong, not to the pilots performing the service in whose names these petitions have been filed, but to the association of which they are members. The terms of the state law are that the fees shall be paid to the pilot first speaking the vessel. It has been shown that certain of the pilots do pool their earnings, and divide them, after paying out certain agreed items of expense; but there is no proof that, as among themselves, they have agreed to be partners. A mere agreement to divide equally their individual earnings does not make them partners. *Law* v. *Cross*, 1 Black, 533. I hold the claims for pilotage to be liens against the respective steam-ships.

There is one other claim, viz., that of the sail-maker, Mitchell, for the cost of two new try-sails, made for the Kenilworth, which I think is properly to be distinguished from the claims of the other material-men. These two sails were made for the Kenilworth upon the order of the master. The vessel was nearly loaded for a voyage, having come in from her previous voyage with her old sails torn to pieces. Mitchell was sent for, and, either upon the ship or on the wharf, a conversation took place in his presence between the master and one of the firm of Hart & Co., in which the master declared that the vessel was not sea-worthy without the new sails, and that he would not go to sea without them. Mitchell was asked if he could make them in a great hurry, so that the ship could sail by a certain hour, and he agreed to do so. He received the order, and put the sails on the ship on the twenty-second of January last; his bill amounting to $100. Mitchell declares that he knew nothing of any charter, and supposed it was the ordinary case of dealing with the master of a foreign vessel to supply an actual pressing maritime necessity. It is suggested that it is not clear from the language of the charter-party whether the renewal of the sails was one of the expenses to be borne by the charterers, and there is ground for the suggestion. This claim is not entirely free from doubt; but as the vessel has been returned to her owners with the new sails on her, and as the claimant is of that class of artisans favored by the maritime law, I think the doubt should be resolved in his favor.

The decree will be in favor of the claims for pilotage, and in favor of the claim of Mitchell for the sails, and dismissing all the other petitions which were presented at the hearing.

THE JOHN K. SHAW.

RAPHAEL *v.* THE JOHN K. SHAW.

(*District Court, D. Maryland.* April 12, 1887.)

1. BILLS OF LADING—PAYMENT OF DRAFT—TRANSFER OF TITLE.
A printed form of a bill of lading was signed in blank by the master of a canal barge before any cargo was put on board, and was filled up by the intended shipper as for a cargo of wheat to be delivered to a merchant, who, on the faith of it, accepted and paid a draft to which it was attached. *Held*, that as against the vendors of the wheat, who were ignorant of the issuing of the bill of lading, it did not transfer to the acceptor of the draft the title to a cargo of wheat, which was subsequently put on board under an agreement between the vendors and the shipper that they should retain their title to the wheat until it was paid for, and under an agreement that the barge should not be allowed to proceed on her voyage until payment was made.

2. SAME.
Held, under such a state of facts, that the vendors of the wheat, having exercised their right to reclaim it, the holder of the antedated bill of lading could not proceed *in rem* against the barge for its value.

(*Syllabus by the Court.*)

In Admiralty.

Robert H. Smith, for libelant.

Sebastian Brown, for respondent.

MORRIS, J. This is a libel *in rem* against the canal barge John K. Shaw, to recover the value of a cargo of grain, which, it is alleged, the master contracted by a bill of lading to deliver to the libelant in Philadelphia.

A certain George W. Morrison, of New Castle, Delaware, who was engaged in the business of shipping grain under the firm name of W. H. Jefferson & Co., chartered the canal barge to carry a cargo of grain for him to Philadelphia. The grain was to be received on board at St. George's and at Delaware City. On the last days of September, or perhaps on the first day of October, 1886, and before any grain had been put on board, John Eveland, the master of the barge, at the request of Morrison, signed his name to a printed form of bill of lading. This printed form Morrison dated October 1, 1886, and filled up so as to read that he had shipped 3,510 15-60 bushels of wheat on the barge John K. Shaw, then lying at Delaware City and bound for Philadelphia, to be delivered to Raphael (the libelant) on his paying one and one-eighth cents per bushel freight. On the same day, October 1st, Morrison drew a sight-draft for $2,500 on Raphael, which he negotiated, with the bill of lading attached, and which Raphael paid in due course, receiving with it the bill of lading. On the twelfth of October, the grain not coming, Raphael telegraphed to the master of the barge at Delaware City to know why the barge had not brought the grain, but he received no reply. Raphael then went to Delaware City, and saw the master, who, in substance, refused to come to Philadelphia because the farmers from whom Morrison had procured the grain which had been put on board,

claimed to be the owners of it, and had forbidden his taking it to Philadelphia.

The proofs show that there was put on board the barge in all 3,090 bushels of wheat under the following circumstances: A farmer named Reybold had been for some years in the habit of acting for Morrison as his agent in buying wheat from the farmers in the neighborhood of Delaware City and along the canal. The grain was bought for cash, and was to be hauled by the farmers, with their own teams, and emptied in bulk into the canal-boats furnished by Morrison. As the grain was run into the hold, it was weighed, and the quantity ascertained. Then Reybold procured from Morrison his checks for the respective amounts due the farmers, and paid them.

Reybold began loading this barge at St. George's on October 1st, and on that day received from E. L. Mifflin 548 bushels of wheat, and from F. D. Reynolds 192 bushels. He had already advanced to Mifflin $350 on account. The barge was then moved to Delaware City, where, on the fourth, she received about 700 bushels, on the fifth nearly 2,000 bushels, and on the eleventh the balance, making up the total of 3,090 bushels. On the morning of the fifth Reybold learned that two checks, dated September 29th, which Morrison had given for grain purchased through him for a previous shipment, had gone to protest. He telegraphed to the cashier of the bank, who replied that the checks had not yet been provided for, but that Morrison had said he would make them good that day. Reynolds also telegraphed for Morrison to come at once to Delaware City, and he replied that everything would be right, and that he would come that afternoon. Morrison did not come, and at 5 P. M. Reybold wrote him that he had stopped all the teams and should not haul any more grain until he saw him. After this, on the 11th, there was about 400 more bushels of grain put on the barge. The barge then lay at Delaware City until the fifteenth October, when, the grain not having been paid for by Morrison, the farmers, through their attorney, ordered the master to take the cargo to Baltimore, and the master, with the assent of Morrison, and upon the demand of the farmers and of Reybold, issued another bill of lading on the fourteenth October, making the grain on board deliverable to consignees in Baltimore. It was so delivered, and was sold for the account of the farmers.

Reybold testified that all the grain was bought for cash, and was to be paid for as soon as delivered on board, and that, with respect to that put aboard on the fifth October and afterwards, there was a distinct agreement and condition that, if it was not paid for, it should be taken out. Mr. Higgins, who was the owner of 1,100 bushels, testifies to this, and that, knowing that Morrison was in financial difficulties, he would not have put his property on the barge upon any other terms. Neither Reybold nor Higgins nor any of the farmers knew, until the telegram from Raphael on the 12th, that a bill of lading had been issued by the master to Morrison.

It is contended, on behalf of the respondents, that the bill of lading held by libelant is altogether void, not only because signed by the master

before any grain had gone aboard, but also because it was signed in blank, and could not therefore specify what was to be carried or to what place or in what quantity, and that the master had no authority from the owner to bind him by such a signature to a blank paper. Some authority is found for this contention. In *The Joseph Grant*, 1 Biss. 193, it was held by Mr. Justice MILLER that a blank bill of lading cannot be made a contract binding the vessel or the owner, for the reason that the master has no implied authority to sign it, and that it no more bound the vessel than a bill of lading for goods not delivered to the vessel. But the case before Mr. Justice MILLER was one in which the master, after the cargo was on board, and before signing the blank, had already exhausted his authority and agency by signing a regular bill of lading for the goods, upon which they were actually delivered to the consignee named in it. It is, however, well settled that if, in anticipation of the delivery of goods to the vessel, the master signs a bill of lading, and the goods are subsequently delivered as and for the goods intended to be embraced in it, if there be no intervening title to the goods between the issuing of the bill of lading and the delivery on board, the bill of lading will cover the goods. *The Idaho*, 93 U. S. 582; *Halliday* v. *Hamilton*, 11 Wall. 564; *Rowley* v. *Bigelow*, 12 Pick. 314. And if the blank form of a bill of lading is signed by the master, with the intent that the shipper shall fill it for a certain voyage and at a certain freight and for such goods as may be subsequently in fact put on board, I think it might well be held operative as to the goods actually appropriated and so shipped. A formal bill of lading is not the only evidence receivable to show an intention to appropriate goods delivered to a carrier, and to pass the title to a consignee. But, in any event, such a bill of lading should be operative in no greater degree than if it had been delivered at the time the goods were really put on board; for, as it is the delivery of the goods to the vessel which gives it validity, its validity should be controlled by whatever circumstances would control the contract if not issued until after the specific goods were on board.

In this case there is evidence to prove that the understanding of the farmers, who furnished the grain, with Reybold, the agent of the shipper, was, that the barge was not to be taken away until the grain was paid for, and as to the greater part of the whole amount, which was put aboard after Morrison stopped payment, there can be no doubt that there was a distinct understanding that the grain should be taken out again if the money was not paid. And the master must have known that his barge was not being loaded, and that he was being detained because the farmers claimed to hold the grain until the purchase money was paid. If at that time he had been asked to give Morrison a bill of lading, he would have known that Morrison was not the owner of the grain, but that the farmers retained a *jus disponendi*. He could not at that time and with that knowledge have given a bill of lading which would have defeated their rights. *Thompson* v. *Trail*, 2 Car. & P. 334; same case on appeal, 6 Barn. & C. 36. And this is the difference which, in my judgment, distinguishes the facts of this case from those of *Row-*

ley v. *Bigelow*, 12 Pick. 306. In that case the goods were not delivered upon any condition whatever, but, having been sold to a fraudulent purchaser, were unconditionally delivered to the carrier, who issued a bill of lading, and transported them to their destination without any notice of any infirmity in the title of the shipper. The present case more nearly resembles *Hussey* v. *Thornton*, 4 Mass. 405, and *Dows* v. *Bank*, 91 U. S. 618. In the latter case the shipper had received the grain under an agreement to hold it in his elevator as bailee until he had paid the purchase money for it, and the supreme court held that there was no such delivery to him as would enable him to transfer title to it by shipping it, and transferring the bills of lading for value to a stranger. A very similar case to the present one is *Coggill* v. *Railroad Co.*, 3 Gray, 546.

It would, of course, have been more regular for the vendors of the grain to have each taken a receipt from the master as evidence of their intention to retain a *jus disponendi;* and, in a commercial port where that method of retaining a lien on goods put aboard conveyances for transportation is established and well known, it might be that the court would hold that the absence of such a receipt was a decisive proof of an unconditional delivery; but whether a delivery is without any retention of a *jus disponendi* or not is always a question of intention to be derived from the acts, declarations, and circumstances accompanying the delivery. *Prince* v. *Railroad*, 101 Mass. 546. A barge lying in a canal in a farming country, for the reception of grain to be hauled and placed on board by the growers, is known to be loading under very different circumstances from a vessel receiving cargo in a commercial port. She is in fact for the time being a warehouse for the collection of the grain which is to constitute the cargo. Delivery on board is a prerequisite of payment; and when it is known to the master that the grain has not been paid for, that the vendors do not intend to relinquish their title to it, and that the retention of the title is necessary for their protection because of the failing condition of the shipper, under such circumstances the master cannot safely give a bill of lading to the shipper.

The proof is not very clear as to the knowledge of the master in this case, but I think enough appears from which it is only a fair inference that he well knew on October 5th why it was that he was being detained, and that he then knew that the barge was not to be allowed to leave until payment for the grain was made. Notwithstanding, therefore, that an antedated bill of lading may be allowed to operate by way of estoppel and relation upon the grain subsequently put aboard, still it must be affected by whatever knowledge the master had, at the time the goods were actually ladened, with regard to the intention of the vendors not to unconditionally part with their property.

In *Bryans* v. *Nix*, 4 Mees. & W. 774, a case frequently referred to as authority on this class of questions, receipts for two cargoes of oats were obtained from the masters of two canal-boats, and drafts were drawn against them. At the time the receipts were given, one boat was loaded, but the other was not, although the shipper had a cargo prepared for her.

Subsequently the shipper, being pressed by a creditor, agreed to give him the oats, and in fulfillment of that agreement, loaded the second boat, and obtained from the masters other like receipts for the cargoes of both boats, and transferred them to the creditor, who upon them obtained possession of both cargoes. It was held that the acceptor of the bill of exchange could recover the cargo which was loaded on the first boat when his receipts were obtained, but that he could not recover the grain loaded on the second barge, because it was not on board when his receipt was given. With regard to the second boat load, Baron PARK, in giving judgment, said that, if the oats had been put on board the second boat for the purpose of fulfilling the first contract, and were received by the master as such before any new title to the oats had been acquired by a third person, he should probably have held that the property in both boat loads passed to the plaintiff, who was the acceptor of the draft, and in that case, as to the cargo of the second boat, the receipt might have operated as an executory agreement that, when the oats were ladened on the second boat, the master should hold them for the plaintiff so that, when the agreement was fulfilled, they would have become his property. But, before the agreement was fulfilled, the shipper had been induced to enter into another engagement to deliver them to the defendant. The plaintiff had an agreement with the shipper that the oats to be loaded on the second boat should be sent to him, and the defendant subsequently obtained an agreement that they should be sent to him. Both contracts were executory until the oats were appropriated by some new act; and Baron PARK held that the signing of the receipt for the oats, after they were put on board the second boat in execution of the second contract, was the first act by which the oats on that boat were specifically appropriated. This decision has been questioned, because it has been said that the facts found by the jury and stated by the reporter do not sustain the position taken in the decision; but the law, as applicable to the facts assumed by the court, is not questioned.

Applying the doctrine of *Bryans* v. *Nix* to the present case, it would follow that any contract, agreement, or understanding which Morrison had with the vendors of the grain, after the issuing of the blank bill of lading, and while the grain was going aboard, even though unknown to the master, and which was subsequently executed by the signing of new bills of lading by the master under which they took possession, can be sustained as against the holder of the first bill of lading. It is very true that it is settled law that, where a vendor delivers goods to a carrier by order of a purchaser, the appropriation is determined. Delivery to the carrier is delivery to the vendee, and the property vests immediately. Benj. Sales, § 362; *Halliday* v. *Hamilton*, 11 Wall. 560; *Prince* v. *Railroad Co.*, 101 Mass. 542. But this rule is not contravened by asserting the *jus disponendi* of the vendor, when the circumstances evidence an intention to retain, and where there is a special agreement to retain it. If the goods are not delivered to the carrier unconditionally as goods to which the shipper has acquired title, the carrier cannot validly agree, and certainly by an antecedently issued bill of lading he cannot contract,

to deliver them in disregard of the retained title of the unpaid vendor. Now, in this case, Reybold was Morrison's agent in purchasing, receiving, and shipping the grain, and he declares that the grain was to remain the property of the farmers until paid for, and that, although put on the barge and thus received by him, it was with the understanding that it was not unconditionally delivered, but that the barge was not to leave Delaware City until it was paid for, and that, as a great deal of it was received by him after he knew that Morrison had stopped payment and gone to protest, he was careful to make this agreement. It is conceded that there is no statute of Delaware which affects the question of a conditional delivery of chattels, or which legislates with regard to bills of lading, and there is no rule of the common law which forbids such a transaction. *Harkness* v. *Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51; *Coggill* v. *Railroad Co.*, 3 Gray, 545. Even though a bill of lading be given for goods regularly delivered on board, if the carrier discover that the shipper had no title and the true owner demand them, the carrier may deliver them up to the true owner in disregard of the bill of lading thus wrongly obtained. *The Idaho*, 93 U. S. 575.

The grain being the property of the vendors, it was rightly given up to them without requiring them to resort to legal process, except as to the portion of Mifflin's grain which was paid for by the $350 advanced to him by Morrison, and which respondent has tendered. The decree will be in favor of the libelant for the proper value of so much of the Mifflin grain as had been paid for. Each party must pay his own costs.

DWYER v. PESHALL.

(*Circuit Court, S. D. New York.* September 23, 1887.)

1. REMOVAL OF CAUSES—APPLICATION—ACT OF MARCH 3, 1887.
   Under the New York Code of Procedure the defendant must serve his answer by the twentieth day after service of the complaint, unless the time is extended by order of court or by written stipulation. *Held*, that an oral agreement between the parties to the effect that the suit, which was only brought as a stalking-horse to beguile third persons, was not to be pushed, and that no answer would be required, was not such an extension as was provided for by either the laws of the state or the rules of the state court, and that a petition for removal filed after the 20 days were up came too late; the amendatory removal act of March 3, 1887, requiring such petition to be filed "at the time or any time before the defendant is required, by the laws of the state or the rule of the state court in which such suit is brought, to answer or plead."
2. SAME—ACT OF MARCH 3, 1887—INTERPRETATION.
   The intention of the amendatory removal act of March 3, 1887, to restrict removals from state to federal courts, is so clear that it should be strictly construed against any one seeking to evade the additional requirements which it puts upon the right of removal.

On Motion to Remand.

Kelly, Tucker & Henderson, for Dwyer.

C. Fine, for Peshall.

LACOMBE, J. This action was begun in the state court, by service of a summons and complaint, on February 19, 1887. The defendant was, by the Code of Civil Procedure, required to answer the complaint on March 12th. No answer was served, but on August 12th defendant filed his petition for removal. The recent amendment (1887) to the removal act requires the defendant to file his petition "at the time or any time before the defendant is required, by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." The New York Code of Procedure requires a defendant to serve his answer by the twentieth day after service of the complaint. That time may be extended under the Code and the rules in two ways,—either by order of the court or by written stipulation. Such an extension would no doubt enlarge the time within which a petition for removal may be filed, (*Simonson* v. *Jordon*, 30 Fed. Rep. 721,) but in this case there is neither order of court nor written stipulation. Defendant relies upon an alleged oral agreement between the parties, entered into before the action was brought, that "it should never be prosecuted to trial or judgment; that no default should be taken therein; that the time to answer should be indefinitely postponed, and that no answer should be required,—the action having been commenced merely for the purpose of facilitating a successful termination of negotiations for the sale of certain terminal railroad interests in Jersey City; and to be discontinued when such result was consummated, or when it was apparent that the commencement of the action did not hasten such negotiations." In other words, the alleged agreement contemplated us-

ing the process of the supreme court of the state as a stalking-horse to beguile third persons for the benefit of the parties thereto.

Whether or not persons making such an agreement are guilty of contempt of court may be left to the determination of the tribunal whose process has been thus abused. It is not even necessary to pass upon the question whether the alleged agreement is legal and binding on the parties. The utmost that could be claimed for it is that it may afford good ground for obtaining an extension of time to answer; it is not in itself such an extension as is provided for either by the laws of the state, or the rules of the state court, and therefore not within the letter of the act of 1887, above quoted. The amendments of 1887 were plainly meant to restrict removals from state to federal courts. The value of the matter in dispute is increased from $500 (including interest) to $2,000, (excluding interest.) Removal can be had only by the defendant, instead of by either party, as heretofore. The time within which such removal shall be had is materially shortened. The intention of the act is so clear that it should be strictly construed against any one seeking to evade the additional limitations which it puts upon the right of removal.

Defendant further contends that plaintiff is, by the alleged oral agreement above quoted, estopped from moving to remand the cause. It is unnecessary to discuss that point. This court is not estopped from remanding a cause not properly before it, and will be astute, on its own motion, to decline the consideration of cases which under the federal statutes have not been properly relegated to its jurisdiction.

MOORE and another *v.* TOWN COUNCIL OF EDGEFIELD.

(*Circuit Court, D. South Carolina.* August, 1887.)

1. COURTS—FEDERAL JURISDICTION—AMOUNT IN DISPUTE.
   Under the act of congress (March 4, 1887) the circuit court of the United States has not jurisdiction in a controversy between citizens of different states, if the sum or value of the matter in dispute does not exceed $2,000, excluding from the computation any interest which may have accrued up to the date of suit.
2. MANDAMUS—TAX LEVY—IMPEACHMENT OF JUDGMENT.
   In an application for a *mandamus* for the levy of a tax to pay a judgment, it is competent to show that the judgment was obtained *coram non judice.*
3. JUDGMENT—COLLATERAL ATTACK.
   A judgment can be impeached collaterally if the court rendering it was wholly without jurisdiction.[1]

(*Syllabus by the Court.*)

Rule to Show Cause why a *mandamus* should not issue to levy a tax for the payment of a judgment.

[1] The want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it. Grimmett v. Askew, (Ark.) 2 S. W. Rep. 707, and note; Fahey v. Mottu, (Md.) 10 Atl. Rep. 68; Jasper Co. v. Mickey, (Mo.) 4 S. W. Rep. 424; Spoors v. Cowen, (Ohio,) 9 N. E. Rep. 132.

R. W. Shoud, for plaintiffs.
Ernest F. Gary, for defendant.

SIMONTON, J. On the rule-day, in May, 1887, the plaintiff obtained judgment by default against the town of Edgefield in the sum of $2,105, and costs; the cause of action consisting of certain bonds and coupons issued by defendant. Judgment was entered for the principal of the bonds, and the coupons with interest on them, in detail as follows:

Principal of bonds past due,	$1,440 00
Coupons for 3½ years,	436 80
	$1,876 80
Interest on such principal and on the coupons,	228 95
	$2,105 75

The execution issued upon this judgment having been returned *nulla bona*, application was made for a rule to show cause why a *mandamus* should not issue to the town council of Edgefield requiring the levy of a special tax to pay this judgment. The return to this rule sets out several grounds for refusing the *mandamus*. It is necessary to consider but one of these. The respondent contends that the subject-matter of the suit on which judgment was had was not within the jurisdiction of this court, and that the judgment is void. The act of congress (March 4, 1887) limits the jurisdiction of this court in controversies between citizens of different states to cases "in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000." 120 U. S. 786. This suit began March 9, 1887. On that day the matter in dispute, "that is to say, the amount claimed by the plaintiffs in their complaint," (*Kanouse* v. *Martin*, 15 How. 207,) consisted of past-due bonds, past-due coupons, and interest on the bonds and coupons. The aggregate of bonds, coupons, and interest exceeds $2,000. If the interest be excluded the result will be less than $2,000. Do the words of the act exclude the interest which had accrued up to the date of the action, or do they refer only to the interest which may accrue between the date of the action and the rendition of verdict or allowance of judgment? The relator with great force presses the latter construction. The act, he says, excludes costs also; "the matter in dispute, exclusive of interest and costs." As costs do not accrue until after suit brought, he contends that the word "interest," put into the same sentence and category with the word "costs," must mean the interest which, like the costs, accrues after suit brought. This is the first case in this court upon this act. Although the act bears on its face marks of great haste and of an unusual want of care in its passage, and is in some particulars obscure, its purpose is clear to abridge the jurisdiction of the circuit courts of the United States. Before its passage the limit of the jurisdiction was a minimum ascertained on the whole amount claimed, excluding costs. This act ascertains the minimum by excluding from the amount claimed interest as well as costs. The decisions of the supreme court

had already decided that accruing interest as well as costs do not enter into the computation in determining the limit of its jurisdiction. The language is the same, "when the matter in dispute, exclusive of costs, exceeds $5,000." Here neither interest on the judgment nor costs of suit can enter into the computation. *Telegraph Co.* v. *Rogers*, 93 U. S. 566; *Troy* v. *Evans*, 97 U. S. 1. By analogy of reasoning, when a matter in dispute, exclusive of costs, did not exceed $500, the accrual of interest of the suit brought could not have created jurisdiction in the circuit court under the law as it stood before the act was passed. It would seem, therefore, that congress, when the word "interest" was inserted, intended something more than to declare the law. The matter in dispute in the present case consists of three elements,—the past-due bonds, coupons representing past-due interest, and the interest accrued on past-due bonds and coupons. The act of 1887 does not say that the matter in dispute must exceed $2,000, but that the matter in dispute, *exclusive of interest*, must exceed, etc.; that is to say, the interest must be excluded from the matter in dispute, and the result must exceed $2,000, else the court will not have jurisdiction.

Again, the jurisdiction of the court depends upon and is determined by the condition of things existing on the day action is brought. If the jurisdiction depends upon citizenship, and on the day suit is brought the parties to the controversy are citizens of different states, the court will have and will retain jurisdiction, notwithstanding that afterwards they may become citizens of the same state. *Conolly* v. *Taylor*, 2 Pet. 556; *Dunn* v. *Clarke*, 8 Pet. 1. A petition for removal on a similar ground will not be granted, unless it appears that at the time of action brought the diversity of citizenship existed, even though at the date of the preparation and filing of the petition the parties had ceased to be citizens of the same state. *Bruce* v. *Gibson*, 108 U. S. 563, 2 Sup. Ct. Rep. 873; *Akers* v. *Akers*, 117 U. S. 197, 6 Sup. Ct. Rep. 669.

Notwithstanding this act, an action begun at any time anterior to its passage could be maintained, although the matter in dispute exceeded but by one dollar $500, exclusive of costs. And so, as we have seen, the jurisdiction of the supreme court is determined by the amount of the judgment in the circuit court, and is not aided by interest accruing thereon after the date of the judgment. This being so, when the jurisdiction depends upon the amount, this amount on the day suit is brought must exceed the minimum fixed by law. And when the amount is ascertained by excluding from the matter in dispute interest as well as costs, the interest to be excluded must be the interest due on that day. But it is said the act also excludes costs. So it does, but we must remember that costs accrue the instant the suit begins, on filing the papers with the clerk, or upon depositing them with the marshal; and therefore there is neither looseness nor impropriety in the expression that there must be excluded from the calculation the costs existing on the day suit is brought, as well as the interest accrued up to that time. It is true that under this view of the law some inconsistency arises. The court would have jurisdiction in an action upon an open account for $2,001.

And it may not have jurisdiction in an action upon a note or bond for $1,800, upon which there may be due and unpaid four years of interest. Such inconsistencies are for the consideration of congress, and not the court. But, say the plaintiffs, suppose that the claim is wholly for interest,—for example, a bond for $100,000, payable in 10 years, interest payable annually; on this bond let one or more installments of interest be due,—is the court excluded from jurisdiction? Clearly it would not be. Each installment of interest due itself becomes an interest-bearing fund; a sum certain and a distinct cause of action; a matter in dispute in itself actionable independent of the fact that the bond is not due. The relators contend that the return cannot impeach the validity of the judgment; that this cannot be inquired into collaterally; and that, for the purposes of this rule, the judgment must stand. If there be error in the judgment, it can be corrected only by appeal. There can be no doubt that where the parties and the subject-matter, or either, are within the jurisdiction of the court, the judgment cannot be impeached for error in whole or in part in a collateral proceeding. The only mode of correcting it is an appeal. *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 185; *Skillern* v. *May*, 6 Cranch, 267; *Bank* v. *Moss*, 6 How. 39; *U. S.* v. *Hackabee*, 16 Wall. 435. See *Walker* v. *Hill*, (Ind.) 12 N. E. Rep. 387. But when it appears by an inspection of the record that the court was wholly without jurisdiction,—that the matter was *coram non judice*,—the judgment is void and of no effect, and must be disregarded. *Elliott* v. *Lessee of Peirsol*, 1 Pet. 328; *Miller* v. *Miller*, 1 Bailey, Law, 244; *James* v. *Smith*, 2 S. C. 188; Freem. Judgm. 188. See *Pasteur* v. *Lewis*, (La.) 1 South. Rep. 307. This court, it must be remembered, has but a limited jurisdiction in *mandamus*. Its authority to issue the writ is solely in aid of its jurisdiction. *Bath* v. *Amy*, 13 Wall. 244; *Rosenbaum* v. *Bauer*, 120 U. S. 450, 7 Sup. Ct. Rep. 633. The first question, then, is, is the matter to be enforced within the jurisdiction of the court? In the present case it is not. Let the rule to show cause be dismissed, and the *mandamus* be refused.

LUNDBERG *v.* ALBANY & RENSSELAER IRON & STEEL CO.

(*Circuit Court, S. D. New York.* 1887.)

EVIDENCE—AT FORMER TRIAL—REVERSAL AND REMAND OF CAUSE.

In an action in which a new trial has been ordered in a United States circuit court in New York, to recover damages for breach of a contract to purchase a quantity of iron which defendant refused to accept because it was not of the proper quality, the power of the court is doubted to grant a motion of defendant to be permitted before trial to take borings from pigs of iron, the property of the firm, for which plaintiff is agent, and in his possession, and to make an analysis of said borings, to be used as evidence upon the second trial, on the ground that, as the pigs were offered in evidence on the former trial, and would be offered again, they were under the control of the court.

Action for breach of contract for the sale of iron, which defendant refused to accept on account of alleged imperfections. On appeal from a verdict in plaintiff's favor, the United States supreme court reversed the judgment and remanded the cause for second trial. See 7 Sup. Ct. Rep. 958.

J. W. Eaton, Jr., and *Edwin Countryman*, for the motion.

Everett P. Wheeler, against the motion.

SHIPMAN, J. This is a motion, in an action at law, that the defendant be permitted to take borings from three pigs of iron, now the property of the firm for which the plaintiff is agent, and in his possession, and to make an analysis of said borings, which analysis is to be used as evidence upon the next trial of said cause. Upon the former trial to the jury, the plaintiff introduced an analysis of the borings taken from said three pigs. The action is for an alleged breach of contract for the purchase of a large quantity of iron which was furnished and acceptance of which was refused, and of which these pigs are a part or sample. The amount of phosphorus which was contained in the iron is an important question of fact in the case. The defendant has other analyses taken from other samples. The ground upon which the motion is placed is that as the pigs have once been offered in evidence, and will undoubtedly be offered again, they are now, in a certain sense, under the control of the court. It is to be noticed that no authority is given by statute to the courts of common law of the United States or of the state of New York, to direct an inspection and examination of this species of personal property before trial. It is substantially conceded that, if the case had not once been tried, the motion would not be pressed. *Ansen* v. *Tuska*, 1 Rob. (N. Y.) 663; *Miner* v. *Gardiner*, 4 Hun, 132; *Cooke* v. *Lalance Manuf'g Co.*, 29 Hun, 641.

I have very serious doubts of the power of this court to make such an order before the trial, and before the articles have been offered in evidence, although they were offered upon a former trial. Upon the trial, when the articles are in court for the purposes of evidence, they will be subject, for the time being, to its direction and control. I am not clear that I have power, at the present time, to direct that the defendant shall have an inspection of the articles which are the property of the plaintiff or of his principal, and which are to become a part of his testimony in the case.

The case of *Hewitt* v. *Pigott*, 7 Bing. 400, which was a motion for the inspection of a deed which had been read upon the former trial, an inspection of which was wanted for the purpose of ascertaining its language, does not seem to be controlling. The motion is denied, with leave to renew it, if so advised, upon the trial of the case.

ALPERS v. CITY AND COUNTY OF SAN FRANCISCO and another.

(*Circuit Court, N. D. California.* September 5, 1887.)

1. MUNICIPAL ORDINANCE—REMOVAL OF DEAD ANIMALS—CONTRACT—EXCLUSIVE PRIVILEGE—INJUNCTION.
   The city and county of San Francisco, under the power vested in all municipal bodies to provide for the health of their inhabitants, and by virtue of express provisions of the constitution of California, art. 11, § 11, and by the consolidation act of 1863, has power to make regulations for the removal from its limits of dead animals, not slain for human food. Pursuant to this authority, the board of supervisors entered into a contract, and passed the necessary ordinance to give it effect, known as the "Dead-Animal Contract," whereby plaintiff and his assigns were granted the exclusive privilege, for 20 years, of having and removing all dead animals not slain for food. During the existence of the contract, the board of supervisors passed a resolution directing its clerk to advertise for proposals from parties desirous of obtaining the carcasses of dogs killed by the pound-keeper pursuant to the order of the board, and repealing "all orders or resolutions, or parts of orders or resolutions, in conflict with this resolution." The plaintiff asked for an injunction restraining the board from passing or carrying out such a resolution. *Held*, that the passage of a resolution or order or ordinance providing for the removal of dead animals by the board was a matter of legislative discretion, and an injunction restraining the passage of such a resolution, order, or ordinance would not be granted by the circuit court of the United States.[1]
2. SAME—"DEAD-ANIMAL CONTRACT" OF SAN FRANCISCO—DUTY OF POUND-KEEPER.
   The contract known as the "Dead-Animal Contract," whereby plaintiff and his assigns were granted, by the board of supervisors of San Francisco, the exclusive privilege, for 20 years, of having and removing the carcasses of all dead animals, not slain for food, subject to the sanitary regulations and control of the supervisors, provides that it shall "be the duty of the keeper of the public pound to notify the plaintiff or his assigns to remove the animals destroyed by him." *Held*, that the plaintiff is entitled to an injunction restraining the pound-keeper from delivering, or causing to be delivered, to any other person than plaintiff or his assigns, such carcasses during the existence of the contract.

The plaintiff has filed a bill against the city and county of San Francisco, its mayor, supervisors, and pound-keeper, to prevent any obstruction by them to the execution of a contract between him and the city and county, known as the "Dead-Animal Contract." And he applies for a provisional injunction against the municipality to restrain the passage of any resolution, order, or ordinance, which will impair the obligation of that contract. The injunction is asked upon the bill and affidavits, and their allegations not being controverted, are, for the purposes of this application, to be taken as true. It appears by them that in April, 1866, the board of supervisors made a contract with one G. Wetzler, for the removal from the city limits, at his own cost and expense, for a period of 20 years, of all dead animals not slain for human food, to some

[1] In *California*, an injunction to restrain the anticipated action of the board of supervisors of a county in paying certain alleged illegal claims will not be granted, it being hardly claimed that the board has no jurisdiction. Merriam v. Yuba Co., 14 Pac. Rep. 137. But that courts have jurisdiction to enjoin the board of supervisors of a municipal corporation from passing an ordinance which is not within the scope of their powers, where the passage of such ordinance would work irreparable injury, see Water-Works v. Mayor, 16 Fed. Rep. 615.

place where they should be disposed of in a manner so as not at any time to become a nuisance,—the manner to be at all times subject to the sanitary regulations and control of the supervisors, and the removal to be made in every instance immediately upon receiving notice of the existence of the dead animals.

In consideration of the removal, the city and county agreed that Wetzler should have the exclusive right of removing all the dead animals for the period designated; such exclusive privilege to be secured by a proper ordinance requiring notice to be given to him in every case of the death of the animal; and Wetzler, on his part, agreed to keep an office or place of business in some central location, where notices might be given of the existence of any dead animal. If the contractor should fail or neglect to perform the terms of the contract, its privileges were to be forfeited, and he was to pay to the city five hundred dollars ($500) as liquidated damages. The supervisors passed the necessary ordinance to give effect to the contract; and it was ratified and confirmed by a special act of the legislature. Statutes of 1875–76, p. 866.

By various mesne assignments, the contract was transferred to the complainant. In 1882, before the expiration of the 20 years, it was renewed and extended for another similar period, and in December of that year, and also in November, 1884, resolutions were adopted by the supervisors giving full effect to the renewed contract, and requiring of the contractor a bond, with sureties, in the sum of one thousand dollars, ($1,000,) for the faithful performance of all its stipulations. Among the provisions of the resolutions was one making it the duty of the keeper of the public pound to notify the plaintiff or his assigns to remove the animals destroyed by him, and of all health and police officers to give notice of the death of animals which were to be removed.

The bill alleges that the plaintiff accepted the resolutions adopted, executed the bond required, and entered upon the performance of the duties under the contract, and that he and his assignors have expended twenty-five thousand dollars ($25,000) in buying lands, erecting buildings, and in purchasing horses, wagons, carts, and necessary machinery, for carrying out the contract, and have fully performed all its conditions. The carcasses of the animals were utilized by the plaintiff in many ways. Leather was made from the hides, and various articles from the bones, fat, and flesh; and it is alleged that in the prosecution of the business expensive and peculiar kinds of machinery are required, and employes expressly trained for it.

Notwithstanding the contract thus made, and the interest in it held by the plaintiff, the bill alleges that, on the seventh of February of the present year, a resolution was passed by the board of supervisors, directing its clerk to advertise for proposals from parties desirous of obtaining, for a period of two years, the carcasses of dogs and other animals killed by the pound-keeper, pursuant to the order of the board, and repealing "all orders or resolutions, or parts of orders or resolutions, providing for the disposal of the carcasses of dead animals, and in conflict with the provisions of this resolution." Thereafter, pursuant to the res-

olution, the supervisors caused an advertisement to be made "for proposals for purchase of the carcasses of dogs and other animals killed by the pound-keeper;" and the bill alleges that, unless restrained, the board will carry out the action indicated by the resolution and advertisement, and will accept some of the proposals made, and award to the highest bidder the exclusive privilege for the period of two years, of obtaining and removing all the carcasses of animals thus killed; that the board has the physical power and instrumentalities to carry out its action; that the plaintiff will thereby be deprived of such carcasses for that period, and be subjected to great and irreparable injury; and that such action will impair the obligation of his contract, and deprive him of his property without due process of law, contrary to the constitution of the United States. The plaintiff therefore prays that the board of supervisors may be enjoined from carrying out its intended action, and from passing any resolution, order, or ordinance depriving him, or attempting to deprive him, or his assigns, of the privilege of removing the dead animals mentioned, during the period designated in his contract.

The bill also alleges that, since the first of January, 1857, the board of supervisors has authorized the pound-keeper, Jacob Lindo, to disregard, and in pursuance of such authority he has disregarded, the contract of the plaintiff with the city, giving him the exclusive privilege of having and removing the carcasses of dogs and other animals destroyed by the pound-keeper, and has refused to deliver the same or any part of them to him; but on the contrary, has delivered a large number, namely, about 400 dogs, to the defendant William P. Lambert, one of the supervisors, who has received them and converted them to his own use. The plaintiff therefore prays that the city pound-keeper may be enjoined from delivering, or causing to be delivered, to any other person than the plaintiff or his assigns, such carcasses, during the period the contract has to run.

Langhorne & Miller, for plaintiff.

M. C. Hassett, for defendants.

FIELD, Circuit Justice, (*after stating the facts as above.*) There is no doubt that the contract between the plaintiff and the city and county of San Francisco is one within the competency of the municipality to make. It is within the power of all such bodies to provide for the health of their inhabitants by causing the removal from their limits of all dead animals not slain for human food, which otherwise would soon decay, and, by corrupting the air, engender disease. And provisions for such removal may be made by contract, as well as the performance of any other duty touching the health and comfort of the city; its authorities always preserving such control over the matter as to secure an observance of proper sanitary regulations. In addition to this general power, the constitution of the state of California which was in force when the contract with the plaintiff was renewed, declares that "any county, city, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws." Article

11, § 11. And the consolidation act of 1863, still in force, provides that the board of supervisors shall have power "to authorize the summary abatement of nuisances; to make all regulations which may be necessary or expedient for the preservation of the public health, and the prevention of contagious diseases; to provide by regulation for the prevention and summary removal of all nuisances and obstructions in the streets, alleys, highways, and public grounds of said city and county, and to prevent the running at large of dogs, and to authorize the destruction of the same when at large, contrary to ordinance."

The contract in question does not appear to be open to any serious objection; none is alleged against its provisions. It imposes no burden upon the municipality. The removal of the dead animals is to be made without any expense to it. The compensation of the party making the removal is found in the uses to which the animals are or may be put. Their hides are converted into leather, from some of which, shoes, from others, gloves are made. Of their bones, buttons or handles for knives may be manufactured; from their flesh and fat, various oils may be distilled for use in the arts. And in case of horned animals, glue from their hoofs and combs from their horns may be made. Indeed, all parts of the animals may be put to some useful purpose. It requires, however, for such uses, special and somewhat expensive machinery, and also, it is said, the employment of hands trained to the business. All these facilities the bill alleges have been provided by the plaintiff.

While there can, by contract, be no such restriction imposed upon the power of a municipal corporation as to preclude legislation required by the health of its people, yet a contract having for its object to secure such health is not to be disregarded, and its provisions set aside, where no charge justly lies that the purposes of the contract are not accomplished. It is not pretended in this case that the plaintiff has failed in any respect to comply with his contract, and that the duty assumed by him has not been fully performed. The municipality cannot disregard its contract obligations upon mere caprice, or because a pecuniary advantage may be thereby secured. When that is attempted, the courts will come to the relief of the contractor, if the party committing the injury is, with reference to the matter complained of, subject to their jurisdiction. There can be no doubt that the pound-keeper may be reached and enjoined from delivering the animals destroyed by him to any other party than the plaintiff, or his assigns. And should the board of supervisors, by its legislation, attempt to destroy the contract, or to deprive the plaintiff of its benefit, the enforcement of such legislation may be arrested. The difficulty presented in the case before us is that the application to enjoin the passage of any resolution, order, or ordinance, which may tend to impair the obligation of the contract, is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a court of equity. This no one will question as applied to the power of the legislature of the state. The suggestion of any such jurisdiction of the court over that body would not be entertained for a

moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. Municipal corporations are instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of that power, upon the subjects submitted to their jurisdiction, they are as much beyond judicial interference as the legislature of the state. The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary.

A municipal corporation may be clothed, and generally is clothed, with other than legislative powers, and in their exercise may, in many instances, be brought under the jurisdiction and control of the courts. If, for instance, it be the holder of property as trustee, it may be required to execute the trusts assumed, and to make such disposition of the property as the trust requires. If, being the owner of property, it contracts for its sale, the execution of the contract can be enforced as in the case of such contracts by natural persons. So, also, if it attempt to act upon matters not by its charter or law subject to its jurisdiction, it may be reminded of the limitations upon its powers, and brought to a more careful consideration of them; by the process of the courts; and if the rights of third parties will be injuriously affected by its proposed action, it may be enjoined therefrom. It matters not in such cases that its action takes the form of legislation, when it is not, in fact, the exercise of legislative power, or upon a matter which is committed to its jurisdiction.

In what we have said of the want of authority in courts of equity over the action of a municipal corporation, we confine ourselves strictly to such action as is purely legislative, upon a matter which is, by its charter or law, made subject to its legislative discretion. That the exercise of such legislative discretion of municipal bodies shall be exempt from judicial restraint, is declared in the laws of this state. Among the provisions of the Civil Code is one which provides that an injunction cannot be granted "to prevent a legislative act by a municipal corporation." This was enacted in March, 1874, and is, we think, declaratory of sound doctrine, though often disregarded in practice by the courts.

With special force may this doctrine be invoked in the present case, when, in a controversy between citizens of the same state, the restraint of legislation by the city of San Francisco, which the courts of the state

are prohibited by statute from granting, is prayed from the court of another government. It would, indeed, be an extraordinary proceeding for a court of the United States to send its process to a municipal body of a state invested by its legislature with certain legislative powers, commanding it not to take any initiatory steps in the exercise of its legislative functions towards the passage of a resolution or ordinance, such initiatory steps in themselves vesting no right.

In *Gas Co.* v. *City of Des Moines* we have a decision of the supreme court of Iowa in accordance with the views we have expressed. 44 Iowa, 505. There it appeared that the city had, by ordinance, granted the plaintiff a valuable franchise, providing that for 15 years he should have the exclusive privilege of laying pipes in the streets and alleys of the city, and binding the company, in consideration of the privilege, to furnish gas in such quantities as might be ordered by the common council for the public offices and lamps, at a certain specified price. The gas company was willing to furnish gas under the provisions of the ordinance, and in accordance with its charter; but, notwithstanding this fact, the common council was attempting, as the bill of complaint in the case alleged, to repeal the ordinance, and would repeal it unless restrained by the court, and its repeal would destroy the value of the property. A preliminary injunction of the circuit court of the state, granted against the passage of the repealing ordinance by the common council, was, upon motion, dissolved, and from the decree of dissolution an appeal was taken to the supreme court of the state, where it was held that the circuit court had no power to restrain the passage of the repealing ordinance. "The general assembly," said the court, "is a co-ordinate branch of the state government, and so is the law-making power of public municipal corporations within prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of one than the other. But the unconstitutional acts of either may be annulled. Certainly, the passage of an unconstitutional law by the general assembly could not be enjoined. If so, under the pretense that any proposed law was of that character, the judiciary could arrest the wheels of legislation. Had the ordinance under which the plaintiff claims been enacted by the general assembly, and the plaintiff acquired thereunder the same rights as under the ordinance, and the general assembly thereafter attempted to enact a law in substance like the ordinance sought to be enjoined, could the judiciary interfere and by injunction restrain the action of the general assembly, on the ground that the law, if enacted, would 'impair the obligation of contracts?' After its passage the judiciary may declare the law unconstitutional, (*Bank* v. *Knoop*, 16 How. 369; *Dodge* v. *Woolsey*, 18 How. 331;) but previous to that time judicial powers cannot be invoked."

In *People* v. *Mayor, etc., of New York*, it was held, by the supreme court of the First district of New York, that the legislation of a municipal corporation is not subject to restraint by injunction, but that the acts of its agents and officers, in pursuance of resolutions or ordinances which are in violation of law, may be restrained by injunction. "The legislative power of

that body, (the common council,)" said the court, "is a power resting in their discretion. They have a right to pass such laws and adopt such resolutions as in their judgment are proper and necessary, in reference to those matters which, by the various charters of the city, are subject to their jurisdiction. Until they have legislated upon any subject, their contemplated action is not known, and it would be equally improper for the courts to direct what the legislature should not do, as it would be to order them to adopt any particular mode of legislation." 9 Abb. Pr. 254.

There have been other and different decisions in the courts of New York, and notably in *Davis* v. *Mayor, etc.*, in the superior court, (1 Duer, 451,) and in *People* v. *Sturtevant*, in the court of appeals of that state, (9 N. Y. 263.) The question in these cases arose upon a motion for an attachment for contempt, against one of the aldermen of the city of New York, in committing a breach of an injunction restraining the mayor and aldermen of the city from granting the privilege of laying a railway in Broadway, one of the principal streets of that city. In the first case, much weight was placed upon the fact that the constitution of New York declared that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in the like cases as natural persons." The court said: "A corporation subject to be sued is necessarily subject to every process or order that in the commencement or in the progress of the suit may be necessary to, or be connected with, the relief which is demanded, and the words 'in the like cases' plainly mean for the like acts or omissions, and for the like reasons." But the court in its opinion went further than this, and held that a municipal body, though clothed with legislative and political powers, was in all its powers subject to the restraint and control of the courts, equally with any other body, natural or artificial,—a doctrine which, to this extent, would not now, it is believed, be advanced in any court.

In the second case, the one in the court of appeals, the court held that the act in question in that case was not in any just sense an act of municipal legislation; that, though it took the form of a resolution, it was in substance a grant upon condition; that making a grant was not in its own nature a legislative act, but was such as had always been in the power of any court possessing equity jurisdiction to prohibit by injunction. "The corporation," said the court, "municipal or private, is capable of being sued. As a corporate body merely, it has no immunities which set it beyond the jurisdiction of the courts. It may be enjoined from making a grant just as it may be ordered to make one."

So many instances have occurred in the history of the country of hasty legislation by municipal bodies, and of the granting by them of valuable privileges without due compensation, under the influence of unscrupulous men, that the tendency of judicial opinion has been to encourage the interference of courts with the action of such bodies, when, under other circumstances, such interference would be disapproved; but the principle that the exercise of legislative power by a municipal body is beyond judicial control, is too important in our institutions to be

weakened by occasional decisions in disregard of it. In New York and other states, where such interference of the courts has been sustained, there was no statute, as in California, forbidding the jurisdiction.

It follows from the views expressed that an injunction to restrain the defendant Jacob Lindo, the pound-keeper, from delivering the carcasses of any of the animals destroyed by him to any other person, except the plaintiff, or his assigns, will be granted, but the application to restrain the municipality from passing the threatened resolution, order, or ordinance, is denied.

SAWYER, Circuit Judge, (*concurring.*) I concur in the order made, and in the reasoning of the circuit justice. I am not prepared to say, that the court can, in no instance, or under no circumstances, enjoin the legislative department of a municipal corporation from passing an ordinance, which is wholly without its constitutional, or lawful power to enact. I concede that, where such a body has a lawful discretion to act, the courts cannot interfere to control, or restrain the exercise of that discretion. But can these bodies be said to have any legislative discretion, or legislative power, over a subject upon which they are forbidden by the constitution or laws, to act at all? I gave this subject a very thorough examination, in *Spring Valley W. W.* v. *Bartlett*, the result of which is stated in 8 Sawy. 559–569, 16 Fed. Rep. 615. I see no substantial reason for changing my views, as there expressed.

Restraining the action of municipal legislative bodies in passing ordinances, under any circumstances, is a matter of great delicacy; and the power, conceding it to exist in the courts, should only be exercised in extreme cases, and never, where the object can just as well be accomplished by restraining action under the ordinance after its passage, as by restraining its passage. But cases may, possibly, arise of action without lawful authority, wherein the mischief would be accomplished, and be beyond remedy by the passage of an ordinance, or before the remedy could be effectually applied after its passage. As it is unnecessary to do so for the purposes of this case, I am unwilling, now, to commit myself to a principle so broadly stated, as to prevent restraining an act by a municipal body that is wholly beyond its lawful authority to deal with, should a case arise, where there could be no other adequate remedy. I do not understand, that the limitation in the opinion of the circuit justice is broader in its scope, than the principles herein stated. With that understanding, I fully concur in the views expressed by him.

OPIE *v.* CASTLEMAN.

(District Court, D. West Virginia. 1887.)

1. PAYMENT—CONFEDERATE MONEY.
   A. and B. entered into a contract for the sale of land in 1856. The deferred payments under the contract came due during the years of the civil war, and were paid by the vendee, B., to the personal representative of A. with depreciated Confederate money. *Held*, that as against the heirs of A. not ratifying it, such payment did not extinguish the indebtedness; the original contract contemplating payment in lawful money of the United States.
2. EXECUTORS AND ADMINISTRATORS—PAYMENT OF DEBTS DUE THE ESTATE—CONFEDERATE MONEY.
   The act of a fiduciary in accepting Confederate money in payment of debts due the estate, and investing the proceeds in bonds of the Confederate States, issued for the avowed purpose of waging war against the United States, is wholly illegal and void.
3. SAME.
   Where the necessity of the estate requires it, a fiduciary may accept depreciated currency in payment of indebtedness to the estate; but not where it appears that the estate is not embarrassed by debt, and there is little or no need of the money for any legitimate purpose.
4. LIMITATION OF ACTIONS—SUSPENSION—WAR.
   In an action to enforce a deed of trust made in 1856, a recovery on one of the notes secured was barred by the statute of limitations. *Held*, that the period during the war should be deducted from the operation of the statute.[1]
5. SAME—ACTION TO ENFORCE TRUST DEED.
   A deed of trust can be enforced within 20 years after the maturity of the debts secured by it.

In Equity.

Robert White, for complainant.

Marshall McCormick and *R. T. Burton*, for defendant.

JACKSON, J. In 1856, Hiram L. Opie, the ancestor of the plaintiff, sold to Henry W. Castleman, now deceased, a tract of land in Jefferson county, then in the state of Virginia, now West Virginia, for the sum of $41,733.66, $10,000 cash in hand, and the balance in deferred installments; evidenced by notes bearing date January 1, 1856,—the first for $5,000, due January 1, 1857; the second for $5,000, payable January 1, 1858; and six other notes for $3,622.27½, payable, respectively, January 1, 1859, 1860, 1861, 1862, 1863, 1864,—all bearing interest from date. Shortly after the sale of his land, he moved to Augusta county, Virginia, then and ever since a county in the state of Virginia, where he resided until his death in 1862. At the time of the sale a deed conveying the property was made by the vendor to the purchaser,

[1] The existence of war suspends the statute of limitations as between citizens of the adverse belligerent powers, but not as between citizens of the same power. Cross v. Sabin, 13 Fed. Rep. 308. Under the act of congress of 1863, requiring claims against the United States, cognizable by the court of claims, to be sued upon within six years after the cause of action first accrues, and excluding all exceptions to the running of the statute except those enumerated, held, that the disability of one to sue, arising from his connection with the rebellion, would not suspend the operation of the statute. Kendall v. U. S., 2 Sup. Ct. Rep. 277.

and a deed of trust was executed by the purchaser upon the land conveyed to secure the payment of the unpaid purchase money. When the grantor died there remained unpaid of the purchase money four bonds, each for the sum of $3,622.27, due and payable the first day of January, 1861, 1862, 1863, and 1864, respectively; it being conceded that the interest was paid up to January, 1861.

In 1861, certain states, afterwards known as the Confederate States, seceded from the Union, whereby war ensued between the United States and the so-called Confederate States, and during the war the county of Jefferson was for the most of the time in the military possession of the United States, while the county of Augusta during the same period was mostly in the military possession of the so-called Confederate States. In 1863 the state of West Virginia was created, whereby Jefferson county became a part of that state. In November, 1862, the widow of the deceased and Thomas L. Opie qualified as personal representatives of the estate of the decedent. Late in the year 1862, Castleman, knowing there was due on the purchase money of the bond which had matured January 1, 1861, and on the bond to fall due in January, 1862, something over $8,000, with unpaid interest, got together notes of the Confederate States and Virginia bank notes sufficient to pay off the notes payable January, 1861 and 1862, and crossed the military lines into the Confederate States, and found Mrs. Opie, one of the personal representatives, and paid off and discharged the notes of 1861 and 1862 with Confederate money, which at the time was greatly depreciated. Subsequently Castleman paid and discharged the notes that fell due in January, 1863 and 1864, in the same kind of depreciated currency. At the time the payments were made, Mary and John, heirs of the decedent, were under age, and the plaintiff in this action was absent from home, and has not ratified the action of the personal representative of the estate. In 1865 a release was executed by the trustee in the deed of trust, upon the request of Mrs. Opie, administratrix of the estate. The estate of the decedent was not in debt, and the greater part of the money which came into the hands of the personal representatives was invested in bonds of the Confederate States.

These are substantially the facts of the case, and the question that presents itself for the consideration of the court is, were the payments made on a contract entered into before the war, and which at the time was to be discharged by the lawful money of the United States, satisfied and extinguished by the payments made to the fiduciaries in depreciated currency? It is to be borne in mind that the relation of a fiduciary to the estate he represents is very different from that of the decedent, if living. The latter could exercise unlimited discretion to do as he saw proper in accepting as payment of a debt due him any currency passing for money, however depreciated; while the former, acting in a fiduciary capacity, would be required to exercise the soundest discretion. A personal representative must act in good faith with the estate he has in charge. It is his duty to look after the estate, preserve it from waste, and protect it from unnecessary expenditure.

In the case before us there is no charge of neglect of property, or the usual charge of waste connected with its administration. The heirs, in this instance, who are asserting their rights in this action, did not ask for a distribution of its assets; two of them being minors, and the other absent from home most of the time. It does not appear that they consented or acquiesced in the action of the personal representatives. Moreover, the debtor was not pressed or required to pay the money. On the contrary, he seemed to have put himself to unusual trouble to secure the funds with which to pay the debts due the estate in a depreciated currency, the greater portion of which he had to borrow, and which only had a purchasing power of one-third its face value. This attempt to pay and discharge the debt was made outside of the military lines of the United States, to satisfy a debt fully secured upon lands inside the federal lines, in a currency not only unauthorized by the laws of the land in which the contract was made, and where the debt was properly payable, but the proceeds were invested in the bonds of the Confederate States, issued for the avowed purpose of waging war against the United States. For this reason we are inclined to the opinion that this action of the fiduciary is wholly illegal and void. We might well rely upon this position as conclusive of the case. It is, however, contended that the fiduciary should not have accepted the payment of the debt in Confederate money. We do not deny that, where the necessity of the estate requires it, the fiduciary may, in the exercise of a sound discretion, do that which will promote the best interests of the estate. This rule is, however, general in its character, and its application must be controlled by the circumstances surrounding each case. In this case the estate was not embarrassed by debt, and there was little or no need of money for any legitimate purpose.

But we do not rest this cause alone upon that position. As before remarked, this attempt to pay off and discharge this debt was made to the agent or trustee of the estate, and not to the principal in life. We have already said that the rule governing the action of a fiduciary to an estate is entirely different from the one that would apply to its owner, if living. In the case of the fiduciary, he has but little or no discretion, while the other is not bound by any limitation of that character. The principal in a debt may accept a payment of a debt due him in depreciated currency, but his agent could not do so; and so it was held in the case of *Ward* v. *Smith*, 7 Wall. 447, that an agent cannot accept payment of a debt due his principal in depreciated currency, although it was the principal currency in which the ordinary business transactions of the country were conducted. The case cited would seem to be conclusive as to the validity of the payment made by the debtor to the representative in the case under consideration. Following closely upon this case was the case of *Horn* v. *Lockhart*, 17 Wall. 570, in which the supreme court of the United States held that where an executor had sold the property of his testator, and received payment in Confederate money, and invested it in Confederate bonds, and settled his accounts before the probate court, not only was the action of the executor invalid, but the action of the pro-

bate court was a nullity, and afforded him no protection. It is true that this ruling was based upon the ground that the action of the executor in making investments in Confederate bonds was in aid of the Rebellion. And so it was in this case. The debt was collected in Confederate money and invested in Confederate bonds, and it falls within the rule of the law as laid down in the case cited. There was, however, more excuse for the action of the executor in the case cited than for the fiduciary in the one under consideration. The executor in the case cited was in the heart of the Confederacy, and the country was entirely under the control of the Confederate authorities, and it is but fair to presume that there was but little or no choice left him as to his course of action. Not so in this case. The military lines often shifted, and the military authorities of the United States were not unfrequently in possession of Augusta county, the place of residence of the administratrix of the estate. Under such circumstances, ample opportunity offered to enable both parties to settle the debts due the estate in money called for by the contract.

It is further insisted that Castleman's effort to pay off and discharge a debt under the circumstances was an illegal act upon his part, and consequently void. It will be observed that Castleman's action for the most part was voluntary. There is no evidence in the record which discloses the fact that he was required to pay the notes past and falling due. But the evidence tends to show a feverish desire on his part to get rid of this indebtedness with little expense as speedily as possible, and with the least inconvenience to himself. It is quite apparent that he wanted to pay the debt, which was contracted at the time with reference to the standard value of money in the United States, in a currency far below that value, and in fact possessing only a purchasing power of one-third of its apparent value. This attempt thus to satisfy a debt so well secured, and when there existed no necessity for its collection, and when he was not required to pay with any other money than that called for in the contract, savors not only of a fraud, but is an injustice to the heirs of this estate, and should be disregarded. If the personal representatives were not justified in accepting in payment any other money than that called for by the contract, then, clearly, Castleman had no right to pay them in the money he did. In the language of Judge DAVIS, speaking for the court in the case of *Fretz* v. *Stover*, 22 Wall. 198: "It was a void act on his part to attempt to discharge his debt in this way, as well as a fraud in the personal representative to suffer him to do so." In the further support of this position we rely upon the law as stated in the case of *McBurney* v. *Carson*, 99 U. S. 567. There are other adjudications to this effect in the state tribunals, but we content ourselves with those we have cited to sustain this view of the case.

It is insisted, however, that the supreme court in the case of *Glasgow* v. *Lipse*, 117 U. S. 327, 6 Sup. Ct. Rep. 757, has changed its position, and that, under the law as stated in that case, the payment by Castleman to the personal representatives was legal, and that, as a consequence, the plaintiff is not entitled to recover. We do not concur with this view. The cases are very different, and necessarily the rule of law applicable

to this case cannot be the same. In that case the executors were authorized by the will to sell the land, and convey it to the purchaser. There the contract was with the executor, and not, as in the case under consideration, with the decedent, who, if living, could accept payment in any authorized money without regard to its value. As we have before said, the case is far different with an executor or an administrator. In *Glasgow* v. *Lipse* the executor, acting under the power conferred by the testator, sold the land, and conveyed it by deed to one Speers. After the purchase, Speers died, and Glasgow became, under his will, the executor. In that case a demand was made by the executor of Lipse upon Glasgow for the money due the estate, and Glasgow was informed that the heirs wanted their money, and that they were willing to accept it in Confederate notes, which had then become the principal currency of the country. In the case under consideration, there was no demand made on the debtor for money for distribution among the heirs, nor does it appear that it was needed for any of the uses of the estate which would require the personal representative to call for the payment. We must therefore conclude that no legal excuse existed for the action of the fiduciaries in accepting, as they did, the payment of the debt due from Castleman in Confederate money. Certainly, the debtor had taken no steps to coerce them to receive the money offered in discharge of his debts, but they determined to accept it and reinvest it. Under the circumstances, the acceptance of the money in depreciated currency, and its reinvestment, was not only illegal, but, as we said, directly in aid of the Rebellion, and in contravention of public policy.

It is contended that the plaintiff should not recover on account of his laches in prosecuting this case. We do not concur in this defense. The record discloses the fact that the personal representatives have never made a settlement of the estate, and that they moved out of the state of Virginia, and carried all papers with them relating to their administration; that the plaintiff came out of the war financially ruined, and was unable to institute an action for want of means; that the deed of release to Castleman was not placed on record until near the close of the year 1871. The action, however, was commenced in the spring of 1881, and if the notes had been sued upon at law the statute of limitations would not have barred a recovery upon them. Courts of equity usually follow the rule of law in the application of this statute. But this action is to enforce the deed of trust given to secure the payments of the purchase money. The release was placed on the record only 10 years before the suit was commenced. It is sufficient to meet this position that a deed of trust can be enforced within 20 years after the maturity of the debts secured by it. All of the notes secured are within the time, save one; and the period deducted from the operation of the statute during the war saves it.

But one more position of the defense remains that we think necessary to notice; and that is, under the circumstances, were not the fiduciaries justified in their action? Numerous authorities have been cited from the highest courts of Virginia that when the necessities of the estate require money to pay debts it owes, and where legatees and distributees

consent to receive it, and when the security for the debt is doubtful, it is wise to accept the payment in depreciated currency. Of course, every case is governed, more or less, by its surroundings; but in this case none of the reasons assigned exist, as we have shown. We are of opinion that not only is the plaintiff, as a matter of strict legal right, entitled to the relief sought, but that it is only simple justice. The heirs of Castleman enjoy a landed estate of great value, which was purchased to be paid for in lawful money of the United States, and the heirs of Opie, who are suing in this case, have never received the consideration promised under the contract entered into in 1856. We take no notice of the fact that the money received by the executors as payment of the debts due had some value, for the reason that we hold the payment, so far as the parties to this action are concerned, was illegal and void, and any relief the heirs of Castleman may have, if, indeed, they have any, is against the executor.

A decree will be prepared in conformity with the views of the court as expressed in this opinion, referring the cause to a commissioner to ascertain the interests of the plaintiff and the two heirs, John Opie and Mrs. Mead, in the debt secured by the deed of trust upon the land sold by their ancestor.

LEROY *v.* DOE.

(*Circuit Court, N. D. California.* October 17, 1887.)

LIMITATIONS OF ACTIONS—SAN FRANCISCO LAND TITLES.

The act of congress of July 1, 1864, (13 St. 333, § 5,) granting lands within the charter limits of 1851, to San Francisco, for certain purposes, vested a perfect title without a patent, and, as to titles derived under the act, the statute of limitations began to run from the time of its passage.

(*Syllabus by the Court.*)

Action to Recover Lands.

The lands are situated within the limits of the pueblo of San Francisco, and within the corporate limits of the city under the charter of April 15, 1851. In August, 1853, E. C. Marshall filed what is called a pre-emption claim, embracing the lands, took possession, and fenced it. He afterwards conveyed undivided portions to various parties. The numerous defendants and their grantors claiming under Marshall took possession at an early date, and maintained it, claiming title, adversely to plaintiff, up to the time of the commencement of the suit. There were numerous conveyances, and several partitions made between the defendants. The plaintiff also claims an undivided interest, by conveyances made under Marshall, but neither the plaintiff, nor any of his grantees, appear to have been in actual possession since the conveyances from Marshall in 1854. On June 20, 1855, the common council of the city of San Francisco passed an ordinance, since known as the "Van Ness

Ordinance," whereby the city relinquished and granted all its right and title to lands within its corporate limits, "to the parties in actual possession thereof, by themselves or tenants, on or before the first day of January, 1855," with certain specified exceptions, not including the lands in question; "provided, such possession has been continued up to the time of the introduction of this ordinance in the common council; or if interrupted by an intruder, or trespasser, has been, or may be, recovered by legal process." Section 3 provided that the patent issued, or any grant made, by the United States to the city, "shall inure to the several use, benefit, and behoof of the said possessors, their heirs and assigns, mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued, or made directly to them, individually, and by name." St. 1858, p. 53. This ordinance was ratified and confirmed by an act of the legislature of the state of California approved March 11, 1858, (St. 1858, p. 52.) On July 1, 1864, congress passed an act, section 5 of which provides as follows, to-wit:

"That all the right and title of the United States to lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the state of California on the fifteenth day of April, 1851, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said state, approved on the eleventh of March, 1858, entitled 'An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city,' etc."

The title of the city of San Francisco was confirmed to the pueblo lands, including the lands in controversy, by a decree of the United States circuit court, on May 18, 1865; and, by an act of congress approved March 8, 1866, pending an appeal from the decree of the circuit court, (14 St. 4,) the title of the city was finally granted and confirmed to the city, in trust for those in actual possession, at the time specified, to all the lands embraced in said decree of the circuit court of May 18, 1865; but no patent was issued to the city till after the commencement of this suit, which was on January 28, 1876. The question arising under the statute of limitations was as to when the statute of limitations began to run, as against the parties out of possession, claiming title under the city, through the various proceedings herein stated. The plaintiff insisted that the title from the United States did not become final and perfect until the issue of the patent to the city under the decree of confirmation, and said confirmatory act of 1866. While the defendants maintained that the title became perfect to the lands covered by the act without a patent by the legislative grant in the said act of 1864, and that the statute began to run as to the title derived from the United States under said act, through the city of San Francisco, from the date of that act.

Wm. Leviston, for plaintiff.

Wilson & Wilson, for defendants.

Before SAWYER, Circuit Judge.

SAWYER, J., (*orally.*) I have gone over this case very carefully. As to all that part of the land described in the complaint lying outside of the line of the Marshall claim, the plaintiff failed to show any title, and that point I decided against him at the trial. As to the other parts, those detached portions lying within the line of the Marshall claim, I am satisfied, that the statute of limitations began to run from the date of the act of congress of July 1, 1864, granting the lands to the city of San Francisco for the purposes stated. 13 St. 333, § 5. That was a positive statutory grant. It passed the title as perfectly, as a patent would. A patent adds nothing to the title. It only affords a convenient muniment of title. I have ruled before, and so has Justice FIELD, that the statute of limitations begins to run as to the lands embraced in this act from the date of its passage. I am satisfied that there was an adverse possession, from the date of the act, such as would set the statute running even against the party who claims to be a tenant in common. The other parties did not recognize plaintiff as a tenant in common. Their claim was so notorious and manifest against all the world, that Leroy must have known it. They paid the taxes and had various dealings with each other in regard to the lands, recognizing each other's interests, but not the claim of Leroy; they fenced it up, and rented it in parts to tenants, and constantly exercised dominion over it. There were several partitions and deeds of partition. Their numerous acts were open and notorious, and wholly in disregard of any claim of Leroy, if he made any pretension to title. Their acts were of such a character, that he could not fail to have been put on notice. I am satisfied that under the later decisions, even against a tenant in common, an adverse possession is shown. There can be no possible question as to all other claimants. The action is barred by the statute of limitations, and there must be a judgment and finding for the defendants, on that ground. I put the decision on the ground that the plaintiff is barred by the statute of limitations, without considering the other points as to title. The statute began to run in 1864; the suit was commenced in 1876. They were 10 years in such adverse possession. The action was barred even under the further act of congress of March 8, 1866, (14 St. 4.)

Let there be findings and judgment for defendants.

HUDSON and others v. BISHOP.

(Circuit Court, N. D. Iowa, E. D. May, 1887.)

1. GUARDIAN AND WARD—SUIT ON BOND—LEAVE OF COURT.
Rev. St. Wis. *c.* 170, § 3968, provides that "in case of any breach" of a guardian's bond, the bond "may be prosecuted in the name of the ward for the use and benefit of such ward, or any person interested in the estate, *whenever the county court shall direct.*" *Held*, the bond running to the ward by name, and it being the duty of the guardian, by its terms, to settle with the ward personally, the ward, after coming of age, could maintain suit in his own name on the bond, against the sureties, without first obtaining authority to do so from the county court.

2. SAME—SUIT ON BOND—LIMITATION OF ACTIONS.
The death of the guardian before the ward comes of age operates to "discharge" him, within the meaning of Rev. St. Wis. *c.* 170, § 3968, providing that "no action shall be maintained against the sureties on any bond given by a guardian, unless it be commenced within four years from the time when the guardian shall have been discharged;" and the special limitation in that section in favor of the sureties begins to run from the date of the death.

3. SAME.
The guardian was appointed in 1866, and died in 1875; his estate being closed in 1883. An accounting was had in 1874, which disclosed a balance in favor of the ward. This balance was proved against the estate, and allowed by the probate court in 1876, but it was never paid in full. *Held*, that a suit against surety on the bond, commenced in 1886, to recover the balance, was barred by the four-years limitation of Rev. St. Wis. *c.* 170, § 3968; the guardian "having been discharged," at the latest, by the proof and allowance of the claim against his estate in 1876.

4. SAME.
Rev. St. Wis. *c.* 170, § 3968, provides that "no action shall be maintained against the sureties on any bond given by a guardian unless it be commenced within four years from the time when the guardian shall have been discharged." *Held*, that the bond being statutory, and the limitation a special one for the benefit of the sureties as contradistinguished from the guardian, the limitation entered into and formed a part of the sureties' contract.

5. LIMITATION OF ACTIONS—CONFLICT OF LAWS—ACTION ON GUARDIAN'S BOND.
Under Code Iowa, § 2534, providing that, "whenever any cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter," the fact that the surety on a guardian's bond in Wisconsin removed from that state into Iowa does not prevent him from setting up the Wisconsin statute of limitations as a defense to a suit in Iowa on the bond, where at the time he left Wisconsin the bar of that statute had already fallen.

At Law.

Action on guardian's bond. On demurrer to petition.

Lewis & Pfund and *Henderson, Hurd & Daniels*, for plaintiffs.

Starr & Harrison, for defendants.

SHIRAS, J. In January, 1866, one Robert Limon was duly appointed by the county court of Dane county, Wisconsin, the guardian of plaintiffs, who were then minors, and executed a bond in the sum of $8,000, with William Powell and E. D. Bishop as sureties, conditioned for the faithful performance of his duties as guardian; the same being given pursuant to the provisions of chapter 170, Rev. St. Wis., section 3968 of which is as follows:

"Every bond given by a guardian shall be filed and recorded in the office of the county court requiring the same, and in case of any breach of the condition thereof, may be prosecuted in the name of the ward for the use and benefit of such ward, or any person interested in the estate, whenever the county court shall direct; but no action shall be maintained against the sureties on any bond given by a guardian unless it be commenced within four years from the time when the guardian shall have been discharged. But if, at the time of such discharge, the person entitled to bring such action shall be under any legal disability to sue, the action may be commenced at any time within four years after such disability shall be removed."

On the thirteenth day of April, 1874, an accounting was had in the county court of Dane county, Wisconsin, with the guardian, and it was found and adjudged that he had in his hands belonging to his wards the sum of $4,748.55. In 1875 said Limon, guardian, died, and administration was had on his estate, the same being closed in the year 1883. The available assets were insufficient to pay the debts in full, and consequently the amount coming to plaintiffs was not wholly paid; the claim therefor having been duly filed in, and allowed by, the probate court in Wisconsin having charge of said estate. To recover the balance thus unpaid this action is brought by the wards, they being now of full age, against the surety, Bishop, who is now a resident of Iowa; the petition having been filed on the ninth day of July, 1886.

By demurrer to the petition two questions are presented: (1) Can the action be maintained without averring and showing that the county court of Dane county, Wisconsin, authorized and directed the bringing of the suit? (2) Is the action barred by lapse of time?

Upon the first proposition it is contended by defendant that, under the provisions of section 3968, no suit can be maintained upon a guardian's bond unless the same is directed to be brought by the county court in which the bond is filed. Counsel have not cited any decision by the supreme court of Wisconsin construing this section in this particular. While the true meaning of the provisions is not clear, and the mere language is open to the construction claimed for it by counsel for defendant, yet such construction should not be placed upon it unless it is clear that such is the legislative intent, for thereby a restriction would be created upon the rights of the wards for which no sufficient reason is perceived. The clause of the section is permissive, and not restrictive, in its purport, and confers authority upon the court to direct suit to be brought in the name of the ward, for the benefit of the ward, or of any other person interested. Without such authority it would be questionable whether a third party could sue upon the bond, or whether the ward could maintain suit during the continuance of the guardianship. To obviate all question, under such circumstances, authority to direct suit to be brought is conferred upon the court; but is there any reason why it should be held that after the wards come of age they may not maintain suit thereon without authority from the court? Under the terms of the bond, it is made the duty of the guardian to settle his accounts with the wards, if they shall be of full age, and to pay to the parties entitled thereto the sums found due them. This is an express contract with the wards.

The bond runs to the wards by name; and surely, if it is the duty of the guardian to settle with the wards personally when they become of age, they must have the right to enforce such settlement by suit on the bond, and such right is not dependent on the order of the court.

The second question presented is whether it appears that the action is barred by the lapse of time. The express provision of section 3968 is that—

"No action shall be maintained against the sureties on any bond given by a guardian unless it be commenced within four years from the time the guardian shall be discharged."

This is a special limitation for the benefit of the sureties, and does not affect the right to recover from the guardian. The limitation begins to run "from the time the guardian shall be discharged." On part of plaintiffs, it is argued that the guardian is not discharged until there has been a final accounting and settlement, and an order or judgment entered adjudging the amount due from the guardian, and ordering its payment. This construction would make the words "shall be discharged" equivalent to the term "final settlement of accounts." Practically, this may be, in the majority of instances, the time when the guardian is discharged. For instance, when the ward becomes of age, it is the duty of the guardian to settle his accounts, and turn over all property in his hands belonging to the ward. The fact that the ward comes of age does not, *ipso facto*, change the relation in which the guardian holds the property from that of a statutory trustee to that of a debtor. Holding the property of the ward, he is bound to exercise proper care thereof, and this duty and obligation will continue until he has duly accounted for and delivered up possession of the property. But is this true in case of the death of the guardian before the ward comes of age? In such case the personal care and management of the property by the guardian is at an end. Are the sureties on the guardian's bond to be held liable for the acts or negligence of others than their principal? Is not the guardian discharged when by any reason he is relieved from any further control over the property of the ward? Such a discharge does not relieve from liability for all past acts; but is he not discharged from further liability by reason of the fact that his power to control is at an end? The death of the guardian ends, of course, all personal control over the property. His estate becomes liable for all sums found due to the wards. If it is ascertained that at the date of the death of the guardian a certain sum was in the hands of the guardian belonging to the wards, and the same is not paid, the sureties on the bond may be liable therefor; but, under the statute, suit thereon must be brought within four years from the discharge of the guardian, and it seems to me that death is such a discharge.

If this be the correct construction of the statute, it follows that the four years would begin to run at the date of Limon's death, in 1875; but, if this is not the true reading of the statute, then, when in fact did it begin to run under the theory of plaintiffs? The petition avers that in 1874 a settlement of accounts was had in the county court of Dane county, and

it was adjudged that there was in the hands of the guardian the sum of $4,748.55, with which he was to stand charged; that the guardian died in 1875; that administration on his estate was had; that the above claim for $4,748.55 was presented and allowed by the proper court as a claim against the estate; and that various payments were made thereon, extending from November 6, 1876, down to the year 1883. Was not the account of the guardian settled, allowed, and ordered to be paid when it was filed in and allowed by the court as a just claim against the estate?

It is claimed in argument that the guardian cannot be deemed to have been discharged until the final winding up of his estate in 1883; that it could not be known how much would be left due and unpaid, and therefore the four-years limitation did not begin to run until the final winding up of the estate. The amount due from the guardian to the wards was ascertained when the claim was allowed. If not paid at once, the condition of the bond was broken, and the wards were not compelled to await the final settlement of the estate before resorting to the bond. The bond is not conditioned for the payment of any deficiency left after resorting to the property of the principal, whether he be living or dead, but for the proper discharge of the duties of the guardian, including prompt settlement, and payment of all amounts in his hands, when the guardianship should be terminated. If Limon had been removed, or had resigned the guardianship, in 1875, and, failing to pay over or account for the sum of $4,748.55 charged against him, suit had been brought against him individually to enforce the collection thereof, can it be true that the limitation of four years enacted for the protection of the sureties would would not begin to run until the final termination of the action against Limon, and the exhaustion of all means to enforce the collection of the debt from his property? If not, then why, in case of his death, is the running of the statute to be postponed until all means have been exhausted to collect from his estate? Under any view that can be taken of the statute, the four-years period began to run not later than the date of the allowance of the claim against the estate of Robert Limon, and it had therefore expired long before this suit was brought.

The statute, however, contains another exception, and that is that, if the parties interested are under any legal disability to sue, the action may be commenced at any time within four years after the removal of such disability. It does not appear from the averments of the petition, or upon the record in any form, when the wards came of age, and it may therefore be true that, under the second exception, the right of action still exists.

On behalf of plaintiffs, it is claimed that the fact that the present defendant removed from Wisconsin, and is now a resident of Iowa, prevents him from availing himself of the limitation contained in the Wisconsin statute. If the four-years limitation had expired before the defendant left the state of Wisconsin, then, under section 2534, Code Iowa, the action would be barred in this state.

The allegations of the petition do not show when the defendant ceased to be a resident of Wisconsin, and hence, upon demurrer, it cannot be

held that the action is barred by lapse of time, unless it be true that the four-years limitation is part of the contract of suretyship. It is well settled that statutes of limitation may be enacted affecting existing rights, if a reasonable time is allowed within which actions may be brought after the passage of the act. *Terry* v. *Anderson*, 95 U. S. 628. It is equally well settled that "the laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement." *Walker* v. *Whitehead*, 16 Wall. 314. When the legislature of Wisconsin provided for the giving of a bond by a guardian, it had a right to enact and declare the duties and obligations imposed thereunder upon the sureties signing the same. The extent of the liability thereby imposed is to be determined by the statute of Wisconsin, no matter in what forum suit may be brought thereon. When the statute in express terms declares that, as against the sureties, no action can be maintained unless brought within four years after the discharge of the guardian, this defines the extent of the liability of the surety. It cannot be treated as a mere matter affecting the remedy upon the contract of suretyship, but it is part of the contract itself. In this regard sureties stand in a different position than the principal. The guardian receiving the property of his wards would be liable to account therefor without any statutory declaration to that effect. He has no vested interest in any particular period of limitation, and cannot complain if the statute should be entirely abrogated. When, however, a person is asked to assume the position of a surety for another, by signing a statutory bond, and the statute expressly limits his liability by providing that he cannot be sued thereon after a fixed period, it will not do to hold that the limitation is a mere matter of form, affecting the mode of procedure, and that it may be wholly taken away by legislative enactment. It is a substantial right protecting the surety by limiting the extent of the liability assumed, and enters into the obligation of the bond given under the statute. As such it is one of the conditions of the contract, and therefore an action cannot be maintained against the surety unless brought within the period thus fixed.

In many policies of insurance it is provided that no action can be maintained thereon unless brought within a year, or other fixed time, from the date of loss, and such provision is sustained. *Riddlesbarger* v. *Insurance Co.*, 7 Wall. 386; *Carter* v. *Insurance Co.*, 12 Iowa, 287. If valid at place of contract, such provision is valid everywhere.

The statute of Wisconsin does not give to the wards an unlimited right of action against the sureties on the bond. It creates a limited right of action, and, when suit is brought in Iowa upon the bond given in pursuance of such a statute, regard must be had to the provisions of the statute in determining whether a right of action exists. In favor of a surety who has assumed only the liability provided by the statute, its provisions must be deemed to be part of the contract, in such sense that if, by its terms, all right of action thereon has ceased to exist in the state under whose laws it was contracted, no action can be maintained thereon else-

where. If there are circumstances, legal or equitable, which save to the plaintiffs a right of action, notwithstanding the lapse of time, the same should be pleaded.

It does not appear that the failure to bring suit against the surety within four years after the discharge of the guardian was due to any legal disability to maintain an action on part of the wards, or to fraud, concealment, or the like on part of the surety. It does appear that this action against the surety was not brought until 11 years after the death of the guardian, and 10 years after the allowance of the claim of the wards against his estate; and this lapse of time is a defense, under the provisions of the Wisconsin statute limiting the right of action against the surety to the period of four years from the discharge of the guardian.

Demurrer is therefore sustained.

MIDDLETON *v.* BANKERS' & MERCHANTS' TEL. CO.

(*Circuit Court, E. D. Pennsylvania.* May 6, 1887.)

1. ATTORNEY AND CLIENT — COMPENSATION OF ATTORNEY — COMPENSATION OF MASTERS AND COUNSEL.
   Counsel are entitled for their services to what those services could have been obtained for under a contract made in advance.
2. EQUITY—COMPENSATION OF MASTER.
   The compensation of masters, whose functions are judicial, may be measured by the standard of judicial salaries.

In Equity.

Henry Sampson and *Gummey & Fletcher*, for complainants.

R. J. Ingersoll and *J. H. Barnes*, for respondents.

BUTLER, J. But two exceptions remain; all others have been withdrawn. These relate to the fees of counsel and compensation of the master. The court realizes the danger of overestimating the value of such services in cases like this, and feels no hesitation about interfering where the circumstances warrant it. As respects the fees of counsel, it must be understood that the court has no personal knowledge, either of the extent of services, or their value. The master reports that the calls upon counsel were very frequent, weekly, and sometimes much oftener, throughout the whole period of their employment, and that the sum allowed (but a small part of the amount claimed) is reasonable and just. In answer to this I am not referred to anything but the record of the proceedings, which shows, virtually, nothing pertinent to the subject. The services may have been very great without any indication of it appearing there. No serious questions were discussed before the court. The property and interests involved, however, were very large, and the proceeding was one that required professional knowledge, skill, and care.

If I knew the extent of the services I could not form an estimate of their value, without evidence. Since I left practice (26 years ago) the rate of compensation has no doubt greatly changed. The counsel should have just what the services could have been obtained for by contract, in advance, if such a contract were practicable; in other words, should be paid according to the usual rate of compensation for such services. The counsel themselves testify that they are justly entitled to much more than is allowed; and the master says the sum awarded is just. Now, what is there in the case to justify the court in deciding that this sum is too much?

As respects the master's compensation, the circumstances are different. He is called to assist the court in discharging its judicial functions, and his compensation may, and should, I think, be measured by the standard of judicial salaries. The highest salary paid in this court is $6,000, and if the master is compensated as the judge is for the same period and extent of labor, he cannot complain of injustice. The master has filed a statement of the time occupied; and the report, or rather reports, show that he did a large amount of work. It would seem from his statement filed this day, at the instance of the court, that he informed the counsel interested, previous to filing his first report, of his intention to charge $1,000, and that they virtually assented to his doing so. A small additional sum is charged for services subsequent to the first report, which the court feels constrained to strike out. The master's conduct respecting the exception, and throughout the business submitted to him, is very satisfactory to the court.

The master is allowed the sum of $1,000, and the expenses charged.

MORGAN'S LOUISIANA & T. R. & S. S. CO. *v.* TEXAS CENT. RY. CO., etc. (Bill.)

FARMERS' LOAN & TRUST CO., Trustee, *v.* SAME. (Cross-Bill.)

(*Circuit Court, N. D. Texas.* October 28, 1887.)

1. JUDGMENT—ENTRY—POWER OF COURT TO MODIFY.
   Except upon bills of review in equity cases, upon writs of error *coram vobis* in cases at law, or upon motions which, in practice, have been substituted for the latter remedy, no court can reverse or annul its own final decision or judgment for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes; from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing.
2. SAME.
   After an appeal has been allowed and a *supersedeas* bond is taken, either during or after the term, jurisdiction as to all matters—certainly those of substance—determined by the decree is transferred to the court to which the appeal goes.

3. SAME.

Plaintiff brought suit to have a certain claim declared an equitable lien on the property of a railroad company, prior to the lien of two mortgages on the same property executed to defendant. Receivers were appointed by the court in accordance with plaintiff's prayer, and took charge of the property under order of court. Subsequently the court declared plaintiff's claim a lien on the property, but subordinate to the mortgages of which it decreed a foreclosure. Plaintiff appealed from the whole decree, and gave a *supersedeas* bond; and, after the expiration of the term in which this decree was rendered, the court, at the instance of defendant, modified its decree so as to order the property in the receivers' hands to be turned over, subject to the court's supervision, and pending the appeal, to the defendant, who was the trustee under the mortgages, in accordance with the condition in the mortgage that, upon default of payment, the trustee might take possession of the mortgaged property. *Held*, the court had no power over the decree after the expiration of the term and after the appeal had been perfected, and that the attempted modification was a substantial alteration.

This is an application by Morgan's Louisiana & Texas Railroad & Steam-Ship Company, complainant in the original suit, and defendant in the cross-suit, for a rehearing in respect to matters embraced in an order or decree, made herein, June 11, 1887, upon certain petitions of the Farmers' Loan & Trust Company. The Farmers' Loan & Trust Company also makes application for a resettlement of that order. The object of the original suit is to obtain a decree enforcing the claim of Morgan's Louisiana & Texas Railroad & Steam-Ship Company to an equitable mortgage or lien upon the property of the Texas Central Railway Company. That lien, the plaintiff insists, is superior to the liens created upon the same property by two mortgage deeds of trust, of the respective dates of September 15, 1879, and May 16, 1881, executed by the Texas Central Railway Company to the Farmers' Loan & Trust Company, as trustee, to secure certain issues of bonds. Under the prayer of the original bill, Charles Dillingham and Benjamin Clarke were appointed receivers, by an order entered April 6, 1885. In that capacity they took possession of and managed the mortgaged estate. The Farmers' Loan & Trust Company, by its cross-bill, claims that its liens are paramount to the lien, if any, of the plaintiff in the original suit. The prayer of that company is for a decree of foreclosure, and a sale of the mortgaged property, the proceeds to be applied to the payment of its costs, expenses, and compensation as trustee, and in discharge of the bonds and coupons secured by the deeds of trust. The mortgage deeds of trust, among other things, provide that—

"In the event that the said railway company should pay or cause to be paid the principal of said bonds, and the several installments of interest thereon, as the same become due, then this deed and all herein contained shall be void, and the property hereby conveyed shall revert to and revest in the said Texas Central Railway Company, its successors and assigns, without any acknowledgment of satisfaction, reconveyance, or other act; but in case the Texas Central Railway Company shall fail to pay the principal, or any part thereof, or any of the interest on any of the said bonds, at any time when the same may become due and payable, according to the tenor thereof, and if said default shall continue sixty days after having been demanded, then and thereupon the principal of all the said bonds hereby secured shall be and become immediately due and payable; and upon the request of the holder or holders

of seventy-five per cent. of said bonds then outstanding, and written notice of said request being served on the New York agency of the party of the first part, at which said bonds and coupons are made payable, the said trustee, (who may act by its president or attorney,) or its successor or successors in this trust, may and shall take actual possession (with or without entry or foreclosure) of said railway, and all and singular the said mortgaged property, and shall manage and operate the same, and receive all the income and profits of the same, together with all the books, papers, records, accounts, and money of the said railway company, first defraying out of the same the expenses of the road and its needful repairs and the management of the said trust; and the surplus to pay the interest and principal of all the bonds which may be due and outstanding, and hereby secured, *pro rata*. * * * And the said Texas Central Railway Company, for itself, its successors and assigns, hereby covenants and agrees that in case of default in the payment of the principal of said bonds, or any installment of interest thereon, it will at once, upon demand, deliver possession of the railroad and other property herein conveyed to the trustee herein named, or to its successor or successors or assigns."

On the twenty-first of February, 1887, the Loan & Trust Company represented, by petition filed in the case, that it had been requested by the holders of 75 per cent. of the first and second mortgage bonds, secured by the deeds of 1879 and 1881, to take actual possession of the railway and mortgaged property, and manage and operate the same as in said mortgages provided, and to take such other course as might be necessary under existing circumstances to protect their rights as bondholders; and prayed that the court order the receivers appointed herein to deliver over to it the railway and other property now in their hands, "in order that it may take actual possession of the same, and operate the same, under and in pursuance of the provisions of the said mortgages or deeds of trust."

On the eleventh of April, 1877, a decree was rendered, whereby it was adjudged, among other things, that Morgan's Louisiana & Texas Railroad & Steam-Ship Company have an equitable lien upon the property of the Texas Central Railway Company, to secure its claim for $761,992.04, with interest from November 1, 1884, but that such lien is subordinate to those which the Farmers' Loan & Trust Company has, under the mortgage deeds of trust, to the amount of $4,150,528.18, with interest, for the benefit of the holders of bonds and coupons. In default of the payment of the latter amount within a time fixed, the equity of redemption of the railway company, and of all parties to the suit, in and to the mortgaged property, was barred and foreclosed, and the property ordered to be sold to the highest bidder for cash. Special commissioners were appointed to execute the decree. The railroad and steam-ship company, and the Texas Central Railway Company, respectively, asked and were allowed appeals to the supreme court of the United States *from the whole of the decree*, on their giving bonds in the sum of $300,000. The required bonds—conditioned that the appellant would prosecute its appeal to effect and answer all costs and damages if it should fail to make good its plea—were executed and approved. A citation on each appeal, returnable to the second Monday of the present month, was duly signed, and served in May last. The transcripts of the records, on these

appeals, have been filed in the supreme court, and the cases are there regularly docketed.

On the eleventh of June, 1887,—the term at which the decree of foreclosure and sale was rendered having expired,—the Farmers' Loan & Trust Company presented to the circuit judge, at chambers, a petition which, after referring to the petition filed February 21, 1887, to the decree of foreclosure and sale, and to the advertisement of the sale, states:

"Thereafter appeals from said decree to the supreme court of the United States were perfected by the said Morgan's Louisiana & Texas Railroad & Steam-Ship Company, and by the said Texas Central Railway Company, their respective bonds for appeal having been duly approved by the judges of this court, to all of which reference is hereby made. Your petitioner further shows to the court that application has been made by the receivers in this cause, for authority to borrow $40,000, and to issue their debentures therefor, with interest thereon at the rate of seven per cent. per annum until paid, in order to pay the past-due and the future operating expenses of the said railroad, a copy of which petition is annexed hereto for reference as to its contents. Twenty-five thousand dollars indebtedness of said receivers is already in existence. The premises considered, your petitioner, the said Farmers' Loan & Trust Company, in virtue of the powers conferred on it in said mortgage, and of the action of the bondholders, set forth in said petition, now renews its said petition so heretofore filed in this honorable court, and prays for an order directing the receivers in this cause to deliver possession of all and singular the railway and property in their hands, and declared subject to the mortgages, as shown by said decree, into the possession of your petitioner, for administration and for operation by it under the terms of said mortgages, and under such terms and conditions as to your honor shall seem meet, and under the proper orders and supervision of this court, until the final determination of this cause. And it prays for all such orders, decrees, and relief as it is entitled to in the premises."

Upon this petition it was ordered and decreed, June 11, 1887, that "the Farmers' Loan & Trust Company, being the trustee in the mortgages heretofore foreclosed by the decree of the court in the above entitled causes, on the eleventh day of April, 1887, and having the powers conferred on it in the said mortgages, which are set forth in its said petition, subject to these suits; and it appearing to be equitable to the court that the said Farmers' Loan & Trust Company should have the custody, management, and operation of the railway and all the property subject to its mortgages now in the hands of the receivers, Benjamin Clarke and Charles Dillingham, and ordered to be sold by the said decree of this court, made and entered on the eleventh day of April, 1887, until the final hearing of these causes on appeal to the supreme court of the United States, or until the further orders of this court; but that the custody over said property shall continue subject to the orders of this court, and subject to the terms and conditions hereinafter set forth." It was further ordered and decreed that upon the payment by the Farmers' Loan & Trust Company of the indebtedness (to be ascertained by the master) incurred by the receivers in the operation and control of the mortgaged property, including the compensation allowed to them and their counsel, they "shall immediately turn over and deliver, under the inspection, direction, and orders of said master, all the said railways, roll-

ing stock, and property and rights of every kind whatsoever, subject to said mortgage, in the hands, care, custody, or control of said receivers, and all the books and papers of said Texas Central Railway Company pertaining to the organization, operation, and business of said railway, to the said Farmers' Loan & Trust Company, acting by its duly constituted agent or attorney, under the signature of its president, and the seal of said company. * * * And thereupon, upon the payment of said indebtedness, the said Farmers' Loan & Trust Company shall be, and is hereby, invested with the possession, custody, care, administration, and management of all and singular the said railway, its property, franchises, rights, etc., subject to said mortgages, said property being delivered to said trustee for safe-keeping during the pendency of this cause; and it is ordered that said property be not alienated, nor encumbered, but be preserved as a good and safe-going railroad under the charter and franchises of the defendant."

This order was rendered upon the following, among other, conditions, viz.:

"(1) That the said Farmers' Loan & Trust Company, as trustee for the bondholders under its said mortgages, undertakes and agrees that the money for the future operation of said railways, and for all running and operating expenses thereof, shall be furnished by it, under its own arrangement with bondholders, and without appeal to the power or authority of this court to cause further charges or liens upon the property.

"(2) That the debentures heretofore authorized by this court, and issued by the receivers, amounting in the aggregate to the sum of twenty-five thousand dollars, remain in full force, subject to all the rights of the holders thereof, at the maturity thereof, to apply to this court for orders of payment of said debentures and interest thereupon, unless said payments be duly provided for by said Farmers' Loan & Trust Company.

"(3) Upon the further condition that said Farmers' Loan & Trust Company shall pay the allowances to be made by the court to the master in this cause to the present time, said master to continue in this cause, and to hear all claims which may be brought for damages growing out of the operation of the said railway in the hands of the present receivers: provided, that the same shall be filed before him within ninety days from the date of the discharge of said receivers, or the same shall be stale, and forever barred; and, further provided, that said Farmers' Loan & Trust Company shall provide for and pay off all such legal claims and demands arising under the administration of said property by the receivers.

"(4) Upon the further condition that said Farmers' Loan & Trust Company shall, within thirty days from this date, and prior to the vesting of the rights and authority in it by virtue of this order, execute a bond with security in the sum of one hundred thousand dollars, payable to the judges of the circuit court of the United States for the Fifth circuit and Northern district of Texas, conditioned faithfully to account for whatever shall come into its hands under the authority hereby vested in it, and to pay and apply the same from time to time as may be directed by the court, and obey such orders as the said court may make in the direction of said trust, which bond shall, before filing, be approved by this court, or a judge thereof, or by the said special master."

There was a further condition, requiring the Farmers' Loan & Trust Company to file its acceptance of the possession of the property, and all

of the rights vested in it by the order, subject to its terms and conditions; otherwise the order should be void.

On the twentieth of June, 1887, the railroad and steam-ship company presented to the circuit judge, at chambers, its application for a rehearing in respect to the matters covered by the order of June 11th, insisting that he had no power to make it in vacation, or after said appeals, with *supersedeas*, had been allowed and perfected.

It should be here stated that the Farmers' Loan & Trust Company asks, in the resettlement of the order of June 11, 1887, that the following clause be added to the first of the conditions upon which that order was based, viz.:

"It being fully understood, however, that the said trustee, in its accounting to be had as hereinafter stated, shall be entitled to charge, as against the moneys received by it from the operation of the railroads and property, any and all moneys which it may so furnish and advance under the provisions of this order, and shall have a lien against the trust estate for any excess of such moneys furnished beyond the amount so received."

It also asks that the order be further extended so as to provide:

"The Farmers' Loan & Trust Company, as to any money and claims against said railroad company which it may pay off under and in pursuance of this order, shall be entitled to be subrogated to the rights and claims of the previous holders of such claims against the trust property."

J. Hubley Ashton and *E. B. Kruttschnitt*, for Morgan's Louisiana & T. R. & S. S. Co. and Texas Cent. Ry. Co. *Turner, Lee & McClure*, for Farmers' Loan & Trust Co.

Mr. Justice HARLAN, after stating the facts as above reported, delivered the following opinion:

It is an established principle that, except upon bills of review in cases in equity, upon writs of error *coram vobis* in cases at law, or upon motions which, in practice, have been substituted for the latter remedy, no court "can reverse or annul its own final decision or judgment for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes; from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing." *Sibbald* v. *U. S.*, 12 Pet. 488, 492; *Bank* v. *Moss*, 6 How. 31; *Bronson* v. *Schulten*, 104 U. S. 415; *Schell* v. *Dodge*, 107 U. S. 630, 2 Sup. Ct. Rep. 830; *Phillips* v. *Negley*, 117 U. S. 665, 6 Sup. Ct. Rep. 901; *Cannon* v. *U. S.*, 118 U. S. 355, 6 Sup. Ct. Rep. 1064. It is equally well settled that, after the court has allowed an appeal, and a *supersedeas* bond is taken, either during or after the term, jurisdiction as to all matters—certainly those of substance—determined by the decree is transferred to the court to which the appeal goes. *Draper* v. *Davis*, 102 U. S. 371; *Goddard* v. *Ordway*, 101 U. S. 752; *Hovey* v. *McDonald*, 109 U. S. 157, 3 Sup. Ct. Rep. 136; *Roemer* v. *Simon*, 91 U. S. 149; *Rubber Co.* v. *Goodyear*, 6 Wall. 156.

Can the order of June 11, 1887, be sustained consistently with these principles?

The Railroad and Steam-Ship company, in its original bill, alleges that the only manner in which it could obtain satisfaction of its claim, and a recognition of its prior lien, was through the interposition of the court, and the appointment of receivers with power to administer the property. The court appointed receivers; and such appointment, as we have seen, was under the prayer of the original bill. The Loan and Trust company, in its cross-bill, sets forth that the mortgagor company was in default as to interest due, under said deeds, on May 1, 1885, and as to all interest due subsequent to that date; that the payment of interest had been duly demanded, and default had continued 60 days after such demand; and consequently the principal of the bonds secured by both deeds had become immediately due and payable. The cross-bill further alleged that the mortgagor company was insolvent; that its indebtedness, bonded or otherwise, was so large that the company and its receivers were utterly unable to pay the floating debt and discharge the interest on mortgage bonds from time to time out of net earnings; that this state of affairs was likely to continue for an indefinite period of time; that, in consequence of the embarrassed condition of the financial affairs of the mortgagor company, it was impossible for the trustee, under the mortgage deeds of trust, to execute said trusts in the manner therein specified, without the aid or interposition of the court; nor could the trusts be executed, and the rights of the parties interested be ascertained and fully protected, otherwise than by a judicial sale of the mortgaged premises and property covered by the mortgage deed of trust. The cross-bill also alleged:

"Until such sale can be had, and the proceeds thereof be distributed, your orator is likewise advised and charges that it is expedient and necessary that the franchises, property, premises, and appurtenances so mortgaged to your orator in trust as aforesaid, and all the rights, franchises, and property of the said defendant, the Texas Central Railway Company, of whatever name, nature, and description, including all its moneys on hand and the earnings of the same, *continue to remain* and be placed in the hands and under the control of a receiver, or receivers, with such proper powers and control over the same as to the court shall seem right and equitable to be conferred."

While the appointment of receivers was, in the first instance, a matter within the discretion of the court, the order placing the property in the hands of Dillingham and Clarke was a judicial determination that the plaintiff was entitled, under the circumstances disclosed, to have the property, pending the litigation, administered under the supervision and direction of the court, by receivers. So far from that determination being questioned by the Loan and Trust company, its correctness was recognized by the cross-bill, and the court was distinctly informed that it was both expedient and necessary that the property should "continue to remain" in the hands of receivers. The final decree was, in legal effect, a confirmation of the previous order, placing the property in the hands of receivers.

In view of these facts, it is clear that the order of June 11, 1887, does modify the final decree in material respects. It proposes to dis-

charge the receivers appointed under the prayer of the original bill, and to transfer the actual custody and management of the property *to one of the parties*, who, as the trustee named in the mortgage deeds of trust, holds fiduciary relations to the property, and is hostile to the claim asserted by the original plaintiff to a prior equitable mortgage or lien. Although the order recites that the property is delivered to the Loan and Trust company for "safe-keeping during the pending of the cause," other recitals plainly show that it was based upon the right given and the duty imposed upon that company by the mortgage deeds of trust to take possession of the property and operate it, when default in the payment of interest or principal continued for 60 days after demand, and when the trustee should be requested to do so by holders of 75 per cent. of outstanding bonds, the railway company first receiving written notice at its New York agency of such request. But the right to such possession, if it was disputed, could have been enforced only in a direct suit for that purpose. *Trust Co.* v. *Railroad Co.*, 4 Dill. 116, 117.

After the appointment of receivers in the suit instituted by the railroad and steam-ship company, and so long as the receivership continued, this provision could be made available to the trustee only upon application, before final decree, to the court to vacate the order appointing receivers, and return the property to the mortgagor company. Instead of that course being adopted, at the outset, the trustee, by its cross-bill, not only advises the court that the property should continue to remain in the hands of receivers, but presented such facts as made it the duty of the court to adhere to the purpose of having it administered by one of its own officers. It is true that on the twenty-first of February, 1887—more than a year after this litigation was commenced—the trustee filed a petition, asking that it be put into possession of the property as trustee under the mortgage deeds of trust. It is sufficient, upon this point, to say that if any state of case would have justified the court in granting that request in this suit, after the Loan and Trust company had filed its cross-bill seeking a decree of foreclosure and sale, the fact that such a petition was filed is immaterial here; for no process was issued upon it, and no action was sought or taken upon it before the final decree was passed. If the attention of the court was called to it at the time the cause was submitted, the final decree must be regarded as confirming its previous action in taking possession of the property by receivers. The term having passed, and if it had not passed, an appeal with *supersedeas*, from the whole decree having been duly allowed and perfected, the circuit court had no power to change the *status* of the property by placing it in the custody of one of the parties, to be managed and operated, not for the benefit of all interested in the result of the suit, but subject to the mortgages under which that party claimed. It had no more power to do that than to set aside the order appointing receivers, and return the property, pending the appeal and after the decree was superseded, to the mortgagor company. This must be the result in every view of the case; for it cannot be said to be a matter of no consequence to the plaintiff in the original suit whether the property on which it claims to have a para-

mount lien is administered, under the orders of the court, and by a receiver, indifferent between the parties, or administered, under mortgage deeds of trust, by a party to the suit, which, as trustee, disputes its priority of lien. It is plain that the order of June 11, 1887, varied the final decree in a matter of substance.

This view is not affected by the circumstance that the order provided that "the custody over all said property shall continue subject to the orders of this court, and subject to the terms and conditions" heretofore referred to. If the court below, after the term, and after the decree was superseded, had power, upon grounds involving merely the safety or preservation of the property, to remove the present receivers and substitute others, the fact remains that the Farmers' Loan & Trust Company did not ask to be put in possession, as receiver of the court; nor did the court intend to substitute it as receiver in place of Dillingham and Clarke. It directed that that company be put into possession in its capacity as trustee for bondholders, under the mortgage deeds of trust. Its possession was none the less in that capacity, because the court reserved, by its order, a general control of the property, pending the appeal.

The learned counsel for the trustee contends that there is absolutely nothing in the case to sustain the claim of Morgan's Louisiana & Texas Railroad & Steam-Ship Company to a superior lien, and that the appeals in question have been taken for delay merely. Upon that question I am not at liberty, at this time, to express an opinion. That question is now before the supreme court of the United States for determination. The plaintiff's claim to priority of lien was denied, and it was allowed and has perfected an appeal from the whole decree. A belief that the appeal is for delay cannot, in law, affect the question whether the circuit court or circuit judge had jurisdiction to make the order of June 11, 1887.

For the reasons stated, I am of opinion that the circuit judge was without jurisdiction to make that order, and it is set aside. It is scarcely necessary to say that, for the same reasons, the application for a resettlement of that order must be denied.

It is proper to say that these applications were ordered by the circuit judge to be heard before me as the justice of the supreme court assigned, for the time, to the Fifth circuit.

UNITED STATES *v.* OWEN and others.

(*District Court, D. Oregon.* November 7, 1887.

1. CONSPIRACY—TO DEFRAUD GOVERNMENT—PUBLIC LANDS.
   Section 5440, Rev. St., is not limited in its operation to conspiracies to defraud the United States of its "revenue," but applies to all conspiracies to deprive the United States of any property or dues by means of misrepresentation or concealment of material facts.
2. LIMITATION OF ACTIONS—PROSECUTION FOR CONSPIRACY.
   The crime defined in section 5440, Rev. St., is composed of the conspiracy, and an act done in pursuance thereof; and as soon as the one is formed, and the other committed, the crime is consummated, and the statute of limitations begins to run against a prosecution therefor; and in three years thereafter the bar is complete.

(*Syllabus by the Court.*)

Indictment for Conspiracy with Intent to Defraud the United States.

Lewis L. McArthur, for the United States.

M. H. Y. Thompson and *Rufus Mallory*, for the defendants.

DEADY, J. The defendants are accused by the grand jury of this district of the crime of conspiring together to defraud the United States out of sundry portions of the public lands in the district of Oregon contrary to section 5440, Rev. St.

The indictment was found on April 12, 1887, and it is alleged therein that prior to July 1, 1881, the defendant Owen had from time to time filed with the proper state board applications for the purchase of swamp and overflowed lands therein described, as soon as the same or any portion thereof should be certified to the state of Oregon under the acts of congress and the regulations of the department of the interior on the subject; that between August 1, 1880, and January 15, 1882, the defendant Ankenny was a special agent of the general land-office, charged with the duty of inspecting, in the field, the swamp and overflowed lands claimed by the state of Oregon under said acts and regulations, and of reporting the result, under oath, to the commissioner of the general land-office; that on July 1, 1881, said Owen, Ankenny, and the defendant Barnhart did agree and conspire together to defraud the United States government of sundry parcels of public lands in Oregon, amounting to 86,665 acres, and to that end said Ankenny, as said special agent, was to report as swamp and overflowed lands, to which the state of Oregon was entitled, large tracts of the public land, including the lands last aforesaid, which were and are not swamp and overflowed, and endeavor to procure the issue of patents therefor to said state; and said Owen was to procure certificates of purchase from the state for said lands; and said Barnhart was to assist said Owen, by preparing applications for the purchase of said lands from the state, and by producing false preliminary proofs as to the character of said lands, and thereby secure their withdrawal from entry; and that said defendants, and each of them, would use any means available for such purpose, and endeavor to negotiate the

sale of said lands; that afterwards, on December 26, 1881, said Ankenny, in pursuance of said unlawful agreement and conspiracy, did make oath to a series of 18 affidavits, wherein he stated that all the lands described therein, to-wit, 97,560 acres, were swamp and overflowed, within the meaning of the act of congress of March 12, 1860, on that subject, and on which the secretary of the interior on April 16, 1882, certified the same to the state of Oregon as swamp and overflowed lands, the list thereof being entitled, "List number five of the Lakeview series of swamp lands," 33,000 acres of which lands were not swamp or overflowed lands, within the meaning of said act, and did not accrue to the state thereunder,—all of which was well known to said Ankenny when he made said affidavits.

It is also alleged in the indictment that, later on, other acts were done by the defendants, or some of them, in pursuance of the conspiracy, namely: (1) On December 23, 1881, Owen, with the knowledge of Barnhart, made an agreement with Ankenny and James H. Fisk to sell a large portion of the lands which Ankenny was then about to report, and did on December 26th report, by means of the affidavits aforesaid, as swamp and overflowed. (2) The defendants, between the date of said conspiracy and the finding of the indictment, endeavored, at divers times, to secure the issue of patents for said lands from the United States to the state. (3) On August 24, 1881, September 6, October 9 and 16, November 5, 1883, and December 22, 1884, Owen caused to be filed with said board six specific descriptions of land, containing in the aggregate 621,527 acres, and six applications to purchase the same from the state as swamp or overflowed, well knowing that a large portion thereof was not swamp or overflowed, but public lands of the United States; and on October 9 and November 14, 1883, and March 10, 1885, received certificates of purchase for said lands from the state. (4) On October 31, 1883, Barnhart procured himself to be appointed notary public for Oregon. (5) On September 25, 1884, Barnhart forged three writings purporting to be the joint affidavits of D. M. McMenamy and I. L. Poujade; and, on October 8 of the same year, one other writing, and on October 9th two other writings, purporting to be the joint affidavits of C. C. Loftus and D. R. Jones,—all of which appear to have been subscribed and sworn to before him as notary, and are to the effect that the lands described in the lists annexed thereto, amounting to 155,600 acres, are swamp or overflowed, the larger portion of which were on March 12, 1860, and ever since have been, dry lands of the United States, and not unfit for cultivation by reason of being swamp or overflowed; which writings were, before December 11, 1884, by Owen, delivered to the governor of the state as proof of the facts therein stated, and by the latter transmitted to the surveyor general of the United States for Oregon, for a like purpose, as said Barnhart and Owen intended and expected he would.

The defendant Ankenny resides out of the state, and has not been arrested. The defendants Owen and Barnhart demur to the indictment, for that it was not found within the time prescribed by law, and that

the facts stated therein do not constitute a crime according to the laws of the United States.

Section 5440, Rev. St., on which this indictment is founded, reads 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 parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of no less than $1,000, and not more than $10,000, and to imprisonment not more than two years."

The crime defined by this act is *sui generis*. It consists of two elements: A conspiracy, and an act done to effect or accomplish it. The purpose of the conspiracy must be either to commit a crime defined by any law of the United States, or to defraud the same. To defraud "the United States in any manner or for any purpose" is a very comprehensive expression, and includes every conspiracy to deprive the United States, by the misrepresentation or concealment of material facts, of any kind of property, or whatever may be legally due it on account of taxes, duties, imports, excises, or the like.

For the demurrer it is argued that section 5440 applies only to a conspiracy to defraud the revenue of the United States. The reason given is that the section being taken from section 30 of the act of March 2, 1867, (14 St. 471,) entitled, "An act to amend existing laws relating to internal revenue, and for other purposes," the words "to defraud" must be limited to the subject-matter of the act,—the internal revenue.

The subject of the act is not limited by its title to revenue of any kind, but expressly includes "other purposes" or subjects. The language of the section gives no evidence that it was the intention of congress to limit its operation to frauds upon revenue. Taken in its natural sense, the language includes a conspiracy to commit "any" crime against the United States, or to defraud it in any manner; and there is nothing in the circumstances of the case which ought to prevent it from having effect accordingly. As found in the Revised Statutes, there are some verbal changes in the section which only emphasize the general purpose and character of the statute. It is a wholesome and much-needed act; and it is difficult to assign any reason compatible with the public good, or the protection of the public property or dues, why any conspiracy to commit a fraud thereon or thereabout should be excluded from its operation. The limitation on the prosecution of the crime described in this indictment is found in section 1044, Rev. St., which provides that the indictment must be found within three years next after the same "shall have been committed;" while section 1045 thereof declares that the limitation shall not extend to the case of "any person fleeing from justice."

In *U. S.* v. *Cook*, 17 Wall. 168, the supreme court decided that the defense of the bar of this statute of limitations cannot be made by a demurrer to the indictment, although it should appear on the face thereof that the period within which the action should have been commenced had passed before the finding of the indictment; for it may turn out on

the trial that the defendant is within the proviso concerning a fugitive from justice. This decision is founded on a well-known rule of pleading where the statute defining a crime contains an exception or proviso. It would be much more convenient, however, if the prosecution was required to allege in the indictment that the defendant was a fugitive from justice, in cases where that fact is relied on to take the case out of the statute. *People* v. *Miller*, 12 Cal. 291; *People* v. *Montejo*, 18 Cal. 38. In this case, it being well understood that the defendants joining in the demurrer were never fugitives from justice, the district attorney, at the suggestion of the court, and to avoid the trouble and expense of a useless trial with a jury, in case the court should be of the opinion that the action was barred by lapse of time, has filed a paper in which he admits, for the purpose of this demurrer, that the defendants joining therein were not fugitives from justice. Assuming this to be a fact of record, I proceed to dispose of the question: is this action barred by lapse of time?

The general rule is that the statute begins to run from the commission or consummation of the crime. Whart. Crim. Pl. § 321. When was this crime committed? The conspiracy was formed on July 1, 1881, and the first act done by any of the conspirators in pursuance thereof was the making of the alleged false affidavits by Ankenny on December 26, 1881, in relation to the character of the land mentioned therein. The crime was then consummated. The two elements of which it is composed—the conspiracy and the act—were accomplished, and the crime committed. On December 27, 1881, more than five years prior to the institution of this prosecution, an indictment might have been found against the defendants for this crime. This being so, the limitation on the right to institute a prosecution therefor began to run at the same time, and became a bar thereto on that day, in 1884.

In support of the prosecution it is contended that the crime was not completed until the commission of the last acts done in pursuance of the conspiracy; and that as the filing of the false description by Owen on December 22, 1884, and the making and using the alleged forged affidavits by Barnhart in September and October of the same year, each took place within the three years immediately preceding the finding of the indictment, the prosecution is not barred. In this respect it is likened to or said to be a continuous crime. No authority is cited for the proposition, and on general principles I think it cannot be maintained.

An instantaneous crime, such as arson or killing, is consummated when the act is completed. A continuous crime, such as carrying concealed weapons, endures after the period of consummation. In the former case the statute of limitations begins to run with the consummation, while in the latter it only begins with the cessation of the criminal conduct or act. But even then it is a bar to a prosecution for any act or part of the continuous crime which occurred three years prior to such time.

As has been said, this crime consists, not in a continuous series of acts, constituting what may be called a habit, but of two distinct things only:

a conspiracy, and an act done in pursuance thereof, at any time thereafter. But admitting this is a continuous crime, the demurrer must be sustained on this point. That being the case, the prosecution of the defendants for any act committed three years before the finding of the indictment is barred by lapse of time, and those alleged to have been committed within three years of such finding are not sufficient to constitute the crime defined by the statute. The very foundation of the crime—the conspiracy—is shut out, and without this circumstance the offense in question is not charged in the indictment. However, this is an instantaneous crime, composed of the conspiracy, and the first act done to affect the object thereof, at whatever distance of time therefrom. When the conspiracy is formed the crime is begun, and when the act is committed it is consummated. An indictment will then lie against the criminal, and the limitation on the right of the government to prosecute him begins to run, and in three years the bar is complete.

This conclusion does not deny the liability of any of these defendants for any act committed by him within three years, in furtherance of said conspiracy, when the same amounts to a crime. Indeed, Barnhart now stands accused in this court in three indictments, found under section 5418, Rev. St., on account of the affidavits alleged herein to have been forged by him in furtherance of this conspiracy.

The demurrer must be sustained; and it is so ordered.

UNITED STATES *v.* COY and others.

(District Court, D. Indiana. July 7, 1887.)[1]

ELECTIONS—OFFENSES AGAINST ELECTION LAWS—REV. ST. U. S. § 5515.

Rev. St. Ind. 1881, §§ 4712, 4713, require that an inspector of elections, who receives the certificate, tally-sheet, and poll-list of an election, shall safely keep them in his custody until they are delivered to the board of canvassers. *Held* that, at an election in which a representative in congress was voted for, the violation of the duty of keeping such papers safely was an offense against the general government, under Rev. St. U. S. § 5515, providing for the punishment of officers of an election at which a representative in congress is voted for, who neglect or refuse to perform any duty in regard to such election required of them by any law of the United States, or of any state; and under Rev. St. U. S. §§ 5511, 5512, and 5520, any one aiding, abetting, or conspiring to effect such violation is equally guilty with the principal.

Motion by Each Defendant Severally to Quash Indictment for conspiracy to violate federal election laws.

Mr. Bynum, for defendant Beck.

Abram Hendricks, and *O. B. Hord*, for defendant Perkins.

Henry Spaan, *pro se*.

[1] The publication of this case was inadvertently omitted at the time of its decision. For the opinion of the circuit court on an application for writ of *habeas corpus* by the defendant Coy, see 31 Fed. Rep. 794.

C. F. McNutt, *Livingston Howland*, and *Cas. Byfield*, for other defendants.

WOODS, J. The objections made to the several counts of the indictment not being different, it is enough to set out the first count, which is as follows:

"UNITED STATES OF AMERICA, DISTRICT OF INDIANA—SS.:

"*In the District Court of the United States for the District of Indiana.*

"May Term, 1887, at Indianapolis.

"The grand jurors of the United States within and for the District of Indiana, impaneled, sworn, and charged in said court, at the term aforesaid, to inquire for the United States, within and for the district of Indiana aforesaid, upon their oath present that Samuel E. Perkins, Simeon Coy, Henry Spaan, John H. Councilman, Charles N. Metcalf, John E. Sullivan, Albert T. Beck, George W. Budd, Stephen Matler, William F. A. Bernhamer, and John L. Reardon, late of said district, at the district aforesaid, on the fourth day of November, in the year of our Lord 1886, unlawfully, knowingly, and feloniously did then and there conspire, confederate, combine, and agree together, between and among themselves, to commit an offense against the United States, and did then and there unlawfully, knowingly, and feloniously then and there conspire, combine, confederate, and agree together, between and among themselves, to induce, aid, counsel, procure, and advise one Allen Hisey to unlawfully neglect, and omit to perform, a duty required and imposed by the laws of the state of Indiana, relating to and affecting a certain election had and held at and in the county of Marion, in the state and district of Indiana, and at the Second precinct of the Thirteenth ward of the city of Indianapolis, in the county of Marion aforesaid, on the second day of November, in the year of our Lord 1886, pursuant to law, at which election a representative in congress for the Seventh congressional district of Indiana was voted for, to-wit, to unlawfully neglect and omit to safely keep in his possession and custody the tally papers, poll-lists, and certificate of said election at said precinct,—he, the said Allen Hisey, being then and there an officer of said election, to-wit, an inspector of said election at the Second precinct of the Thirteenth ward of the city of Indianapolis aforesaid, having been thereto duly appointed, and having duly qualified under the laws of the state of Indiana, and acting as such inspector; and that, to effect the object of said conspiracy, the said Samuel E. Perkins, then and there, after one of the tally papers and one of the poll-lists of said election at said precinct, and the certificate of the number of votes each person had received at said election at said precinct, designating the office, signed by the board of judges of said election at said precinct, had been deposited with him, the said Allen Hisey, as inspector as aforesaid, and after he, the said Allen Hisey, had received the said tally papers, poll-list, and certificate aforesaid, for the purpose of returning the same to the board of canvassers of said election for the county of Marion, aforesaid, he, the said Samuel E. Perkins, did then and there, by unlawfully and feloniously counseling and advising him, the said Allen Hisey so to do, and by other unlawful means, to the grand jurors aforesaid unknown, unlawfully used to effect the same unlawful purpose, unlawfully induce and procure him, the said Allen Hisey, to unlawfully omit and neglect to safely keep said tally paper, poll-list, and certificate in the possession of him, the said Allen Hisey, as inspector as aforesaid, to surrender and deliver to and into the possession of the said Samuel E. Perkins, and permit him, the said Samuel E. Perkins, to take and have the possession and custody of said tally paper, poll-list, and certifi-

cate, and the said tally paper, to then and there unlawfully mutilate, alter, forge, and change before the said tally paper, poll-list, and certificate had been returned to and canvassed and estimated by the board of canvassers of the said election of the county of Marion aforesaid; he, the said Samuel E. Perkins, not being then and there an officer of said election, and not then and there being a person authorized by the laws of the state of Indiana to have possession and custody of said tally paper, poll-list, and certificate aforesaid; contrary to the form of the statute of the United States, and against the peace and dignity of the United States of America."

I do not deem it necessary to restate here, or to consider separately, the positions and arguments of counsel, but, in connection with the federal and state statutes on which it is predicated, will present the considerations upon which, I think, the indictment must be upheld.

The Revised Statutes of Indiana (1881) provide for two sets of returns of elections from each voting place,—one set consisting of the ballots cast, one of the lists of voters, and one of the tally papers, which together are to be sealed in a strong paper envelope or bag, and in that condition to be delivered to the clerk for preservation, (Rev. St. §§ 4713, 4714;) the other set consisting also of one of the lists of voters, and one of the tally papers, and, besides, a certificate under the hands of the judges composing the board of judges. The frauds in question, as shown by the charge, were confined to returns and papers of the second class, in respect to which the statutory requirements are contained in sections 4712 and 4715 of the Revision.

By section 4712, "when the votes at any precinct shall be counted, the board of judges shall make out a certificate under their hands, stating the number of votes each person has received, and designating the office; * * * and such certificate, together with one of the lists of voters and one of the tally papers, shall be deposited with the inspector, or with one of the judges selected by the board of judges."

And by section 4715, "the inspectors of each township or precinct, or the judges of election to whom the certificate, poll-books, and tally papers shall have been delivered, * * * shall constitute a board of canvassers, who shall canvass and estimate the certificates, poll-lists, and tally papers returned by each member of said board; for which purpose they shall assemble at the court-house on the Thursday next succeeding such election;" and by section 4717, "after compilation of the canvass, the canvass-sheet, together with such certificates, poll-books, and tally papers, shall be delivered to the clerk, and by him filed in his office."

It is therefore a duty, partly implied and partly expressed, "imposed by law," upon these inspectors and judges, safely to preserve the papers "deposited" with them, and to "return" the same intact, to the board of canvassers, and equally the duty of the board,—of its members and officers,—after completion of its work, to deliver the papers unharmed to the clerk, to be filed in his office.

The duty thus imposed is recognized and emphasized by penal section 2187 of the Revision, which reads in this wise:

"Any township trustee or inspector, or any person acting for or on behalf of any trustee or inspector while forming a board of canvassers, or before the

canvassing of any board of canvassers, or after the adjournment of any board of canvassers who shall, with intent to cheat and defraud, alter any election return as made by the election board of any voting precinct, either by increasing the vote of any candidate, or reducing the same, or shall intentionally destroy, misplace, or lose any poll-book or tally-sheet, * * * shall be fined," etc.

The federal statute goes further, and, for every detail of duty imposed by state or federal enactment upon the officers of an election at which a representative in congress is voted for, provides a sanction which, if so enforced as to command respect, will suppress the beginnings of evil and wrong-doing in respect to the returns of such elections. Congress has declared to be an offense against the United States every omission or breach, by any officer of election, of any duty imposed by law, either of the state or of the United States, if the omission or breach be one affecting, either actually or potentially, the congressional election. Thus, by section 5515, Rev. St. U. S., every officer of an election at which any representative in congress is voted for, whether appointed under authority of the United States or of any state, "who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any state, * * * or who violates any duty so imposed," is declared punishable; and, by section 5511, "if any person * * * interferes in any manner with any officer of such election in the discharge of his duties, or by force, threat, intimidation, bribery, reward, or offer thereof, * * * or other unlawful means, induces any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any 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; * * *" or, by section 5512, "if any such officer or other person, who has a duty to perform in relation to such election, * * * knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law relating to or affecting such election, or the result thereof, or [affecting] any certificate, document, or evidence in relation thereto, or if any person aids, counsels, procures, or advises any such voter, person, or officer to do any act which is hereby made a crime, or to omit any act the omission of which is hereby made a crime,—every such person is hereby made punishable," etc. By section 5520, "if two or more persons conspire to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of such conspiracy, all shall be liable to a penalty." That is to say, there are involved here three kinds of offenses and three classes of offenders. The inspector or judge of election may be punished for his neglect or disregard of duty; any who counseled, aided, or procured such neglect or omission of duty by the officer may be indicted for so doing; and those who did not directly aid, counsel, or procure such omission or neglect of duty, but were parties to a conspiracy to effect such omission or neglect, may be indicted for such conspiracy.

Counsel say that there can be "no crime by implication," and, in a sense,

this may be true; but the proposition has little or no application here. According to the explicit terms of the federal statute, any omission, neglect, or violation of "any duty required by law," or "imposed by law," affecting the congressional election or any certificate, document, or evidence in relation thereto, is made a crime; and this, on reason and authority, includes duties deduced by clear implication or inference from the terms of a statute, as well as those expressly and directly declared. Indictments for violation of implied duties were upheld in the following cases, which will be found to support quite fully the views here expressed: *U. S.* v. *Jackson*, 25 Fed. Rep. 548, and cases cited; *U. S.* v. *Caruthers*, 15 Fed. Rep. 309; *U. S.* v. *Baldridge*, 11 Fed. Rep. 552.

That congress had constitutional power to enact these statutes was fully determined by the supreme court in the well-considered cases, *Ex parte Siebold* and *Ex parte Clarke*, 100 U. S. 371, 404. Upon its facts, as well as in respect to the law, the *Case of Clarke* is quite in point here. In order to ascertain the facts upon which the indictment was founded, and to demonstrate more certainly, if possible, the scope of the decision in that case, I have procured, and have before me, a copy of the indictment against Clarke, and also a statement by the United States district attorney, who conducted the prosecution, together with a letter from the present district judge, which show that the facts and circumstances of Clarke's offense were almost identical with the facts charged and known to exist here, and that the questions of law and statutory construction involved were not different. The district attorney says:

"The defendant (Clarke) was a judge at a congressional election, and one of the poll-books including the return, having been sealed up by the judges and directed to the clerk of court, was intrusted to him for delivery to the clerk. He was convicted of neglecting his duty as judge—*First*, in failing to convey the poll-book thus sealed to the clerk; *second*, in permitting the same to be opened while in his custody. It was shown at the trial that the poll-book in question, after being put under cover and sealed, was intrusted to him, as one of the judges, for delivery to the clerk, and that before he delivered it the sealed package had been opened and the return altered. There was originally a third count, charging him with permitting the return to be altered, with the intent to affect the result of the election; but, as the vote for congressman was not changed, this charge was abandoned, and the count *nolled* before trial. As the case was actually tried, the alteration of the poll-book was merely an item of evidence to show that the package had been opened while in his custody, thus avoiding all question as to the relation of the fraud to the congressional election. The return for congressman being in the same package, his neglect to deliver the same unopened was clearly within the scope of the act of congress."

The judge's letter contains the further significant statement, made on the authority of the district attorney, that "the evidence did not make it clear that Clarke opened the package, * * * but that he did permit another person to take it to a room in the Dabolt Exchange, where it was opened, and the returns tampered with, Clarke not knowing or caring to know who did it."

The supreme court, after reciting the substance of the indictment as charging simply unlawful neglect and violation of duty in respect to the

custody and return of the papers to the clerk, without alleging any unlawful intent on the part of the defendant, used this language:

"It is conceded that this indictment was found under section 5515 of the Revised Statutes of the United States. * * * The case was argued at the same time with *Ex parte Siebold*, 100 U. S. 371, and most of the questions involved have been considered in that case. * * * As to the merits of the case, there can be no serious question that the indictment charges an offense specified in the act of congress. Rev. St. § 5515. * * * The principal question is whether congress had constitutional power to enact a law for punishing a state officer of election for the violation of his duty under a state statute in reference to an election of a representative to congress. As this question has been fully considered in the previous case, it is unnecessary to add anything further on the subject. Our opinion is that congress had constitutional power to enact the law, and that the cause of commitment was lawful and sufficient."

The proposition that this indictment rests on ground inconsistent with the decision of the circuit court of this district in *Ex parte Perkins*, 29 Fed. Rep. 900, is plainly untenable. On the contrary, the reasoning of that case, in manifest harmony with the decision of the supreme court in *Clarke's Case*, both suggests and supports the distinction on which the present indictment is founded, as is shown by the following extracts from the opinion:

"The jurisdiction of the federal courts in the enforcement of these statutes depends altogether on something having been done or omitted which has affected, or might affect, the result of an election for a representative in congress. The facts stated in the affidavit, in connection with the admissions of counsel in the course of the argument, show that the result of the election was not affected, unless it was by the mutilation of the tally papers, solely and exclusively in the statements of the vote for coroner and criminal judge. It is not pretended that the tally papers were mutilated, changed, or forged in any other respect, or that any of the tally papers, poll-books, or ballots were removed from their proper place of custody. The alleged offense against the United States consists wholly of the alterations of the statements of the votes for coroner and criminal judge, as contained in the tally papers. * * * These specific facts, stated in the affidavit, which were admitted in the argument to be all the facts in the case, do not constitute an offense against the United States, and the commissioner was therefore without jurisdiction to conduct the examination."

These propositions seem to have been stated with studied care to prevent misconstruction, and to limit the decision to the particular ground stated. While, therefore, that opinion establishes for this court the rule that the mere alteration of the returns of an election in respect to local candidates or offices only, notwithstanding the returns of the congressional election be contained in the same papers, if the alteration be accomplished without disturbing the custody of the documents and without putting the genuineness and truth of the papers in respect to the congressional election in question or doubt, will not be deemed to affect that election, and therefore will not be cognizable as a federal offense, this is the full length to which the decision goes, and it remains unquestioned that an omission or disregard of duty in respect to the custody of such returns by an officer, to whom the custody is by law intrusted, does affect the

election in respect to congressmen, as well as in respect to local contests; and, therefore, within both the letter and spirit of the national statutes, does constitute a crime against the United States, by the officer, and by all who, acting separately or in conspiracy, induce or procure him to neglect or disregard such duty. Motion overruled.

DENSMORE *v.* TANITE CO.

(*Circuit Court, E. D. Pennsylvania.* October 10, 1887.)

PATENTS FOR INVENTIONS—LICENSE—ANNULMENT IN EQUITY.

A court of equity will not annul a license to make a patented article where the only material allegation is that the licensee failed to make a report of his manufactures or sales, and pay the royalty. The licensor has an ample remedy at law, and equity will not interfere.

In Equity.

Ellis Spear, *William G. Henderson*, and *Charles Howson*, for complainant.

Robt. J. Jones and *Charles B. Collier*, for respondent.

PER CURIAM. As distinctly stated in complainant's brief, the bill is brought to annul the license. "There is but one cause of action, and that is to annul and set aside the license." There can be no doubt that such a cause of action falls within the cognizance of equity. But the bill avers no facts to support the cause. The only specific allegations in this direction are that the respondent has failed to make return of his manufactures and sales, and to pay royalty. In other words, that he has not performed his contract in this regard. Other general allegations of wrong stated are immaterial. That such specific allegations, if proved, afford no ground for annulling a contract, is too clear to require the citation of authority. The case is hardly distinguishable from *Purifier Co.* v. *Wolf*, 28 Fed. Rep. 814, decided by this court at the last term. There the complainants did not ask for a decree of annulment, but proceeded on the basis that the contract was annulled by the respondent's neglect to perform. The court held, as we must here, that the complainant has an adequate remedy at law for the injuries complained of. The demurrer must therefore be sustained, and the bill dismissed, with costs.

WESTINGHOUSE AIR-BRAKE CO. *v.* CARPENTER.

(*Circuit Court, S. D. Iowa, E. D.* November, 1887.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION—MODIFICATION.
   The defendants, who had been enjoined from using and manufacturing a certain invention, applied for a modification of the order, that they might be permitted to give bond, and continue the use of the invention, and fill their contracts. *Held*, that the giving of the bond would not be an adequate protection to complainants' rights, and the motion was denied.
2. SAME.
   One who was enjoined from using a patent sought for a modification of the injunction, so that by giving bond he might be permitted to continue the use of the invention, and assigned, as reason therefor, the erection of expensive works for its manufacture. *Held*, that a court of equity cannot come to the relief of such person when it appears that the works were erected subsequent to a notice of infringement.
3. SAME—INFRINGEMENT—INJUNCTION—EXPIRATION OF PATENT.
   Upon motion of defendants in an action for infringement, the court was asked to limit the life of the injunction to a day when it was alleged the patent would expire. *Held*, that the time of such expiration being a point already in litigation, the question would more properly be brought up on motion to dissolve when such time should arrive.
4. SAME—INFRINGEMENT—EXPIRATION OF PATENT—INJUNCTION—RESTRAINT OF PUBLICATION.
   In an action for infringement the defendants asked that complainants be restrained from publishing to the world the fact of the granting and issuance of an injunction restraining them from manufacturing and selling such patent. *Held*, that the court had no such authority.

Nathl. French, *Mr. Christy*, and *Mr. Bakewell*, for complainants.
Banning & Banning, for defendant.

SHIRAS, J., (*orally.*) I am ready to announce the conclusion I have reached on the motion submitted yesterday in the case of *Westinghouse Air-Brake Co.* v. *Carpenter*.

At an earlier day of the term this cause was submitted to the court upon an application for a preliminary injunction, based upon the bill and affidavits in support thereof, in which it was averred that complainants were the owners of a patent for an automatic air-coupler used in connection with air-brakes upon railroad cars, and that the defendant had and was infringing thereon, by using a similar coupling in connection with an electric apparatus manufactured by defendant. The court, Judge BREWER delivering the opinion, held that upon the showing made, both parties being heard upon the motion, the complainants were entitled to the relief sought, *i. e.*, to the issuance of a preliminary injunction restraining defendant from further infringement of complainants' patent until the final hearing of the case.

Upon the announcement of the conclusion reached upon the application for an injunction, the defendant filed a motion and affidavit asking the court to modify the order so made, so as to permit the defendant, by giving bond, to continue the use of the coupler in question until the final hearing, or, if such use could not be permitted to an unlimited extent, that defendant might be allowed to use so many of said couplers as might

be necessary to enable defendant to carry out certain contracts he had made with three named railway companies, which contemplated the equipment of a fixed number of engines and cars with the electrical brake apparatus manufactured by defendant, used in connection with the air-coupler in question; these contracts having been entered into by defendant for the purpose of enabling the railway companies to put the apparatus so furnished to the practical test of every-day use upon freight and passenger trains.

It is also asked that the injunction, when issued, shall be limited to expire on the first day of May, 1888, for the reason that, in fact, complainants' patent will expire at that date. Upon the argument previously had in the cause, it was admitted by counsel for complainants that the patent would expire at that date, this admission being based upon the fact that a patent had been issued to complainants for the coupler in question in England, previous to the date of the patent obtained in the United States; that the English patent expires on the first of May next; and that this will terminate the life of the American patent, although upon its face it would seem to continue for four years or more. Counsel now claim, however, that this admission was made only for the purpose of the particular questions then being discussed; that this exact question is now pending before the supreme court, and it is hoped will be decided at its present session; and that it is not admitted finally that complainants' patent will terminate on the first of May next. Upon a motion of this character, the court ought not to determine when the patent will expire. When the first of May next arrives, it will be open to the defendant to then move for a dissolution of the injunction, upon the ground that the patent has expired, and the question can then be fairly presented, and by that time we may have the aid of a final decision on the point by the supreme court.

Defendant also asks that, although the writ of injunction be issued, the complainants be restrained by order of the court from publishing to the railroad world the fact of the granting and issuance of the injunction, in order that it may work as little injury as possible to the defendant in his efforts to bring before the public, and into general use, the improvements he claims to have made in railroad brakes. If there are cases in which a court would be justified in granting such an order, I do not think it can be done in the present case. It would certainly be the exercise of an extraordinary power for a court, after it has heard a cause in the usual open and public manner, and has openly and publicly declared its judgment upon the matter at issue, to then attempt to restrain the parties, or either of them, from making known the results of the hearing, especially touching a matter in which third parties may become interested. Even if the court should make the order asked, it would be futile, for the fact of the granting of the injunction has already been made public.

This brings us back to the main question presented by the motion now under consideration, and which has already been stated, to-wit: Is the court, under the showing made, justified in suspending the injunc-

tion ordered, and in permitting the defendant, upon giving bond, to continue in the manufacture and use of the coupler in question, either without limit, or to manufacture and use so many of the couplers as may be necessary in the carrying out of the contracts entered into between defendant and certain railway companies?

That in many instances courts of equity have permitted the defendant to continue the manufacture, use, or sale of a patented article, pending the hearing and final decision of the cause, upon giving bond or other security, is not questioned; but upon examination of these cases it will be found that some fact or ground existed justifying such action on the part of the court, aside from the mere convenience of defendant, and the case was of such a character that the giving of a bond afforded reasonable protection to the complainant. For instance, if the only or principal use made by the patentee of his patent-right is to sell territorial rights, or to demand and receive a royalty from licensees, then the court can, by providing for good security and proper accounting, reasonably protect the patentee from loss, even if the alleged infringer is permitted to continue in the use or manufacture of the patented article pending the hearing. So, also, if the patentee makes little or no use of his monopoly, or knowingly permits repeated infringements by third parties, or knowingly permits a third party to engage in the manufacture of the patented article, and without objection allows him to invest money and time in the business, and then seeks to put a stop to the infringement, the court, even though well satisfied that the patent is valid, and the defendant is an infringer, may refuse to grant an injunction until the final hearing, or may give the defendant the option of giving bond. In such cases the laches of the patentee are such that he is held to have forfeited the protection which the court would otherwise have extended to him.

When the present motion and affidavit were filed, it then seemed to the court that there might be merit in the application, and the order was made that notice of the motion should be given to counsel for complainants; but the court, having now heard counsel fully, is compelled to hold that the facts stated in the affidavit are not sufficient to justify the modification asked of the order already made.

The first act of infringement charged against defendant is, that at Burlington, Iowa, in May last, at a competitive trial of railroad brakes had at that place, the defendant made use of the patented coupler, having placed the same upon some 50 cars owned by the Illinois Central Railway Company, in connection with the electric apparatus manufactured by defendant. It appears that, as soon as complainants had knowledge of this use of the coupler by defendant, written notice was given to him that such use was an infringement, and that complainants would proceed against him if such use was continued; and on the twenty-fifth of May the present bill was filed, and service thereof had upon defendant. No laches in promptly moving for the protection of their rights can be imputed to complainants. The affidavit of defendant states, in general terms, that owing to the encouragement he received from the railway managers, in consequence of the results obtained at the Burlington trial or

exhibition, he has been induced to invest a large amount of money in putting up works and machinery at Ilion, New York, for the manufacture of his brake appliances, and that, if he is prevented from using the automatic coupler in question this outlay will be lost to him. It is not shown how much of this expenditure is for the purpose of the manufacture of the coupler as distinguished from the electrical apparatus used by defendant, but, however that may be, it is clear beyond question that this outlay was made by defendant after this suit was brought, and when he knew that the complainants were seeking to restrain him from using or manufacturing the coupler. Defendant therefore proceeded at his own peril. He cannot base an appeal to a court of equity for forbearance upon the ground that he made this outlay in good faith, and not supposing that he was infringing the rights of complainants.

Can the court sufficiently protect the rights of complainant by exacting a bond from defendant? It is shown that complainants do not sell to others the right to manufacture and sell their couplers. They have reserved wholly to themselves the right to manufacture and sell the same, and the principal use and value to complainants is in furnishing the same as part of the system of air-brakes manufactured by complainants. The couplers are not expected to be sold as a separate and independent device. If the court should now authorize the defendant to engage in the manufacture and sale of the couplers upon giving bond, this would, in effect, be compelling complainants to submit to a change in the use heretofore made of their patent, and would at once introduce a competitor, practically working under a license to use the patented coupler, when in fact complainants have never consented to grant licenses. Furthermore, if, upon the final hearing, complainants are adjudged entitled to a decree against defendant, how would it be possible for the court to assess the damages upon the bond so as to remunerate complainants for the actual injury caused them? The court cannot arbitrarily fix the value or price to be paid for the couplers actually used or sold by defendant, for it is the right of the patentee to determine the price that he will exact from others for such use; and unless the patentee has by sales made, or prices fixed, furnished the *data*, the court would be wholly without a guide in seeking to determine the price to be paid simply for the couplers actually used by defendant. But it is at once apparent that no valuation to be placed upon the couplers used would begin to make good the damage caused to complainants by permitting defendant to use the coupler in question, and thereby enabling him to at once become an active competitor in the business of furnishing brakes and automatic couplers for use upon the railways of the country. The damage thus caused to complainants would be serious and actual, and yet would be incapable of computation by legal rules. The damage being, for this reason, irreparable at law, it is the duty of the court of equity to protect the complainants against the same, and this can only be done by means of an injunction.

The same reasons exist against allowing defendant to carry out the contracts for equipping certain cars and engines to be used by three of

the railroads terminating at Chicago. These contracts cannot be carried out without at once creating a competition with complainants. How great the damage caused thereby to complainants cannot be foreseen, nor could the amount thereof be fixed in money. There is no way by which the court can bind the defendant to make good the actual loss or injury to complainants; for, as has already been said, there is no legal criterion by which such loss can be measured. If there was any feasible way discoverable by which the court could, with due regard to the rights of complainants, permit the defendant to carry out these contracts, the order would be made; but the more I have reflected upon the matter, the better I am satisfied that it cannot be done. I am therefore compelled to refuse the modifications asked, and the order for the injunction will stand as heretofore made.

BELL and others *v.* UNITED STATES STAMPING CO.

(*Circuit Court, S. D. New York.* September 3, 1887.)

1. PATENTS FOR INVENTIONS—BAKE PANS—NOVELTY—ANTICIPATION.
In letters patent No. 140,619, of July 8, 1873, to John B. Firth, for an improvement in bake-pans, the improvement is the uniting of a cluster of such pans to a plate, having an aperture for each pan, by a double-seam joint formed from the rim of the cup turned outward, and the edge of the plate about the aperture turned upward, on the upper side of the plate. *Held*, the double seam joint, being peculiarly adapted to usefulness for the purposes intended by the patent, was, although not a new thing, new in this place, and that a wash-boiler having a bottom with two or four pits joined in the same manner was not so similar as to defeat the patent, under the principles laid down in *Railroad Co.* v. *Truck Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220.

2. EQUITY—MASTER IN CHANCERY—TESTIMONY BEFORE.
Rules of practice in equity, No. 80, provides that "all affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master." *Held*, that testimony taken by the examiner for the hearing in chief, under a decree against an infringer for an accounting, which was not brought before the master in making up the case on the accounting so that it could be answered or explained on the other side, but was merely referred to in argument, and requests for findings upon the case made, was not within rule 80, and an exception to the master's report for failing to find upon the point made by this testimony should be overruled.

3. PATENTS FOR INVENTIONS—INFRINGEMENT—ACCOUNTING—"PROFITS."
On an accounting there was testimony tending to show that the patented article could be made much cheaper than those in use before; but it was not shown that the infringing defendant was under any obligation to make the old articles if the patented ones had not been made, or would have done so, nor was there anything else from which it was made to appear that the saving was a profit because it diminished a loss. *Held*, that the amount so saved was not "profits" for which the infringer was accountable to the patentee.

4. SAME.
The fact that the defendant sold to persons, not customers of the licensee, infringing articles, does not by itself raise a presumption that such sales were lost to the licensee; and where the license is exclusive, and the licensee has fixed no market price, and he is not a party to the accounting, there can be no recovery by the patentee for such sales.

5. SAME.

The power vested in the court by Rev. St. U. S. §§ 4919, 4921, with respect to the increase of an award of damages to a patentee for infringement, is not to be understood as authorizing an award of damages without satisfactory proof.

In Equity. On exceptions to master's report.

George H. Fletcher, for orators.

Frederic H. Betts, for defendants.

WHEELER, J. An interlocutory decree for an account of profits and damages on infringement of the plaintiffs' patent was before entered herein. 19 Fed. Rep. 312. The cause has now been heard on exceptions to the master's report. The question of the propriety of the interlocutory decree is still open, and has been argued, on notice to the opposite party, and by leave of court. *Spill* v. *Celluloid Co.*, 21 Fed. Rep. 631. This patent is for a cluster of bake-pans, the pits of which are joined to the plate by a double-seam joint peculiarly adapted to usefulness for that purpose. Pits in the bottom of a wash-boiler, joined in the same manner, are relied upon to defeat the patent, in view of the decision in *Railroad Co.* v. *Truck Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220, made since the interlocutory decree in this case was made. The bottom of the wash-boiler with its pits does not, however, upon much further consideration of the subject, appear to be so similar to this cluster of bake-pans as to defeat this patent under the principles of that decision. The question is not very clear, but the same conclusion remains as before.

There was some testimony taken by the examiner for the hearing in chief which tended to show that these bake-pans could be made much cheaper than those in use before. The master was requested to find from this the saving to the defendants in the manufacture of the infringing pans, and to report the amount as profits, which has not been done. The orators had granted an exclusive license for a certain royalty. The evidence before the master showed that the defendant had sold infringing pans to the customers of the licensee which he would have supplied but for the infringement, and that they had sold to others infringing pans which the proof did not show that the licensee would have supplied. The master has reported the amount of the loss to the orators for not receiving the royalty on the pans sold to the customers of the licensee as damages on account of the infringement, and not reported anything as damages on account of the other sales. The principal exceptions of the plaintiffs relate to these failures of the master to make report of these profits and damages. Those of the defendant are not relied upon.

The testimony on which the exception in relation to profits from saving in cost of manufacture is founded does not appear to have been brought before the master in making up the case on the accounting, so that it could be answered or explained on the other side, but to have been referred to in argument and requests for finding upon the case made. Equity rule 80 provides that such testimony may be used be-

fore the master. This is understood to mean that it may be brought before him without being retaken, by calling his attention to the parts relied upon in making up the case, when the opposite side may have opportunity to know what part is so brought into that hearing and relied upon. The master, therefore, had no basis for doing what this exception is for not doing. With this testimony before the master, the finding would still be that, notwithstanding the saving, there were no actual profits to the defendant. It does not appear that the defendant was under any obligation to make other pans if these had not been made, or would have done so, nor is there anything else from which it is made to appear that this saving was a profit because it diminished a loss. There is no ground, as the case is understood, for sustaining this exception.

The questions raised by the exceptions as to damages are affected by the situation of the orators as licensors of their whole right, and the fact that their licensee is not in any way a party to this suit. The royalty paid and agreed to be paid to them by their licensee is not a price at which those who might wish to practice the invention could obtain the right to do so. The orator had parted with the right to fix any such price before the infringement complained of. Their right would all be satisfied when the amount of their royalties was received. Their exclusive licensee only could establish such a price, and it does not appear that any was established by him. Therefore there was no established royalty by contract that would be a market price or value for taking the same thing without contract or other right. *Birdsall* v. *Coolidge*, 93 U. S. 64. The amount of the orators' royalty would be a limit beyond which they could not go for damages, for it fixed the extent of their right. It would be their part out of what they and their licensee together could recover. They have been allowed this part out of sales expressly shown to have been lost on account of this infringement. They are entitled to more if it is to be presumed that other sales were lost to their licensee and to them from the mere fact that the sales were made by the defendant. Such presumption does not arise without more proof. Damages must be proved, and this does not prove them. *Seymour* v. *McCormick*, 16 How. 480; *New York* v. *Ransom*, 23 How. 487; *Blake* v. *Robertson*, 94 U. S. 728; *Dobson* v. *Hartford Carpet Co.*, 114 U. S. 439, 5 Sup. Ct. Rep. 945; *Dobson* v. *Dornan*, 118 U. S. 10, 6 Sup. Ct. Rep. 946.

The exceptions, according to these views, must be overruled.

It is suggested in argument that it is obvious that the orators have sustained damages in consequence of the infringement beyond those allowed; and that this failure to award to them what they might be entitled to, if proved, should be made up by increasing the damages under sections 4919 and 4921 of the Revised Statutes. But this would be awarding damages without proof, and might not be any nearer right.

Exceptions overruled, report accepted and confirmed, and decree to be entered accordingly.

AMERICAN DIAMOND DRILL CO. *v.* SULLIVAN MACHINE CO.

(*Circuit Court, S. D. New York.* February 20, 1885.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—COSTS.
   Where the witnesses who appear before the master for the purpose of furnishing an account are officers of a defendant corporation in an infringement suit, which has been ordered to render such account, they are not entitled to mileage and *per diem* fees.
2. SAME.
   Where the decree of the circuit court finding the defendant guilty of infringement, and ordering an account, is set aside upon rehearing, or upon final decree, with costs, master's fees paid by the defendant for the accounting should be taxed against the plaintiff as part of the costs; but the allowance is to be made by the court, not by the clerk.

In Equity. On appeal from clerk's taxation of costs. See 21 Fed. Rep. 74.

Edmund Wetmore, for plaintiff.

E. T. Rice, for defendant.

SHIPMAN, J. This appeal from the taxation of costs involves divers different items, of which two only need special mention.

The first is the *per diem* and the mileage of the officers of the defendant, while testifying before the master. They appeared before him in obedience to the order that the defendant should account, and for the purpose of furnishing the account. I concur with the clerk that they are representatives of the defendant, and for this reason stand upon a different footing from its other witnesses; and that the items should not be taxed.

The principal point is in regard to the disallowance of $990, master's fees, which had been paid by the defendant. The clerk is correct in the position that, as taxing officer, he ought not to include this item in the costs without an order or direction of the court to that effect; the question being one for the court to determine. No order in regard to this sum had been entered. The practice in regard to repayment of the money which had been paid by the defendant to the master, as a part of his fees, when the decree against the defendant is reversed, and a final decree is rendered in his favor, is stated by Judge BLATCHFORD in *Myers* v. *Dunbar*, 12 Blatchf. 380, as follows:

"If the defendants succeed, as against the plaintiffs, in reversing the decree, they will, indeed, not be able to recover back any money from the master; but it will be competent for the court, if, on such reversal, costs of the suit shall be awarded to the defendants, to regard the amount paid by the defendants to the master as a part of such costs, and to enable the defendants to recover such amount from the plaintiffs. The amount disbursed by the defendants to the master will merely take its place with other items of disbursements, as to which the defendants, with a decree against them, now have no recovery, but which may form part of a recovery, in case they shall have a decree in their favor."

The plaintiff's argument, that the accounting was prolonged, and that the master's fees were much enhanced by the defendant's reluctance to give promptly the necessary information, and that, therefore, the defendant ought not, in equity, to be repaid this disbursement, has some force; but I have been more impressed by the fact that, as a result of the late decisions of the supreme court, the defendant is successful, and by the consideration that it should reap the benefits of success. I see no controlling reason why, upon a finding that it never was an infringer of the patent, as properly construed, it should pay the master as though it had been an infringer. The sum of $990, disbursed by the defendant, by order of court, to the master, should become a part of the costs, and should be added to the $766.43, as taxed by the clerk. I concur with the clerk in his taxation of the other items in dispute, and in the reasons which he has given therefor, in the statement annexed to the bill of costs.

JOICE *v.* CANAL-BOATS NOS. 1,758 AND 1,892.[1]

(District Court, S. D. New York. June 17, 1887.)

1. ADMIRALTY PRACTICE—RULES 15, 59—PROCEEDINGS IN REM—IN PERSONAM—WHEN JOINED.
   Under the fifty-ninth admiralty rule, the owner of a vessel which has been libeled *in rem*, for collision, may, by petition, bring into the suit, by process *in personam*, any other parties, who are not owners of the vessel libeled, alleged to be liable for the same collision. Rule 15, by implication, prohibits only the joinder in a collision cause of a vessel and *her* owners as co-defendants.
2. CASE STATED—VESSELS SUNK—WHARFINGER—CO-DEFENDANT.
   Where the libelant's vessel, in landing at a wharf, ran upon two vessels recently sunk, which he libeled for the collision, and the claimants of the vessel sued brought in the wharfinger as co-defendant, by petition under the fifty-ninth rule, alleging that he caused the vessels to be sunk by negligently mooring, and leaving them unprotected, and giving no notice of the danger, *held*, that the case was within the general scope of the fifty-ninth rule, and was not forbidden by the fifteenth rule, and a motion to set aside the process and service was denied.

In Admiralty. On motion to set aside additional process.
Hyland & Zabriskie, for libelant.
Anderson & Howland, for claimant.

BROWN, J. Upon the arrest of the two canal-boats named in the libel in a cause of collision, the libelant's vessel having run into the said boats in making her landing, as they lay concealed near a dock at Yonkers, the owners and claimants of the two sunken boats filed a petition, under the fifty-ninth supreme court rule in admiralty; alleging that Peene Bros. were the proprietors of the dock, and were the parties through whose negligence the boats were sunk, by mooring them improperly and leav-

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

ing them unprotected, and that they gave no notice of the danger. Further process was thereupon issued against the wharfingers in person, upon which they were served and brought in as co-defendants. They now move to set aside the additional process, and the service thereof, on the ground that, in a cause of collision, under the fifteenth supreme court rule, proceedings *in rem* and *in personam* cannot be conjoined; and that the fifty-ninth rule, therefore, does not authorize personal defendants to be brought into a suit *in rem* such as this.

It is undoubtedly true that the construction that has been generally given by implication to the fifteenth supreme court rule in admiralty is that, in a suit for collision against a vessel, *her* owners cannot be joined as co-defendants, although the master may be joined. The construction is founded upon the maxim, *expressio unius est exclusio alterius*. The fifteenth rule, however, plainly has reference to the master and owners of the vessel sued. *The Richard Doane*, 2 Ben. 112; *The Clatsop Chief*, 8 Fed. Rep. 163; *The Atlantic*, Newb. Adm. 139, 156. No authorities have been cited where that rule has been actually applied as respects different vessels, or their owners, as co-defendants.

The subject of the fifty-ninth rule is wholly different. It refers exclusively to other vessels and other owners than the vessel sued, or *her* owners, who have been sued in the first instance. Its object is remedial. It should be liberally applied, therefore, to cases that clearly fall within its general scope and purpose. The supposed objections, on the other hand, to the union of proceedings *in rem* and *in personam* in the same action have not proved to be real in those many cases in which the union of both modes of proceeding has been long followed. The practice long adopted in this district has been that, except as clearly provided by the express rules of the supreme court, the district court has the power and right to regulate its practice as "the due administration of justice" shall seem to require. *The Hudson*, 15 Fed. Rep. 162, 175, 176; *The Zenobia*, Abb. Adm. 52; *The Monte A.*, 12 Fed. Rep. 336, 337; *Vaughan* v. *Six Hundred and Thirty Casks Sherry Wine*, 7 Ben. 506; 14 Blatchf. 517–519; *The J. F. Warner*, 22 Fed. Rep. 342; *The Director*, 26 Fed. Rep. 708, 711.

The practical convenience and advantages of this joinder in the administration of justice is often so great that it should, I think, be allowed, in circumstances like the present, when the court is free to permit it. The fifteenth rule should not, therefore, be extended by any supposed analogy merely, so as to restrict the benefits evidently designed by the fifty-ninth rule.

If the owners of another vessel, liable for the same collision, could not be made co-defendants, the practical usefulness of the fifty-ninth rule would often be seriously impaired, through the loss of the other vessel, or her absence from the forum, though the owners were present. When two vessels are in fault in causing damage to the libelant by collision, the fifteenth rule, I am satisfied, does not prohibit the filing of a libel against the one vessel *in rem* and against the owners of the other vessel *in personam*, although in the case of *The Hudson*, 15 Fed. Rep. 172, this was supposed to be its effect. The case is not provided for in the supreme

court rules, except under the fifty-ninth rule; and the general scope and purpose of that rule evidently require that such joinder should be allowed where the second vessel cannot be reached by process; or where, as in this case, the liability of others is *in personam* only. *The Hudson*, *supra*. The new rule has been frequently applied in this court, some of the cases being reported. *The City of Lincoln*, 25 Fed. Rep. 835, 836, *The E. H. Webster*, 22 Fed. Rep. 171. In *The Doris Eckhof*, *infra*, it was applied under circumstances quite analogous to the present.

The motion is therefore denied.

THE DORIS ECKHOFF.[1]

LOUD *v.* THE DORIS ECKHOFF, and Owners of the Steam-Tugs John G. Stevens and R. S. Carter.

(*District Court, S. D. New York.* July 2, 1887.)

1. COLLISION—VESSELS IN TOW—RESPONSIBILITY OF TOW—JOINDER—IN REM AND IN PERSONAM.
   A large vessel in tow, and in charge of her own master and crew, who participate in and in part control the navigation, is jointly liable with the tug for a collision caused by navigating in violation of the state statute, when no protest is made by the master, nor any timely effort to correct the fault. In the absence of one of the vessels, the owners may be joined under rule 59 as defendants along with the other vessel *in rem*.
2. SAME—EAST RIVER NAVIGATION.
   Vessels navigating the East river must go in mid-stream, or as near thereto as may be, as required by the statute of the state of New York.
3. SAME—TWO TOWS—CROSS-TIDE—CARELESS NAVIGATION.
   The schooner Flint was going up the East river with the flood-tide, in tow of the tug Stevens, some 400 or 500 feet from the New York shore, and had reached a point opposite Corlear's Hook. The bark Doris Eckhoff, coming down the river in tow of the tug Carter, was in the eddy tide above the Hook, and about 100 or 200 feet from the shore. At this point in the river the flood-tide takes a strong set towards the Brooklyn shore. When about 400 yards apart the tugs had signaled once to each other, with intent to pass port to port, but the cross-tide carried the bark to port, and she ran into and sank the schooner. *Held*, (1) that both tugs were in fault for disregard of the state statute requiring vessels in the East river to go "in mid-stream, or as near thereto as may be;" that they were also in fault in not exchanging signals earlier, and in attempting to pass so close to each other in that part of the river; (2) that the bark in starboarding as she was running into the true tide, was faulty in her navigation, and was not exercising that care and skill which were known to be necessary at that point, and which if observed, would have avoided this collision; (3) that the schooner, whose master and crew were on board, participating in her navigation, and which received the injury while proceeding in a part of the river forbidden by law, should for that reason bear a part of the loss.

In Admiralty.

Geo. A. Black, for libelants.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

Goodrich, Deady & Goodrich, for the bark.
James W. Osborne, for the tugs.

BROWN, J. The libel in this case was filed to recover damages arising from a collision in the East river, a few hundred feet below Corlear's Hook, at about 10 A. M. on the morning of March 8, 1886, between the libelants' schooner C. R. Flint, and the bark Doris Eckhoff. The Flint was going up river with a strong flood-tide, in tow of the steam-tug J. G. Stevens, upon a hawser of 40 fathoms. The bark was coming down the river, upon a hawser of about the same length, in tow of the tug R. S. Carter. The Stevens and the schooner were proceeding up river about one-third the distance across from the New York shore. The Carter, with the bark, was coming down river from above the Hook, still nearer to the shore, and in the eddy tide. Off Corlear's Hook, they were from 100 to 200 feet only off the New York shore. From the Jackson-street pier, a few hundred feet below, the flood-tide takes a strong set across towards the Brooklyn shore, running probably three knots. The tugs were approaching each other at about the rate of 10 knots, and, when only about 400 yards apart, each had given one blast of the whistle, indicating that they would pass port to port. Doubtless they would have done so safely, except for the effect of the cross-tide upon the Eckhoff. As the Carter and the Eckhoff, on rounding the Hook, struck the strong cross-current of the flood-tide, they were both deflected to port, and the bark, unable to keep her former direction, ran into the schooner, in consequence of which the latter sank not long after. The libel was originally filed against the bark and the two tug-boats, alleging fault in all. Only the bark, however, was arrested under the process of this court; the two tug-boats having been previously seized under process in the Eastern district, and thereunder sold. Afterwards, upon petition by the claimants, under the fifty-ninth rule of the supreme court in admiralty, the owners of the two steam-tugs were made parties defendant *in personam*, and they subsequently appeared and answered.

Without referring to the numerous details that appeared upon the elaborate trial of the cause, the following faults contributing to the collision seem to me to be clearly established:

1. The Stevens and the schooner were not going "in mid-river, or as near thereto as may be," as required by the state statute; but at the time of the collision were not more than 400 or 500 feet from the New York shore. Their contention that they could not go further out on account of ice is not, in my opinion, sustained by the proof. After the collision, there was not ice sufficient to prevent the schooner's reaching the Wallabout, towards which she headed as soon as collision was feared. Although the distance from the shore might be deemed sufficient to allow the Carter and the bark to have passed in safety in an even tide, the strong cross-tide made this distance insufficient and unsafe; and the disobedience of the statutory requirement was therefore a fault contributing to the collision. *The Maryland*, 19 Fed. Rep. 551.

2. The tug Carter was guilty of the same fault for hugging the New

York shore. This fault alone would not have caused collision, but, being there, instead of keeping there, she sheered towards the Brooklyn shore sooner than, under the circumstances, she was justified in doing; and she also slackened her speed unnecessarily, as she went into the cross-tide, whereby the hawser was much slackened, and the bark thereby deprived during a few critical moments of the tug's aid in keeping to starboard out of the way of the schooner. The weight of evidence satisfies me that the tug headed towards the Brooklyn shore, just astern of the schooner, by her own volition, and not through the effect of the cross-tide, or in spite of what the tug might have done to keep to starboard.

Both tugs were further in fault for not exchanging signals earlier, *i. e.*, half a mile apart, as required by the inspector's rules; and for attempting to pass so near each other, port to port, in that part of the river, where the strong cross-tide was certain to create considerable deflection in the course of the bark in tow on such a hawser. The nearness of each to the shore probably prevented each from seeing the other as soon as they ought to have been seen, and this prevented timely signals. *The Maryland, supra.*

3. I am not satisfied that the Eckhoff used the prudence and skill that were incumbent on her, and were easily within her power, in passing from the eddy into the strong cross-tide. It was imprudent, and I must regard it as a fault, for the bark to starboard the helm, as she did, at about the time when she was just running into the true tide, when she could not possibly pass ahead of the Stevens and her tow, and when this starboarding, and the effect of the tide, were both calculated to throw her directly upon the course of the schooner. The only excuse offered is that she headed directly after the tug. This is doubtless right in a true tide, and where such a course would have no tendency to precipitate a collision. It was manifestly wrong in this case, because, in order to keep directly after the tug, it was necessary that the schooner should port her helm, rather than starboard it, at the moment, or a little before the moment, when she began to enter the strong tide that swept across her starboard bow. Instead of that, her helm was at first put to starboard, which increased the effect of the strong tide, and made her subsequent port helm wholly ineffectual to avoid the Flint. In this faulty use of her helm the case is analogous to that of *The Virginia Ehrman*, 97 U. S. 309, 315. As in that case, also, there seem to me strong indications that the bark was not keeping a proper lookout, nor taking those precautions which it was well known were necessary in passing into the cross-current at this place. Though the master was on board, he did not observe the whistles exchanged between the tugs; and if the mate was on the lookout, as alleged, no hail was at any time received from him. The wheel was first starboarded by the wheelsman without any direction or counter-order by the master, who was near him and ought to have observed that it was dangerous to starboard the helm. These circumstances together convince me that the bark was not conducting her own part of the navigation with necessary regard to the special circumstances of the place, and did not exercise that reasonable care

and skill which were known to be necessary at that point, and which, if observed, would, I think, have avoided this collision.

4. A more difficult question is whether the schooner is to be held jointly answerable for the damage caused, as I have already observed, in part by the fact that both the tug and schooner were not more than one-third of the distance from the New York shore, instead of being in mid-river, as required by law. The injury was received by the schooner while she was navigating in an unlawful place. Upon the general principles and analogies of the maritime law, the schooner, as the offending thing, would be held in fault, and answerable to third persons, when her navigation was faulty, and the injury did not happen by inevitable accident. Looking to the maritime law alone, the mere fact that the owners might not be chargeable with any personal fault, or themselves stand in any relation of personal responsibility, would not exempt the ship, which is regarded by the maritime law as responsible to third persons for her proper navigation by whomsoever conducted. As respects third persons injured by the faulty navigation of a vessel, it is immaterial what arrangement the owners of the offending vessel may have made in respect to her navigation,—whether by a master and crew engaged by themselves, or by a master and crew engaged by a charterer to whom the vessel may have been let by a contract of charter, or by a tug-boat with which the owners may have contracted for the navigation of the vessel from one place to another. This rule is applied without question in cases of charter-parties, where the possession of the ship is delivered to the charterers, who navigate her on their own account exclusively, through persons employed by them, without any right of selection or control by the owners. In all such cases, the ship, to her whole value, is chargeable for any faults in her navigation or management that cause injury to herself, or to other vessels, or to the cargo of either. It is no defense to the ship that those having charge of her are in no respect under the direction or control of the owners. The ship is regarded as the offending thing, to which persons suffering from her management and navigation are entitled to look for redress; and the owners of the ship must look for their indemnity to the persons in whose charge they have voluntarily placed her. So the faults of a pilot compulsorily taken are by the law of this country faults of the ship, for which the ship is held answerable in damages.

The analogies to be drawn from these undoubted cases of charter-parties, and from the well-settled law of this country holding the ship responsible for the faults of a pilot compulsorily taken on board, would seem to favor the right of third persons to look for redress directly to the ship that does the damage, though a tow, leaving the owners of the latter to their legal remedy against the tug in whose charge they have placed her. There are also important practical considerations of general policy and justice which would sustain this claim of third persons to resort to the offending ship; for otherwise the owners of large ships may escape all responsibility for the injuries inflicted upon other vessels, by simply making a contract of towage; and when other vessels and their

cargoes sustain great losses, through the fault of the tug, since the tug is usually of comparatively small value, the injured parties, under the limited liability act, would have no adequate redress. It would seem to be just that the navigation of large vessels should not by this means be allowed to be conducted with comparative impunity for any damage inflicted on others, but that the tug should be held to be only the servant of the ship that employed her.

Consistently with this view, the English authorities hold that a ship in tow of a tug is liable for her injuries to third persons, though the direct fault may be that of the tug alone. The existence of a contract of towage does not prevent the ship and her owners from being treated as principals, as respects third persons. Macl. Law Shipp. 287; *The Energy*, L. R. 3 Adm. & Ecc. 48; *The Sinquasi*, L. R. 5 Prob. Div. 244; *The Mary*, Id. 16; *The Belknap*, 2 Low. Dec. 283.

In this country, upon the view taken of the law of principal and agent only, in connection with the contract of towage, the tug is held to be the sole principal, and the ship exempted, when her navigation is, by contract, exclusively in charge of the tug. *Sturgis* v. *Boyer*, 24 How. 110. The supreme court, however, not only in the case last cited, but in several subsequent cases, have been apparently careful to limit this rule to the facts existing in that case; namely, where the ship was in the exclusive charge and control of the tug, without officers or men of her own in any way participating in the ship's navigation. Thus, in *The Virginia Ehrman*, 97 U. S. 309, 313, Mr. Justice CLIFFORD says: "Cases arise undoubtedly where both the tug and the tow are liable for the consequences of a collision, as when those in charge of the respective vessels *jointly participate in their control and management*, and the master or crew of both vessels are either deficient in skill, fail to take due care, or are guilty of negligence in their navigation." See *The Mabey*, 14 Wall. 204; *The Civilta*, 103 U. S. 701. In the case of *The Belknap*, 2 Low. Dec. 281, LOWELL, J., to some extent reviews the various decisions on this subject, and comments upon the uncertain and unsatisfactory condition of the law.

In the case of *Sturgis* v. *Boyer*, *supra*, neither the master nor the crew were on board; the entire management of the ship was with the tug. In the present case, the master and crew were all on board, participating in, if not controlling, the navigation of the schooner. There is no evidence of the relations of the parties, except the mere fact that the tug had the schooner in tow under some contract to take her up the East river. In such a case, doubtless, the general direction of the course of the two vessels is determined by the tug. The tow follows her lead. But the tug, in directing her course out of the middle of the river, contrary to law, was at the same time violating her implied contract of towage. The tow was not bound to acquiesce, and to follow the tug, rather than obey the statute. A large vessel like the Flint has it in her own power to control very considerably her own course and that of the tug. She is bound to exercise this power, so far as she reasonably can, when she is being directed illegally by the tug, to the imminent peril as in this case of

other vessels. Had the Flint done so, by a timely porting, this collision would probably have been avoided. The tug and tow, moreover, were within hailing distance of each other. Orders were given from time to time from the tug to the schooner. Can it be assumed that any request or requirement from the master of the schooner to the tug, that she should proceed in mid-river, where the law required, would be unheeded? The master of the schooner testifies that they were going up one-third of the distance from the New York shore. Had they gone a little further towards mid-river this collision would have been avoided. It would probably have been avoided had the Flint earlier ported strong, even without communication with the tug. The circumstances show at least an acquiescence on the part of the master of the schooner in the illegal course taken by the tug. Had there been any attempt by the master of the schooner to go in mid-river, as the law requires, or any request to the tug to do so, which the tug disregarded, the case would be different. The Flint, by her master and crew, participated in navigating the vessels in a way that was contrary to the statute, and in a position that was plainly perilous to other vessels, and the master made no use of the means in his power to correct the error until too late.

The libelant is entitled to recover half his damages against the bark and the owners of the steam-tugs. The latter, having set up the statutes in limitation of liability, are entitled to the benefit of those statutes, so far as they extend, if the owners are not personally in fault.

A reference may be taken to compute the damages.

JUDAH, Assignee, etc., v. IOWA BARB-WIRE Co. and others.

(*Circuit Court, N. D. Illinois.* October 31, 1887.)

REMOVAL OF CAUSES—CITIZENSHIP—REMAND.

The voluntary assignee of an insolvent, a citizen of Illinois, brought suit in the courts of that state to set aside an alleged fraudulent preference. The preference consisted in the insolvent, on the day he made the assignment, turning over to one J., also a citizen of Illinois, certain warehouse receipts to be held by him for the indemnity of a creditor residing in New York Both J and the creditor were made parties to the suit. A receiver was appointed, to whom J. turned over the receipts. Default was entered against J for want of answer, and the creditor removed the cause to the federal court. *Held*, on motion to remand on the ground of the common citizenship of J. and the assignee, that, the only question left open being whether the creditor took title to the receipts as against the assignee, J was not a necessary party, and that the case should be retained, the federal court being as competent as the state court, in the event of the dismissal of the bill, to order the return of the receipts to J.

On Motion to Remand.

Gardener, McFadden & Gardener, for plaintiff.

E. Hanecy, for defendants.

BLODGETT, J. This is a bill brought in the state court by the plaintiff, as voluntary assignee of Sherman & Marsh, to set aside an alleged fraudulent preference made by Sherman & Marsh to the Iowa Barb-Wire Company. The material allegation in the bill is that on the day Sherman & Marsh made their assignment to the plaintiff for the benefit of creditors, and before making such assignment, they placed in the hands of the defendant Judson certain warehouse receipts of the value of $15,000, to be held by Judson to indemnify the defendant against loss on certain notes of Sherman & Marsh held by the Iowa Barb-Wire company, Sherman & Marsh being then insolvent, and intending thereby to give an unlawful preference to the barb-wire company. Judson was duly served with process, and a receiver was appointed in pursuance of the prayer of the bill, to whom the warehouse receipts in controversy were surrendered by Judson. The default of Judson for want of answer was also entered, and, after these proceedings, the barb-wire company, which is a citizen of the state of New York, filed its petition in due form for the removal of the cause to this court. The record was duly filed here, and the plaintiff now moves to remand on the ground that Judson was a necessary party to the bill, and that, as he and the plaintiff at the time of the commencement of the suit were both citizens of Illinois, the case was not removable.

It may be conceded, for the purpose of the question now raised, that Judson, having possession of the warehouse receipts now in controversy, and being clothed by the transfer to him with a certain duty in regard to them, was a necessary party to the bill; but, at the time the barb-wire company applied for the removal, the court had taken possession of the subject-matter in controversy, and the case was ended so far as

Judson was concerned, and the only controversy left open was whether the action of Sherman & Marsh in transferring these receipts to Judson was effective in law to clothe the barb-wire company with a valid interest in them as against their assignee. The court, in other words, is only called upon to decide whether these receipts belong to the complainant, by virtue of the assignment to him for the benefit of the creditors of Sherman & Marsh, or whether they are wholly or in part to be applied in the manner directed by the transfer to Judson. Judson appears from the allegations in the bill, and his own confession of the truth of those allegations, to have no interest now in this controversy, and had none at the time of the application for removal.

It is urged, however, if the complainant was to dismiss the bill, it would be the duty of the court to direct the receiver to return the receipts to Judson; but this does not seem to me any reason why the remaining defendant should not be allowed to have the controversy between himself and the complainant decided in this court, as this court can as easily order the receipts returned to Judson by the receiver as could the state court in the same contingency, if it shall appear that they ought to be so returned.

For these reasons I shall overrule the motion to remand.

BLOCH *v.* PRICE and another.

(Circuit Court, E. D. Missouri, E. D. October 28, 1887.)

PARTNERSHIP—CONTRACTS WITH—DISSOLUTION—LIABILITY OF RETIRING PARTNER.

A commission firm in St. Louis, composed of four members, was accustomed to send "price-currents" to all shippers who had ever had dealings with it. The caption of these gave the firm name as well as the names of the individual partners. The plaintiff, who lived in Kansas, and who had made a shipment of wool in June, 1882, received these lists prior and subsequent to that date, during the season of that year, and the following seasons of 1883–84, and in June, 1885, on the fifth day of which month he made his second and last consignment. One of the partners retired from the firm in February, 1882; another the following November; and the third about a year later. The business, however, was continued under the old name, with their consent. After November, 1883, the lists sent the plaintiff no longer showed the individual names, but in all other respects were the same. The partnership was formally dissolved July 1, 1884, and on that date notices were published for three successive days in the local papers and circulars mailed to correspondents. The plaintiff did not receive a copy of the circular, nor had he any knowledge of any change in the firm when he made the shipment of June 5, 1885. *Held*, that the plaintiff was entitled to notice of the several changes in the firm; and having made the shipment in good faith and on the credit of the firm, he was entitled to a recovery against all the members for the conversion of the proceeds of its sale.

At Law.

Mills & Flitcraft, for plaintiff.

Charles M. Napton, for defendants.

THAYER, J., (*orally.*) The suit of A. Bloch against William M. Price, Stephen G. Price, Darwin W. Marmaduke, and Leslie Marmaduke is an action to recover a debt contracted by Stephen G. Price alone, while doing business in the name of Price, Marmaduke & Co. The case as respects D. W. Marmaduke has been disposed of by a ruling made a few days since on his plea of former adjudication, which plea was sustained. *Ante*, 447. The facts on which the decision depends are as follows:

I state the facts as found by the court from the testimony, some of which are not controverted, while others are in dispute. The firm of Price, Marmaduke & Co. was organized in the fall of 1881, to do a general commission business in the city of St. Louis, Missouri, and was composed of the four defendants last named. D. W. Marmaduke retired from the firm in February, 1882; William M. Price retired therefrom in November, 1882; and Leslie Marmaduke withdrew in November, 1883. Notwithstanding these changes in the *personnel* of the firm, business was transacted continuously in the name of Price, Marmaduke & Co., with the consent of the retiring partners, from the fall of 1881 until August 28, 1885, when S. G. Price, who was then conducting the business on his own account, failed and made an assignment. No public notice of any change in the firm was given until July 1, 1884, when a notice was published for three successive days in two St. Louis daily papers, to the effect that on July 1, 1884, William M. Price, D. W. Marmaduke, and Leslie Marmaduke had sold out all their interest in the firm to Stephen G. Price, and that the latter would thenceforth continue the business. Circulars notifying customers of the dissolution of Price, Marmaduke & Co. were also sent out about July 1, 1884, but my conclusion is that plaintiff did not receive such notice, if in point of fact any such notice was mailed to him.

Plaintiff is a merchant residing and doing business at Minneapolis, in the state of Kansas. In July, 1881, he made a consignment of wool to the firm of William M. Price & Co., St. Louis, Missouri, with which firm defendants William M. and Stephen G. Price were then connected. Some time in June, 1882, plaintiff made a shipment of wool to Price, Marmaduke & Co., which in due course of time was sold by the consignee, and the proceeds duly accounted for. Prior to that shipment, however, and subsequently thereto, during the wool season of 1882, plaintiff received price-currents from the firm of Price, Marmaduke & Co., which purported to be issued by that firm, and in the caption described the firm as composed of William M. and S. G. Price, late of the firm of William M. Price & Co., and of Leslie Marmaduke, and D. W. Marmaduke. By means of the price-currents in question, plaintiff was advised, and at the date of the shipment in June, 1882, supposed, that all of the defendants were then members of the firm of Price, Marmaduke & Co., and he received no notice to the contrary in the course of that transaction. During the following wool seasons of 1883–84, and in June, 1885, plaintiff also received price-currents issued by and in the name of Price, Marmaduke & Co.; and was furthermore aware that certain parties residing in his vicinity had made shipments to, and had had trans-

actions with, the firm, although the plaintiff himself made no further consignments to the firm after June, 1882, until June 5, 1885.

After Leslie Marmaduke retired from the firm, in November, 1883, but not before, a change was made in the caption of the price-currents issued by Price, Marmaduke & Co. The change consisted in dropping from the caption the names of the individuals composing the firm as theretofore published, but in all other respects they were identical with those issued when the firm was first organized.

On June 5, 1885, plaintiff being then ignorant of any of the changes that had taken place in the firm of Price, Marmaduke & Co. since its organization, made a second shipment of 5,355 pounds of wool to that firm. It was sold at auction on July 31, 1885, but the proceeds had not been remitted to the plaintiff at the time of the failure of S. G. Price on August 28, 1885. The purpose of this suit is to charge all the defendants with the payment of the claim. The defendants, William M. Price and Leslie Marmaduke, contend that they are not estopped from denying their liability as partners for the proceeds of the shipment made on June 5, 1885, because, as it is claimed, plaintiff did not know that they were members of the firm, at the date of the first transaction in 1882; that he never in point of fact knew that they were connected with the firm, and consequently did not make the second shipment in 1885, on the supposition that they still continued to be members, or on their credit. In other words, they claim that no act of theirs, or laches on their part, has misled the plaintiff, or induced him to extend credit to the firm of Price, Marmaduke & Co. for the debt sued for.

The law is undoubtedly, as declared in the case of *Thompson* v. *Bank*, 111 U. S. 536, 4 Sup. Ct. Rep. 689, that a person who was not a member of a partnership at the time a debt is contracted, cannot be held therefor, except for some act of commission or omission that will estop him from asserting as against the particular creditor that he was not a partner when the debt sued for was contracted. But the contention on the part of the two defendants last named is based upon a false assumption of matter of fact. From the evidence produced on the trial of this case in the state court (when it was there pending) it may have been a fair deduction that plaintiff, when he began to deal with Price, Marmaduke & Co., did not know the names of the persons composing the firm, and never had known; but on the present trial it was shown to my entire satisfaction, by the production of one of the price-currents that had been received by the plaintiff prior to June, 1882, that at the commencement of his dealings with Price, Marmaduke & Co. he must have known, and did know, or at least have supposed, that all the defendants were then members of the firm. While it was not shown on this trial that plaintiff had any special acquaintance with either member of the firm, or knew the financial standing of either, or trusted the firm because any particular person was a member of the same, yet I do not regard such proof as essential to a recovery. When it appears that a person knows who are the members of a firm, and has had dealings with it in the course of which he has extended credit, the presumption must be, in the

absence of other proof, that he gave credit to all the persons who were known or represented to him to be partners. And, with respect to all subsequent transactions in which credit is extended to the firm, the same presumption obtains so long as the firm name remains the same, and no notice has been given to the creditor of any change in the *personnel* of the firm. In the present case, therefore, the court will presume that, when plaintiff resumed dealings with Price, Marmaduke & Co. in June, 1885, he gave credit to all the persons who had been represented to him to be members of the firm in the course of the first business transaction, although he did not expressly testify that in the last transaction he gave special credit to either William M. Price or Leslie Marmaduke.

It is further contended that plaintiff was not entitled to notice of changes in the firm of Price, Marmaduke & Co., because at the date of those changes he had only made the firm one shipment, and that not of a recent date. This is equivalent to saying that when William M. Price withdrew from the firm in November, 1882, and Leslie Marmaduke in November, 1883, the plaintiff occupied the position of a person who had never had any dealings with any member of the firm. This position the court regards as untenable. When a person has knowledge of the individuals who compose a mercantile firm, derived from business transactions with it, his right to notice of subsequent changes therein cannot be determined or measured by the number of transactions he may have had with the firm, whether one or many. The length of time that has elapsed since a person has had a transaction with a firm before any change occurs therein, may be a proper consideration affecting the question whether such person should be notified of the change. But, considering all the circumstances of the present case, it cannot be said that plaintiff's dealings with the firm in question were so remote from the time changes took place in its membership that the outgoing members were under no obligation to notify him of their withdrawal. In point of fact one of the defendants withdrew within four months after plaintiff's first shipment to the firm, and before the next shipping season. Then, again, the outgoing members knew that the old firm name was to be employed in future transactions, which in itself would be likely to create the impression that no change had taken place in the membership; they were also well aware of the practice that had been pursued of sending out price-currents to merchants and shippers like the plaintiff, who had ever had dealings with the firm, thereby inviting further consignments; and probably understood, as was the fact, that the practice would most likely continue, and that the plaintiff might be thereby encouraged to make further consignments, and to extend further credit to the firm, within a comparatively short period after their retirement.

In any view of the case, plaintiff stood in the relation of a customer of the old firm and a probable patron of those who were to succeed to its business, and in my judgment he was entitled to notice from the outgoing members of their withdrawal. As such notice was not brought home to the plaintiff, and as the evidence in my opinion warrants the conclusion that the last consignment was made on the credit of the old

firm, (plaintiff being ignorant of any change therein,) judgment will be entered against William M. Price, and against Leslie Marmaduke, as well as against the defendant Stephen G. Price. The amount of the judgment will be $810.96, with interest computed at the rate of 6 per cent. per annum from August 31, 1885, to the present date.

The record will show that the case was submitted by these defendants, and also by the defendant D. W. Marmaduke at the same time, and judgment will go in favor of D. W. Marmaduke on his plea of former adjudication, and against the other defendants.

CENTRAL TRUST CO. OF NEW YORK *v.* WABASH, ST. L. & P. RY. CO.

(*Circuit Court, E. D. Missouri, E. D.* November 3, 1887.)

1. RAILROAD COMPANIES — RECEIVER — PRIORITY OF CLAIMS — CONTRACT WITH ROAD.
   A railroad company promised the owner of a saw-mill near one of its sand-switches, which was not used for receiving freight, but only to get sand for track repairing, that it would take up lumber for him at that point in certain quantities. A month later the road notified the mill owner that it would refuse to receive any more lumber at the switch. The road subsequently passed into the hands of receivers. *Held* that, assuming the contract to be one that the company could not terminate at its pleasure, the claim for damages for its breach was not one entitling the mill owner to an allowance against the property in the hands of the receiver, or out of the earnings of the road, in preference to the mortgage bondholders.
2. SAME—LIABILITY OF—BRIDGING STREAMS—DAMAGE TO LOGS.
   The grant of power to a railroad company to bridge a navigable stream carries with it, as a necessary incident, the right to repair; and when the piling necessary to such repair is driven in an ordinarily skillful manner, loss resulting therefrom to a person who uses the stream to raft logs is *damnum absque injuria.*
3. SAME.
   The defendant railroad company finished repairs to its bridge across a navigable stream in the winter of 1884 and 1885 after the ice had formed on the river. The piles used in the work were cut off at the surface of the ice, and when the ice sunk later with the falling river, the stumps were cut again, so that when the ice went out the tops of the piles were from 18 to 30 inches below the surface of the water. The plaintiff rafted logs from the opening of the season down to July, when the stream became so low that it would not have been navigable even if the stumps had been removed. *Held,* that the piling had been properly removed, and that the company was not liable in damages for any loss which occurred while the river was susceptible of navigation.

At Law. On exceptions to master's report on petition of N. F. Coffey, intervenor.

Torrey & Giran, for intervenor Coffey.

Geo. S. Grover and *H. S. Priest*, for receivers.

THAYER, J., (*orally.*) The intervening petition of N. F. Coffey in the *Wabash Case* contains two causes of action. The first count is an action in form *ex contractu* to recover damages for a breach of contract. The second count is in form *ex delicto* to recover damages on account of alleged

negligence of the receivers' agents. The master has made a report recommending the dismissal of both counts. Exceptions have been filed to his report.

The contract described in the first count of the petition is a contract alleged to have been made with the officers of the Wabash, St. Louis & Pacific Railway Company before it passed into the hands of a receiver, and a breach of the same is also alleged to have occurred before the receivers were appointed. So that the first question that arises upon the first count of the petition is whether the claim is a preferential claim, such as entitles the intervenors to an equitable lien upon the property, or income of the property, in the hands of the receivers.

It appears that there was a sand switch near the town of Brunswick, in this state, at which point the railroad company was in the habit of getting sand for the purpose of repairing its track, but the switch was not used for the purpose of receiving freight. Near that switch the intervenors had a saw-mill. They applied to have cars set out upon the switch for the purpose of loading lumber, and after some correspondence had in March, 1884, the officers of the road stated that they would take up lumber at that point whenever the intervenors had as much as four car-loads of lumber to ship. About a month later, in May, 1884, they notified the intervenors that it was impracticable to take up lumber at that point any longer, and refused to do so, and it is for such action on the part of the officers of the road that the first claim for compensation is made.

The master seems to have dismissed that count of the petition upon the ground that the contract, or alleged contract, between the intervenors and the railroad company could be terminated at the pleasure of the railroad company; that it was like a parol license given to go upon land, and do certain acts, which may be terminated at pleasure. However that may be, I am very clearly of the opinion that the claim is not of a preferential character. It is not a claim, even if valid as against the railroad company, that will entitle the intervenor to an allowance against the property in the hands of the receivers, or out of the earnings of the road, in preference to the mortgage bondholders. I think that count of the petition was properly dismissed.

The next count in the petition is of this character: The railroad operated by the receivers crossed Grand river near the town of Brunswick upon a bridge, and, for all the purposes of this decision, it may be conceded that Grand river is a navigable stream. Some distance above the bridge the intervenors had standing timber which they were accustomed to cut into logs, and float down Grand river under the bridge to Brunswick. They claim that the receivers wrongfully obstructed the navigation of the river, and the second count of the petition is brought to recover damages for such obstruction of a navigable stream. It seems that in 1884 the receivers found it necessary to repair the bridge across Grand river. For the purpose of repairing it they set piles in the river to sustain or support false works under the bridge.

The intervenors' claim for damage is of two kinds:

(1) For damage which was occasioned by the obstruction of the river by the piling while the bridge was being repaired; and (2) they claim damages for the obstruction of the river by the stumps of those piles after the bridge had been repaired, and the piles had been cut off. They claim that the piles were cut off so near the surface of the water that the stumps left standing obstructed the stream, and prevented the rafting of logs.

It was conceded on the hearing that the bridge was built by authority of law; that the railroad company had authority to cross the stream with its tracks, and to that end to build a bridge; and that one of its incidental rights under that power would be the right to repair the bridge from time to time as might be found necessary. In other words, it is not claimed that the bridge was an unlawful structure, or a public nuisance, but the claim is that in the process of repairing the bridge the work was done in an unskillful and careless manner. The master found that there was no evidence tending to show that the piling was unnecessary to the work of rebuilding or repairing the bridge, or that it was put down in an unusual manner. That is, in substance, a finding that there was no negligence on the part of the receivers in the matter of putting down the piling, and that finding or conclusion has not been excepted to by the intervenors. It stands therefore, for the purpose of this proceeding, as a final and conclusive finding against the intervenors.

That being the case, it follows that the damage, if any, sustained by the intervenors in consequence of the obstruction of navigation by the piling during the progress of the repairs cannot be recovered. If the piling was driven in an ordinarily skillful manner, as the intervenors concede by not excepting to the master's finding in that respect, then the damages which they sustained were the result of a lawful act done in an ordinarily careful and skillful manner, and the damages which they claim are necessarily *damnum absque injuria*. *Hamilton* v. *Railroad Co.*, 119 U. S. 280, 7 Sup. Ct. Rep. 206.

That leaves for consideration the question whether when the repairs were completed, and the piles were cut off, they were cut off so much below the surface of the water as not to obstruct navigation. It seems that they were cut off during the winter of 1884–85, after the ice had formed on the stream. The master reports that the piles were cut off at the surface of the ice when the river froze, and that as the water in the river fell, and the ice sunk, the stumps were again cut off, so that in the spring of the year the tops of the piles were from 18 inches to two feet and a half below the surface of the water. The master reports that after the ice went out of the stream in the spring of 1885, the intervenors rafted logs down the river continuously during that spring over the stumps and even during the summer of 1885, as late as July; that in July the river had fallen so low that it was not navigable, even if the stumps had been removed, and that the intervenors ceased to raft any more logs for that reason. Now that is in substance a finding by the master that the piling was properly removed; that the piling was cut off so far below the surface of the stream that the stumps did not obstruct navigation, when the river was susceptible of navigation.

There has been no specific exception taken to that conclusion of the master. The intervenors do say that they except to the finding of the master that they rafted logs during the spring of the year 1885, and they further say that they except to his finding that after July they did not raft any logs because the stream was too shallow for that purpose. These are the only two exceptions which the intervenors have taken on that branch of the case. On looking into the testimony upon those points I find that there is sufficient testimony in the report to sustain the master's finding. There is some testimony to the contrary, but the evidence is so conflicting that I will not undertake to overrule the master's finding on those points. I furthermore think that the intervenors should have taken specific exception to the conclusion of law involved in the master's finding of fact to the effect that the piles were properly removed. They have not done so.

The result is that the exceptions to the master's report on the intervenors' claim will be overruled, and the report confirmed.

UNITED STATES v. JONES.

(District Court, D. South Carolina. October, 1887.)

1. WITNESS—COMPETENCY OF WIFE.
   In the courts of the United States a wife is not a competent witness for or against her husband in a criminal case; and this is on the score of public policy.[1]
2. NEW TRIAL—EXCLUSION OF TESTIMONY.
   When, on a motion for a new trial, it appears that the judge erred in admitting incompetent testimony, the verdict will not be disturbed if, upon careful examination, the court is satisfied that the testimony was immaterial, or manifestly could not have affected the verdict.
3. ERROR, WRIT OF—EXCLUSION OF TESTIMONY.
   In this respect the rule differs in a hearing upon writ of error from the hearing on a motion for a new trial.
4. NEW TRIAL—REFUSAL.
   The judge, refusing the motion, should come to his conclusion without a reasonable doubt.

(Syllabus by the Court.)

Motion for a New Trial.

H. A. De Saussure, Asst. U. S. Atty., for the United States.

W. Moultrie Gourdin, for defendant.

SIMONTON, J. The defendant was indicted for presenting a false claim against the United States, and for sustaining his claim with a false affidavit. Rev. St. § 5438. He claimed to be the brother and sole heir of John Jones, a deceased soldier in the regular army, and as such entitled to all back pay, etc., due the soldier. In the testimony in chief,

[1] See note at end of case.

Clara Jones, the wife of the defendant, was called by the government as a witness. The defendant objected. She was sworn, but was instructed by the court that she could not be compelled to answer any question, and that she would not be permitted to disclose any confidential communication made to her by her husband. She was asked if she ever heard her husband speak of a brother by the name of John Jones. She answered that she had often heard him speak of his brother Johnnie; many times before he had heard of the death of the soldier John Jones. This was all her testimony.

The charge to the jury presented three questions for their consideration: (1) Was the defendant the brother of the deceased soldier? (2) Did the defendant believe that the dead soldier was his brother? (3) Did he attempt to establish his claim by affidavits of persons who swore to the relationship, he knowing that they knew nothing of it? The jury found him guilty. This is a motion for a new trial upon the ground that the judge erred in permitting the wife of the defendant to be called as a witness by the government and to testify.

There can be no doubt that at common law a wife is not a competent witness for or against her husband. And this is so, not on account of interest, but on the ground of public policy. 1 Greenl. Ev. § 334; *Stein* v. *Bowman*, 13 Pet. 221; *Lucas* v. *Brooks*, 18 Wall. 452.

There exists no statute of the United States removing this disability. No act of the state of South Carolina has changed the common law on this subject. *State* v. *Workman*, 15 S. C. 545. And, although the rule has been put upon the ground that confidential communications between husband and wife should not be disclosed, it has been applied to a case in which it was sought to prove an *alibi* by the wife. *State* v. *Dodson*, 16 S. C. 453. In actions for divorce, and for violence to her person, the wife has been permitted to testify. *U. S.* v. *Smallwood*, 5 Cranch, C. C. 35. These are exceptions. It was error, therefore, to permit her to be called and to testify. But this being a motion for a new trial in the court, and before the judge who tried the defendant, it must be made to appear that the verdict of the jury was influenced by, or that the defendant was prejudiced by, the testimony erroneously admitted.

A motion for a new trial heard here is not like a hearing on writ of error before an appellate tribunal. There the rulings of the court must stand or fall by their correctness, or otherwise, as matters of law. Here the application is not a matter of absolute right. It rests in the discretion of the court. It is to be granted when a new trial would be in furtherance of justice. If, upon careful examination of the case, it appears that justice has been done, and that the verdict is substantially right; that the evidence improperly admitted could not have influenced the verdict,—a new trial will not be granted because of that error. Such is the rule in civil cases. *McLanahan* v. *Insurance Co.*, 1 Pet. 170; *Rowe* v. *Matthews*, 18 Fed. Rep. 132; *Mining Co.* v. *Mining Co.*, 11 Fed. Rep. 125; 1 Grah. & W. New Trials, 302, note, 341, note. In criminal cases, perhaps, in examining the case, the judge should come to his conclusion without a reasonable doubt. In the case at bar, although the

wife was called by the government, her testimony was wholly in favor of her husband. She sustained his position that he really had a brother bearing the same name as the dead soldier. Thus she gave ground for his belief, and explained and excused his claim. Her testimony could not have injured her husband. It did not affect the verdict, as this was in despite of it.

The motion for a new trial is refused.

NOTE.

Neither the removal of the disability of interest, nor allowing the defendant in a criminal action to testify in his own behalf, renders the wife of such defendant a competent witness. The rule excluding her testimony where her husband is a party rests solely upon public policy. U. S. v. Crow Dog, (Dak.) 14 N. W. Rep. 437. The common-law rule disabling the husband and wife from being witnesses for or against each other has been changed in *Iowa* so far as to permit them to testify for each other in all cases, civil and criminal, and to testify against each other in a civil proceeding by one against the other. Parcell v. McReynolds, 33 N. W. Rep. 139. In *Pennsylvania*, the statute only disables the husband and wife from giving evidence against each other. Pleasonton v. Nutt, 8 Atl. Rep. 63. In *Michigan*, the husband cannot give testimony for or against the wife without her consent, nor the wife for or against the husband without his consent, except when the title to the separate property of either is in litigation between them, when the statute permits either to testify to facts which lie at the foundation of the ownership of the property. Hunt v. Eaton, 21 N. W. Rep. 429. In *Minnesota*, neither husband nor wife can give testimony for or against the other without the other's consent, except in the case of a civil action maintained by one against the other. Huot v. Wise, 6 N. W. Rep. 425. The same statute has been enacted in *Utah*. U. S. v. Bassett, 13 Pac. Rep. 237. In *Florida*, the common-law rule has been modified to the extent of permitting the wife to testify where her husband is a party; but the same right is not accorded to the husband where the wife is a party. Schnabel v. Betts, 1 South. Rep. 692. In *Vermont*, the wife has been rendered a competent witness in a number of cases, but the disqualification of the husband exists as at common law, except in divorce cases. Witters v. Sowles, 28 Fed. Rep. 121. In *Illinois*, the husband and wife are rendered competent witnesses for or against each other in particular instances, among which are suits for divorce; or where the litigation is concerning the separate property of the wife; or actions upon policies of insurance, so far as relates to the value and amount of the property injured or destroyed; or actions against carriers, so far as relates to the loss of property, or the value and amount thereof. Treleaven v. Dixon, 9 N. E. Rep. 189. In *Wisconsin*, the common-law disability of the husband and wife as witnesses is not changed, even where the separate property of the wife is involved, unless they are parties to the suit. Carney v. Gleissner, 17 N. W. Rep. 398. The disability of the husband or wife to disclose communications made by one to the other continues after the death of one of them, Bradford v. Vinton, (Mich.) 26 N. W. Rep. 401; or after a divorce has been obtained, Brock v. Brock, (Pa.) 9 Atl. Rep. 486. But at common law, as well as under the different statutes, the incompetency of the husband or wife as witnesses does not extend to criminal prosecutions for a crime committed by one against the other, People v. Sebring, (Mich.) 33 N. W. Rep. 808; and the bigamy of the husband is held to be such a crime against the wife as will enable her to testify against him in a prosecution therefor, State v. Sloan, (Iowa,) 7 N. W. Rep. 516; U. S. v. Bassett, (Utah,) 13 Pac. Rep. 237. Where competent to testify, as in the case of an offense committed by one against the other, they are compellable. Bramlette v. State, (Tex.) 2 S. W. Rep. 765.

FAIRBANKS, Assignee, *v.* AMOSKEAG NAT. BANK and others.

(*Circuit Court, D. New Hampshire.* October 10, 1887.)

1. JUDGMENT—ENTRY OF—MANDAMUS TO COMPEL.
An opinion in an equity cause in the district court was promulgated by the judge, and delivered to the clerk, who made the following entry on his minute-book: "Bill dismissed as to A. and B. Decree." At the request of counsel of defendants, the clerk sent them a copy of this opinion, and a paper containing the draft of a decree, which draft, he wrote, had been "handed down with the opinion, and may be subjected to minor alterations before being spread upon the record." The defendants then appealed, supposing that the decree had been entered. Finding that such was not the case, they moved in the circuit for *mandamus* to the clerk to compel him to make such entries as would establish the opinion and accompanying paper as a decree in the cause, and to the judge to certify them as correct. *Held*, that the writ should be denied; the paper not being the decree, but only a draft made by the judge for the convenience of counsel, that they might see in a general way what decree he was prepared to enter, and it being no part of the official duty of the clerk to receive the opinion, or make a copy of it.

2. APPEAL—WHEN LIES—ENTRY OF DECREE.
The clerk made the following entry in a cause on his minutes: "Bill dismissed as to A. and B. Decree." *Held*, that the inference was that the judge had announced his decision in the case, and that an appeal might be taken therefrom at once, although no opinion containing a full statement of the judge's reasons had then been filed.

In Equity. On motion for writ of *mandamus*, and motion to dismiss appeal.

H. G. Wood, for appellee.

Briggs & Huse and *Charles R. Morrison*, for appellants.

COLT, J. This is a motion for a writ of *mandamus* to the district judge for the district of New Hampshire, and to the clerk of the district court for that district, requiring that certain papers be certified as true copies, and that certain entries be made in the docket of the court. The allegation of the defendants is that at the March term, 1885, of the district court, in the above-entitled case, an opinion was promulgated by the judge, and delivered to the clerk, and the following entry made on the clerk's book: "Bill dismissed as to Currier and Chandler. Decree;" that afterwards the clerk, in answer to a request from the counsel for the defendants, sent them a copy of the opinion, and also a paper containing the draft of a decree, with a note in which he said: "The inclosed is but a rough draft of the decree handed down with the opinion, and may be subjected to minor alterations before being spread upon the record;" that said written opinion, announcing the conclusions of the court in said cause, and authoritatively pronounced, was a proceeding and determination of said district judge in said cause;" and prays for a writ of *mandamus* requiring the clerk to make such entries as will establish the above referred to paper as a decree in the cause. It appears that the defendants, supposing the decree was entered, have taken an appeal, which is now pending.

It is right to say that the statement of the facts as made by the learned judge, and by the clerk of the court, differs in some important particulars from the allegations of the defendant. But as I am of opinion that the defendants show no ground for the writ of *mandamus*, I shall, for the present purpose, assume the statement of the defendants is correct.

It cannot, I think, be held that the announcement of the opinion amounted to a determination of the cause. It was merely the announcement of the conclusion which the judge had reached in his own mind, with such statement of his reasons as he thought it convenient to make. The opinion need not be in writing, and it may form no part of the record of the case. It may be said that it is no part of the official duty of the clerk to receive it, or to make a copy of it. It is for the convenience of parties that this service is usually performed by the clerk. Nor do I think it can be said that the paper here presented as a decree ever took on that character. It was evidently a draft made by the judge for convenience, that counsel might see, in a general way, what decree he was prepared to enter. The letter of the clerk should have made it plain to counsel that the decree had not been entered. If it had been entered as the decree, it would not, of course, be subject to alterations except on a rehearing or on motion. Indeed, it is called by the clerk a "rough draft." The word "decree" on the clerk's docket cannot amount to an entry of the paper as a decree. The word stands alone, and may mean "decree to be entered," or "stands for decree," as well as "decree entered." The motion for a *mandamus* to the clerk requiring him to make entries relating to the opinion and the supposed decree must therefore be dismissed.

When, however, we come to consider the motion to dismiss the appeal, another question arises. The clerk, as is not disputed, entered on his minutes the words, "Bill dismissed as to Currier and Chandler. Decree." From this entry I think it is to be inferred that the judge announced his decision, although the opinion containing the full statement of his reasons was not then filed. In this state of the case it was proper for the respondents to take their appeal at once. *Silsby* v. *Foote*, 20 How. 290, 295. As the record on the appeal now stands, however, it does not appear that the entry was made. The motion to dismiss the appeal will therefore stand over, to allow the appellants time to move for a writ of *certiorari* to bring up the copy of minute-book of the clerk, so far as to show the entries contained in the certificate of the clerk which has been used on the hearing. When these copies are brought on the record, the motion to dismiss will be denied, unless on further hearing there should appear grounds to support the motion which have not been already argued.

HECKMAN *v.* MACKEY.

(*Circuit Court, S. D. New York.* October 11, 1887.)

1. COSTS—LEAVE TO SUE AS POOR PERSON—IN FEDERAL COURTS.
A non-resident, claiming to have a cause of action for damages for personal injuries resulting from an accident happening in New York state, and caused by the negligence of defendant, a resident and citizen of that state, may be admitted to prosecute his action as a pauper in the federal courts sitting in that state; the pauper act of New York neither in its original nor present form containing any words importing a restriction of its privileges to the resident poor.
2. SAME—LEAVE TO SUE AS POOR PERSON—AMENDMENT OF APPLICATION.
A petition for admission to sue as a pauper set out that the plaintiff was a resident of New Jersey, but did not allege that he was a citizen of that state. The complaint, however, contained a proper averment upon that point. *Held*, on motion to vacate an order granting the petition, that the plaintiff should be allowed to file *nunc pro tunc*, as of the date of the presentation of the petition, an affidavit setting forth his citizenship.

On Motion to Vacate an Order Admitting Plaintiff to Sue as a Pauper.

Wheeler & Cortis, for plaintiff.

Jas. Stikeman, for defendant.

LACOMBE, J. Defendant moves to vacate an order heretofore granted on petition, allowing plaintiff to prosecute this action as a pauper. Plaintiff is a citizen and resident of New Jersey. It appears from the papers that he has sustained personal injuries, as the result of an accident caused, he contends, by defendant's negligence. Defendant is a citizen and resident of New York, in which state the accident happened. Plaintiff is not worth more than $100, besides the wearing apparel and furniture necessary for himself and his family and the subject-matter of this action, and is unable to prosecute this action unless permitted to do so as a poor person. In support of this motion defendant refers to three special term decisions of the supreme, superior, and common pleas courts, respectively, (*Anon.*, 10 Abb. N. C. 80; *Christian* v. *Gouge*, Id. 82; *Alexander* v. *Meyers*, 8 Daly, 112,) holding that a non-resident may not sue in the state courts as a poor person.

The practice of allowing paupers to have original writs and subpœnas *gratis*, and to have counsel and attorney assigned them without fee, and to be excused from paying costs when plaintiffs, dates back to the reign of Henry VII. 3 Bl. Comm. *c.* 24. The provisions of the Revised Statutes and of the Code of Procedure are, in substance, a re-enactment of those contained in the original act; the limit of statutory poverty being raised between the Revision of 1812 and the Revision of 1830 from $20, the equivalent of the £5 of the English statute, to $100. The decisions above cited proceed in part upon the theory that the later statute, which requires non-residents to furnish security for costs, is inconsistent with a policy which would allow an irresponsible non-resident to sue without even a liability for costs. In the supreme and superior court cases the causes of action arose in Pennsylvania, of which state plaintiffs were res-

idents. In the common pleas case both plaintiff and defendants were citizens of Georgia, where the cause of action arose, and the decision is based entirely on the proposition that "it is contrary to the policy of the law to encourage the bringing of actions in this state for torts committed in another state, where plaintiff and defendants are residents of such other state, and were so when the wrong complained of was committed. If * * * such person choose to prosecute in a foreign tribunal, it should be under the usual liability for costs." 8 Daly, 112. The question has never been passed upon by an appellate state court. The state statute does not, either in its original or present form, contain any words importing a restriction of its privileges to the resident poor. The words used are "a poor person," without qualification.

The attention of the learned judges who delivered the opinions above cited seems not to have been called to a distinction between the statutes before them. The pauper act is concerned with liability; the non-resident act with security. Plaintiffs generally are liable for costs, and it is expected that they will respond for them out of their property situated within the jurisdiction of the state. Non-resident plaintiffs, however, who are not supposed to have such property within the jurisdiction, are required to give security that they will so respond. This act, however, in no way enlarges their liability, nor is it necessarily inconsistent with an act which relieves any particular class from the obligation to respond for costs at all. In the particular case at bar the plaintiff cannot, so far as appears, sue and make service of process in New Jersey, his native state. If the rule contended for were adopted, he could not sue in the courts of the state where the wrong was done him; and if it were followed here he would be left, solely because of his poverty, without any forum in which to vindicate his rights. Such a failure of justice should, if possible, be avoided.

The practice in this court in civil causes, other than equity and admiralty causes, is, by section 914 of the Revised Statutes, conformed as near as may be to that in the state courts. This phrase, "as near as may be," was before the supreme court in the case of *Railroad Co.* v. *Horst*, 93 U. S. 300, and the opinions expressed that the federal courts "had 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." In the case at bar it is not even a question of disregarding a subordinate provision of a statute. The state act contains no language sustaining defendant's position, and the construction contended for has not been approved by any appellate tribunal of the state. Under these circumstances such construction may be rejected as tending in this case to defeat the ends of justice.

Defendant further contends that the order should be vacated because the petition states that the plaintiff is a *resident* of the state of New Jersey, but does not state that he is a *citizen* of that state. Plaintiff is in fact both a citizen and resident of New Jersey, and the proper averment as to citizenship appears in his complaint. Under these circumstances,

the order should not be set aside for lack of jurisdiction, but the plaintiff may be allowed to file *nunc pro tunc*, as of the date of the presentation of his petition, an affidavit setting forth his citizenship. Upon the filing of such affidavit, the motion to vacate the order allowing plaintiff to prosecute the action as a poor person is denied.

SCHOLFIELD *v.* UNITED STATES.

(*District Court, D. Maryland.* October 6, 1887)

ELECTIONS—SUPERVISORS—COMPENSATION.

Held, that a supervisor of election, duly appointed under sections 2011 and 2012, who had attended the registration of voters for 18 days, as required by section 2016, was entitled to the maximum pay of $5 a day for not exceeding 10 days, fixed by section 2031, notwithstanding a notice afterwards issued by the attorney general that the supervisors would be expected to perform their work within 5 days, and would be paid for only 5 days' service.

(*Syllabus by the Court.*)

John E. Bennett, Jr., for petitioner.
Thomas G. Hayes, Dist. Atty., for the United States.

MORRIS, J. The plaintiff has brought this case against the United States, in the United States district court for the Maryland district, by filing his petition in accordance with the act of congress of March 3, 1887, *c.* 359, by which jurisdiction in cases against the United States is given to the district court where the amount of the claim does not exceed $1,000, and the claim is founded upon the constitution and laws of the United States, (except pensions;) or upon any regulation of an executive department; or upon any contract, expressed or implied, with the government of the United States; or for damages, liquidated or unliquidated, in cases not sounding in tort,—in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable. The plaintiff's petition has been duly served upon the district attorney of this district, and upon the attorney general of the United States, as required by the act of congress.

The plaintiff alleges that there is due to him by the United States the sum of $25 for the balance of his compensation as a supervisor of registration and election prior to and during the congressional election of 1886 in the city of Baltimore; he having faithfully and diligently performed his duties, and being entitled to $5 per day for 10 days, and having been paid only $25, payment of the balance claimed by him having been refused. The answer of the United States admits that the plaintiff has performed the services claimed for in his petition; but denies that he is entitled to receive more than the $25 already paid to him, for the reason that by a circular letter addressed by the attorney general of the United

States to the marshal of the district, dated the fifteenth October, 1886, the marshal was directed to notify the supervisors that they would only receive $25. The plaintiff has demurred to the answer of the United States, and joinder in demurrer has been entered.

FINDINGS OF FACT.

1. I find that the petitioner was duly appointed and commissioned supervisor of election for the Ninth ward of Baltimore city, in the state of Maryland, by the circuit court of the United States, on the fourth September, 1886, in pursuance of sections 2011 and 2012, Rev. St., and the supplements and amendments thereto, and that he duly qualified, and entered upon his duties.

2. I find that the laws of Maryland governing registration for congressional and other elections in the city of Baltimore require the officers of registration, for the purpose of correcting the lists of qualified voters, shall sit with open doors in the several wards of the city, from 9 A. M. to 9 P. M., for 15 successive days, commencing on the first Monday of September; and afterwards, for the purpose of revising the said lists, for three successive days, commencing on the first Monday of October.

3. I find that the petitioner, in pursuance of his said appointment, and of the provisions of section 2016, Rev. St. U. S., which authorized and required him to attend at all times and places fixed for the registration of voters who, being registered, would be entitled to vote for a representative or delegate in congress, and to personally inspect and scrutinize such registration, did attend the said registration in the said ward for which he was appointed for 15 days in September, 1886, and for 3 days in October, 1886, being October 4th, 5th, and 6th, in said year.

4. I find that the United States marshal for this district, on the sixteenth October, 1886, received from the attorney general of the United States a circular letter, in which he notified the marshal that "it is not expected that supervisors and deputy marshals will receive compensation for more than five days' services, and they should be so informed. Within this time all can be done, it is thought, that ought to be."

5. I find that the plaintiff was on duty and had performed 18 days of proper and necessary service as supervisor before the circular letter of the attorney general, relied upon in the answer of the United States, had been issued.

CONCLUSION.

Section 2031, Rev. St. U. S., provides: "And there shall be allowed and paid to each supervisor of elections * * * who is appointed, and performs his duty, under the preceding provisions, compensation at the rate of five dollars per day for each day he is actually on duty, not exceeding ten days." Under this law the plaintiff earned and is entitled to $50 compensation, and, having received but $25, I sustain the demurrer; and I do give judgment in favor of the plaintiff, against the United States, for the sum of $25, with costs to the plaintiff, being the fees paid by him to the clerk of the court.

CASTNER *v.* MAGONE. CONANT and others *v.* SAME. AVIS and others *v.* SAME.

(*Circuit Court, S. D. New York.* November 7, 1887.)

1. CUSTOMS DUTIES—ACTION TO RECOVER—BILL OF PARTICULARS—SERVICE OF.
Where plaintiff in an action to recover, from a collector of customs, duties alleged to have been illegally exacted, fails to serve a bill of particulars within 30 days after defendant's appearance, as required by section 3012, Rev. St., judgment of *non pros.* must be entered against him.

2. SAME.
The court has no power to grant an application by plaintiff for leave to serve a bill of particulars *nunc pro tunc* after the expiration of 30 days from defendant's appearance.

3. SAME.
Section 3012, Rev. St., is *mandatory*, not *directory*, in its provisions. *Pott* v. *Arthur*, 15 Blatchf. 314, modified and distinguished.

These three cases were suits against a collector of customs for the recovery of duties paid in excess. Defendant appeared by attorney on August 17, 1887. Plaintiffs procured from defendant's attorney extensions of time to serve their complaints, which were served on September 30, 1887. The bills of particulars were annexed to the copies of the complaints so served. Defendant moved for judgments of *non pros.*, under section 3012, Rev. St.

Stephen A. Walker, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., for the motion.

Alexander P. Ketchum, *contra.*

LACOMBE, J. In these three cases motion is made by the defendant for judgment of *non pros.* against the plaintiffs, under section 3012, Rev. St. This motion is based upon an affidavit showing that the action is one to recover from the defendant duties alleged to have been erroneously or illegally exacted by him as collector of customs at the port of New York; that the defendant duly appeared by attorney on the seventeenth of August, 1887, by the service upon the attorney for the plaintiffs on said date of a notice of appearance; and that no bill of particulars, as required by section 3012, Rev. St. U. S., has ever been served, although the 30 days limited by the said section has long since expired. In opposition to defendant's motion, plaintiff in each case submits an affidavit by which the following facts appear: The 30-days limit by the section above cited was the sixteenth day of September, 1887, and on that day application was made for an extension of time to serve the complaint; plaintiff's attorney supposing that his clerk had, in accordance with his instructions, obtained at the same time an extension of time for the service of the bill of particulars. On the thirtieth of September, 1887, and within the time covered by such extension, plaintiff served a copy of the complaint, to which was annexed a bill of particulars. Upon the argument of the motion in open court, the plaintiff's attorney applied for leave to serve a bill of particulars *nunc pro tunc.*

It is unnecessary to consider the sufficiency or insufficiency of the excuse presented in these cases. This court is without power to allow the service *nunc pro tunc* of the bill of particulars required by section 3012, Rev. St. The decision in *Pott* v. *Arthur*, 15 Blatchf. 314, is authority only for the allowance of amendments as to some formal matter not involving any substantial right of the defendant, and then only under peculiar circumstances. The statement in the opinion that the statute was "directory merely" is an *obiter dictum*, and has not been followed in this court to the extent of allowing bills of particulars to be served subsequent to the date named in the statute. A similar application to that of the plaintiff was denied by Judge WALLACE in *Schwietering* v. *Hedden*, (February, 1887, not reported,) upon the ground that the court had no power to grant such relief.

The application of the plaintiffs for leave to serve bills of particulars *nunc pro tunc* is therefore denied, and defendant's motion for judgment of *non pros.* is granted.

WARREN and others, Assignees, etc., v. BURNHAM.

(*Circuit Court, N. D. New York.* October 24, 1887.)

1. SET-OFF AND COUNTER-CLAIM—PARTNERSHIP ACCOUNTING—BANKRUPT PARTNER.
   A solvent firm of which a bankrupt is a member may set off against a debt due the bankrupt a debt due by the bankrupt to the firm.
2. PARTNERSHIP—ACCOUNTING—BANKRUPT PARTNER—FRAUD OF.
   Where a member of a firm obtained indorsements from another member of the firm, of certain negotiable paper, upon a representation that he was to use such paper for the benefit of the firm, but in fact used it for his individual purposes, and afterwards became bankrupt, the firm remaining solvent, the amount so obtained by the bankrupt is a proper charge against him, and in favor of the firm.
3. SAME—ACCOUNTING—BANKRUPT PARTNER—ADVANCES TO.
   In an action brought by the assignees of a person who is a bankrupt individually, but a member of a solvent firm, against the other member of the firm, for an accounting, the defendant may properly claim to his credit amounts advanced by him individually to such bankrupt.
4. COSTS—PARTNERSHIP—ACCOUNTING.
   Costs in such action, like other equitable actions, may be awarded to the successful party.

In Equity.

The complainants are assignees in bankruptcy of one Lazarus S. Hammond. Hammond was engaged in business as an individual banker at Cape Vincent, New York. He was also, as an equal copartner with the defendant, engaged in carrying on the grain and produce business at the same place, under the firm name of Hammond & Burnham. He was also, as a member of the firm of Doty, Hammond & Co., engaged in the produce commission business in the city of New York. Hammond became a bankrupt, but the firm of Hammond & Burnham remained solv-

ent. Burnham was in no way connected with Hammond in the banking business. At the time of the failure, Hammond, as an individual banker, was indebted to the firm of Hammond & Burnham, and the firm was indebted to him, on partnership transactions. Prior to the failure, the firm of Hammond & Burnham was indebted to the Oneida National Bank in about the sum of $15,000. Hammond represented to Burnham that he had no funds with which to meet this indebtedness, and requested Burnham to indorse two drafts in blank, representing that he could then raise the necessary amount. Relying upon these representations, Burnham indorsed the drafts. The drafts were accepted by Doty, Hammond & Co. after the sum of $5,000 was inserted in each, and the money obtained thereon was applied by Hammond to his own use. Prior to the failure, Hammond was indebted to Burnham individually in the sum of about $5,000. This action was commenced by the assignees to obtain an accounting, upon the theory that the defendant was indebted to them in a large amount. The master *pro hac vice*, to whom the matter was referred, reported in favor of the defendant upon all the issues, except that he refused to allow in the account the individual indebtedness of the bankrupt to Burnham.

J. B. Brooks, for complainants.

L. J. Dorwin, for defendant.

COXE, J. This action comes before the court upon exceptions filed by both parties to the report of the master *pro hac vice*. I have carefully read this report, and am of the opinion that the findings of fact and conclusions of law are correct.

The principal controversy arises over the right of a solvent firm, of which the bankrupt was a member, to set off against a debt due the bankrupt a debt due from the bankrupt to the firm. The allowance of this set-off was in conformity with the law, and is abundantly supported by authority. The finding of the master with reference to the two drafts drawn by the bankrupt on Doty, Hammond & Co., and indorsed by the defendant, is sustained by the proof. The drafts were obtained from the defendant upon the representation that they were necessary to pay a partnership indebtedness. The bankrupt applied them to his own use. The amount paid by the defendant upon these drafts was properly charged against the bankrupt in the account. I see no objection to the allowance and addition to the account of the individual indebtedness of the bankrupt to the defendant. If the balance on the accounting had been in favor of the bankrupt, the sums found by the master in the sixteenth item of his report could have been set off against it. *In re Voetter*, 4 Fed. Rep. 632, and cases cited. No injury will be done by permitting these amounts to be added to the sum found due by the master, and all difficulties which might arise under the statute of limitations will thus be avoided.

Upon the question of costs, I see nothing to distinguish this case from other equitable actions, or exempt it from the rule which awards costs to the successful party.

The exceptions of the complainants are overruled, and judgment is awarded in conformity with the provisions of the report, except that the individual indebtedness of the bankrupt to the defendant, amounting to $5,144.84 and interest, may be added to the sum found due by the master.

RICKARD v. BARNEY.

(*Circuit Court, S. D. New York.* October 17, 1887.)

1. CUSTOM DUTIES—ACTION TO RECOVER—AMENDMENT OF BILL—LAPSE OF TIME.
   An action against the collector to recover excess of duties paid under protest was begun January, 1866. The bill of particulars was served the following February, an amended bill in December of the same year, and a further amended bill November 3, 1882. The earliest entry was of date April 29, 1861. In the latter part of 1887 the plaintiff moved to further amend. Neither the merchandise, the vessel, nor the dates of invoice, entry, payment, or protest, were, as to the items forming the subject of the motion, stated in the bill. In fact, the dates, as proposed, were "January, 1861." *Held* that, although under Rev. St. U. S. § 954, providing for amendments for defects of form, the court had power to allow amendments of the bill of particulars after the 30 days limited by Rev. St. U. S. § 3012, the discretion was to be exercised only in extreme cases, and the plaintiff was not within the rule.
2. SAME.
   The act of congress of February 18, 1867, provides (section 1) that all such suits or prosecutions as have been or shall be commenced under any prior acts of congress repealed or supplied by the act of July 18, 1866, for acts committed previous to that date, shall be tried and disposed of, etc., as if the act of July 18th, had not been passed. Section 26 of that act, requiring service of a bill of particulars in actions to recover excess of duties paid under protest within 30 days after notice of defendant's appearance, was re-enacted in Rev. St. § 3012. *Held*, that the question of the repeal of Rev. St. § 3012, by the act of February 18, 1867, was not before the court on a motion to amend such bill of particulars.
3. SAME—ACTION TO RECOVER—NOTICE—SUFFICIENCY.
   The original bill of particulars had the following phrase at the bottom: "E. and O. E. Above intended to include all entries upon which duties and fees were paid by plaintiff to defendant between April 8, 1861, and September 8, 1864." *Held*, that the sufficiency of the notice was to be determined on the trial, and not on motion to amend the bill of particulars.

Action to Recover Excess of Duties paid under protest. On motion to amend bill of particulars.

Almon W. Griswold, for the motion.

Stephen A. Walker, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., opposed.

LACOMBE, J. This action was begun in January, 1866. A bill of particulars was served in February, 1866, an amended bill in December, 1866, and a further amended bill on November 3, 1882. This last bill sets forth the plaintiff's claim as for "excess of duty paid under protest on worsted and cloth dress goods above 35 per cent., and for excess of fees paid for oaths to entries, stamps on invoices, and orders

from one department of the custom-house to another, on importations upon which such duties and fees were paid by plaintiff to defendant by the following vessels." Then follows the name of the importer, and an enumeration of the names of the vessels and dates of entry. A motion is now made to amend this bill of particulars by inserting after the word "worsted" the words, "mousseline delaines above 19 per cent.," and also to insert at the head of the list of entries those of, "Australasian, January, 1861," and "Palestine, January, 1861." The earliest entry now on the list is under date of April 29, 1861. In support of the application, plaintiff refers to three decisions of this court, viz.: *Marks* v. *Barney*, *Kaupe* v. *Barney*, and *Kemys* v. *Redfield*. Mere decisions, unaccompanied as are these with any expression of opinion, are unsatisfactory precedents. An examination of the papers in these three cases, however, does not indicate that they go to the length which counsel contends for. In the first two plaintiff sought leave to amend by including as to each of several importations already enumerated a claim for excess of fees in addition to excess of duties. This was only changing the amount stated to be due under causes of action already enumerated; it did not add to the enumeration a distinct and separate cause of action. *Bartels* v. *Schell*, 16 Fed. Rep. 341. In *Kemys* v. *Redfield* the amendment was allowed after verdict, and then only upon a stipulation by plaintiffs that they would set aside the verdict if defendant so desired. Manifestly this was a peculiar case in which relief was accorded to both parties.

In the absence of any controlling authority in support of the present application, it should be denied. The provision of the statute requiring a bill of particulars when demanded by the defendant in these cases is a salutary one, manifestly intended to restrict the importer to his original claim, without such modifications as subsequent decisions or a more careful examination of the facts might induce him to advance. From and after the 30 days limited by the statute, the defendant is entitled to be advised as to what issue he is to try. It is true that it has been held in this circuit that the court has power, under section 954, to allow amendments to a bill of particulars after the thirty days, (*Pott* v. *Arthur*, 15 Blatchf. 314,) but that discretion will be exercised only in extreme cases, and not to the extent of making the provisions of section 3012 practically of no effect. In the case last cited the original bill contained all the particulars required by section 3012 except the dates of the invoices. It was received and retained by defendant's attorney without notice that it would not be accepted as sufficient, and defendant's attorney subsequently treated the action as one to be tried, and as one in which a proper bill of particulars had been served in time by serving notice of trial. Under these circumstances plaintiff was allowed to insert the dates of the invoices. Here neither the merchandise, the vessel, nor the dates of invoice, entry, payment, or protest, are, as to the two items forming the subject of this motion, stated in the bill. Intermediate the service of the first bill of particulars and the service of the moving papers, a period of 21 years, there has been nothing done by the plaintiff to notify the defendant that any claim was made on mousseline delaines or on

importations by these vessels on the dates specified. The considerations which induced the decision in *Pott* v. *Arthur* are not found in this case.

It is further contended by the plaintiff that the phrase at the bottom of the bill of particulars, "E. & O. E. Above intended to include all entries upon which duties and fees were paid by plaintiff to defendant between April 8, 1861, and September 8, 1864," is sufficient notice. Its sufficiency should properly be determined on the trial. If it is sufficient, this motion is unnecessary.

The plaintiff further contends that his suit is covered by the act of February 18, 1867; that, therefore, the provisions of section 3012 do not apply; and that no detailed bill need be served. This question is not before the court on the present motion. It will come up for decision when plaintiff seeks to recover without having first served such detailed bill. If a bill in the form of the one last served by him is essential to his recovery, he cannot be allowed to amend it in the particulars asked for after this lapse of time. Motion denied.

In re Extradition of HERRIS.

(*District Court, D. Minnesota.* November 16, 1887.)

1. EXTRADITION—WARRANT—AGENT OF FOREIGN GOVERNMENT.
   A complaint made before a United States commissioner, upon which a warrant issues for the arrest and extradition of a fugitive from justice, is fatally defective if it does not show on its face that the person making it was an agent or representative of the foreign government.
2. SAME—WARRANT—SANCTION OF EXECUTIVE.
   Under the extradition treaty of 1842, between the United States and Great Britain, the sanction of the executive department of state is necessary, as an initiative step, for the surrender of an alleged fugitive, in order to give the commissioner jurisdiction; and where no mandate has issued showing a requisition duly made upon the executive authority of this government, the extradition will not be granted.

On *Habeas Corpus.*

Ryan, Fauntleroy & Kerr, for Herris.

Dist. Atty. Baxter, contra.

NELSON, J. There are defects in the proceedings for extradition of John Karl Herris, an alleged fugitive from justice of the province of Ontario, in the dominion of Canada, which entitle the prisoner to a discharge from arrest, for the reason that the commissioner had no jurisdiction to act in the matter.

1. The complaint upon which the commissioner issued a warrant, nowhere on its face shows that the person who made it was an agent or representative of the foreign government.

2. No mandate issued, showing a requisition duly made upon the executive authority of this government, for the surrender.

I have had occasion often to express my views on the questions under consideration; and, until a decision binding on this court is made adverse to my ruling in previous cases, I shall determine, as heretofore, that the sanction of the executive department, as an initiative step for the surrender of an alleged fugitive, is necessary to the jurisdiction of the commissioner. The opinion of the late Mr. Justice NELSON, of the United States supreme court, concurred in by the then Chief Justice TANEY and Mr. Justice DANIEL (see *In re Kaine*, 14 How. 129) commends itself to my judgment as a sound interpretation of the treaty of 1842, between the United States and Great Britain and the law of congress, and I have followed it.

Again, the complaint is made, under oath to the commissioner, by James Wilson Murray, and is in the following words:

"*United States of America, District of Minnesota—ss.:* Before me, W. A. Spencer, a commissioner of the circuit court of the United States in and for said district, and duly authorized by said court to issue warrants for the arrest of fugitives from justice of foreign governments, personally came James Wilson Murray, who, being duly sworn, upon his oath says that one John Karl Herris did, on the thirteenth day of June, A. D. 1887, at the county of Waterloo, in the province of Ontario, in the dominion of Canada, within the jurisdiction and government of said dominion of Canada, and her Britannic Majesty, commit the crime of forgery, that is to say: The said John Karl Herris did, at the time and place aforesaid, unlawfully, wrongfully, and feloniously forge a certain promissory note for eight hundred dollars, ($800,) dated June 13, A. D. 1887, and payable three months after the date thereof, and purporting to have been made by Peter L. Siteweller in favor of J. K. Herris and John Herris, by writing and signing the name of the said Peter L. Siteweller to the said promissory note, with intent to defraud. That the said John Karl Herris is a fugitive from the justice of the said dominion of Canada, and province of Ontario, and the said her Britannic Majesty, and did, on or about June 13, A. D. 1887, flee into the jurisdiction of the United States for the purpose of seeking an asylum, and that the crime with which the said John Karl Herris is charged is one embraced in the treaty of extradition between the United States and her Britannic Majesty, dated August 9, A. D. 1842. J W. MURRAY.

"Subscribed and sworn to before me this twenty-ninth day of September, A. D. 1887. WM. A. SPENCER, United States Commissioner."

It does not appear in this complaint that the deponent was an officer of, or a representative or agent of, the Canadian dominion; nor is there any recital in the warrant that it issued upon the complaint of the duly accredited agent of that government. The complaint at least should purport to be made by an officer or agent of the foreign government.

Prisoner is discharged.

AMERICAN BOX MACHINE CO. v. DAY and others.

(Circuit Court, E. D. Pennsylvania. May 13, 1887.)

PATENTS FOR INVENTIONS—LETTERS PATENT No. 298,879—NOVELTY—COMBINATION OF OLD DEVICES.

Letters patent No. 298,879 were granted to Gordon Monroe, May 20, 1884, for "Box Covering and Trimming Machine." The claims in the patent were for a new and useful combination of old devices. *Held*, that the combination possessed patentable novelty, and the patent was valid.

In Equity.

Redding, Wetmore & Jenner, for complainant.

Moon & Bliss, for respondents.

BUTLER, J. A very few words will express all we desire to say in this case. The suit—as now pressed—is for infringement of claims 2 and 3 of letters patent No. 298,879, issued to Gordon Monroe, May 20, 1884, for "Box Covering and Trimming Machine." These claims are for the machine itself, which consists of a combination of old devices. The defense is twofold,—want of patentable novelty and non-infringement. The presumption in favor of patentable novelty—arising from the patent—must be allowed to stand until overborne by countervailing proof, certain and convincing. Such proof we do not find in the case. To discuss and contrast the several exhibits relied upon by the defendants, and the conflicting testimony of witnesses, would serve no useful purpose. It is sufficient to say that the evidence does not show such a prior state of the art as would justify a finding against the patent. The combination seems to be new, highly useful, and, we think, shows invention. There can be little, if any, room to doubt that the defendants' machine is substantially like the plaintiff's. It embraces the same elements, (or their mechanical equivalents,) combined in the same manner, and operates in the same way. The circumstance that its pasting-cylinder may be an improvement on the plaintiff's is unimportant. Notwithstanding the earnestness and ability with which the defense was presented, a careful examination of the case has led us to this conclusion.

A decree must be entered for the plaintiff as above indicated.

HAMMERSCHLAG MANUF'G CO. v. BANCROFT.

(Circuit Court, N. D. Illinois. September 5, 1887.)

1. PATENTS FOR INVENTIONS—WAXING PAPER—HAMMERSCHLAG AND STENHOUSE INVENTIONS.

The fifth claim of reissued letters patent No. 8,460, October 22, 1878, to Siegfried Hammerschlag is for a "method * * * of waxing paper, consisting in spreading the wax upon the surface, heating the paper from the opposite side to spread and fuse the wax into the fabric of the paper, removing the surplus wax, and remelting and polishing the wax upon the paper. * * *"

The paper is passed over and in contact with a heated revolving cylinder, partly submerged in a vat of melted paraffine, then over a scraper, and lastly over a polishing roller. A scraper is also applied to the cylinder, between the wax-trough and the place of contact with the paper. In the Stenhouse English patents granted in 1862, and the American patent No. 97,983, to Cheney and Milliken, assignees of Stenhouse, December 14, 1869, one method of coating or impregnating fabrics with paraffine, to render them less liable to decay, and less pervious to air and liquids, was by passing them over one or more hot metallic rollers, working in a bath of paraffine; the amount of paraffine applied to the rollers being regulated by a gauger or knife or brush, and the incorporation of the paraffine into the fabric being effected by hot rollers, which also removed any excess of paraffine. Another method was to stretch the fabric on a heated metallic surface, and rub over it a flat block of paraffine, then compressing by a hot flat-iron or hot rollers. *Held*, that the Stenhouse invention was no anticipation of the Hammerschlag invention; following *Hammerschlag* v. *Scamoni*, 7 Fed. Rep. 584.

2. SAME—INFRINGEMENT.

In defendant's machine the paper is passed from the supply reel under a heated pipe submerged in paraffine, then up between two cylinders or squeeze-rollers located over the vat of paraffine; the process of waxing paper being by heat, pressure, and friction, substantially as in plaintiff's process. *Held* an infringement of the fifth claim of plaintiff's patent.

3. SAME—PROCESS OR ART.

The plaintiff's patent being for a process or an art, it is not limited to the particular means described in the patent for carrying out the process.

In Chancery.

Roscoe Conkling, *Frost & Coe*, and *Jesse A. Baldwin*, for complainant.

John G. Elliott and *Lysander Hill*, for defendant.

GRESHAM, J. This suit is brought to enjoin the defendant from infringing the fifth claim of reissued letters patent No. 8,460, issued October 22, 1878, to Siegfried Hammerschlag, complainant's assignor; also the first, third, and fourth claims of letters patent No. 217,280, granted on the second day of June, 1879, to the same person, and by him assigned to the complainant. The fifth claim in the reissue is identical with the second claim in the original patent. *Gage* v. *Herring*, 107 U. S. 640, 2 Sup. Ct. Rep. 819.

After argument of counsel, Judge BLODGETT granted a preliminary injunction against the defendant on all the claims. The complainant's chief reliance is upon the fifth claim in the reissue, which is for a process of waxing paper by machinery. I do not understand that any relief is expected upon the other patent, (No. 217,280,) which is for an improvement in machinery for waxing paper, and no further attention will be given it. The answer contains the usual defenses, but those chiefly relied on are anticipation by a large number of machines and patents, both American and foreign, and non-infringement. The fifth claim of the reissue is as follows:

"The method herein set forth of waxing paper, consisting in spreading the wax upon the surface, heating the paper from the opposite side to spread and fuse the wax into the fabric of the paper, removing the surplus wax, and re-melting and polishing the wax upon the paper, substantially as set forth."

The paper is passed from a supply reel over and in contact with a heated cylinder, which revolves partly submerged in a vat containing

melted paraffine, thus receiving the wax, to and over a heated roller which diffuses the wax equally, then to and over a scraper which removes the surplus wax, and finally to and over a polishing roller. A scraper is also attached to the cylinder that takes up the melted paraffine and applies it to the paper, and this scraper is applied between the wax-trough and the place of contact with the paper, for the purpose of removing surplus wax, and distributing the remaining wax uniformly over the cylinder. A full description of the process, step by step, and the means of carrying it out, will be found in *Hammerschlag* v. *Scamoni*, 7 Fed. Rep. 584. In an elaborate opinion in that case, Judge BLATCHFORD held that Hammerschlag's invention was new and useful; that he was a pioneer in the art,—the creator of a new industry or article of commerce; and in sustaining the fifth claim gave it a broad and liberal construction. This decision was followed in the Third circuit (*Hammerschlag* v. *Garrett*, 9 Fed. Rep. 43) by Judge BUTLER, the circuit judge concurring; also by Judge LOWELL in the First circuit, in *Hammerschlag* v. *Wood*, 18 Fed. Rep. 175.

In referring to the broad construction given to the fifth claim by Judge BLATCHFORD, Judge LOWELL said: "I am myself of opinion that the claim may and should have this liberal construction." It is true that, on a motion in *Hammerschlag* v. *Garrett* to commit the defendant for contempt, the court held the fifth claim was not entitled to the liberal construction given to it in the *Scamoni Case*; but on a similar motion in the latter case, before Judge BLATCHFORD, he adhered to this first interpretation of this claim, and held that dipping the web itself into a bath of wax, instead of dipping the cylinder into the bath, and carrying the paper over the cylinder, was an infringement of the fifth claim. It is not necessary to refer to other cases for infringement of the fifth claim, in some of which the complainant obtained preliminary or perpetual injunctions, while failing in others, on the ground, however, that the proof did not show infringement.

The two English patents granted to John Stenhouse in 1862, and the American patent, No. 97,983, granted to Cheney and Milliken, as assignees of Stenhouse, December 14, 1869, are relied on here, as they were in the three cases above cited, as a complete anticipation of the Hammerschlag invention. Other patents and machines are also relied on as anticipating defenses; but I shall not notice them further than to say that if the fifth claim, broadly interpreted as it was by Judges BLATCHFORD and LOWELL, was not anticipated by Stenhouse, it was not anticipated at all. The Stenhouse invention was for a new improvement in rendering wood, leather, paper, and textile fabrics less pervious to air and liquids, and less liable to decay, by coating or impregnating them with paraffine. In one of his specifications, Stenhouse thus speaks of his invention:

"One way in which I treat leather and textile fabrics is as follows: I take a plate of iron or other metal, the upper surface of which is quite clean, and this I heat to a temperature of 130 to 250 Fahrenheit, or even higher if desirable, either by placing it over a suitable furnace, or by means of low or high

pressure steam, or a metallic or other bath. On this plate I stretch out the cloth or leather which I wish to coat or impregnate, and hold it tight and flat, by means of a frame, or some other suitable arrangement. When it has become sufficiently warm to soften or melt the paraffine easily, I then rub over it, on the wrong side of the cloth, a flat rectangular block of solid paraffine, so as to coat its surface as evenly as possible. The cloth is then strongly compressed by means of a hot flat-iron or hot rollers, or other suitable arrangement, in order to distribute the paraffine more equally among the fibres. * * * This plan will serve also for preparing water-proof paper. A thorough incorporation of the paraffine with the cloth is completed by calendering between hot metallic rollers, as in the previous case. * * * When fabrics of considerable length have to be treated with paraffine, the process can be made continuous by passing them over one or more hot metallic rollers coated with paraffine from working in a bath of that substance. The excess of paraffine is removed by means of what is called a gauge-spreader, having a gauger or knife fixed about it, and furnished with screws so as to regulate the amount of paraffine applied to the rollers. The amount of paraffine can also be regulated by means of a brush or similar apparatus, also acting on a roller; the thorough incorporation of the paraffine into the fabric being subsequently completed with hot rollers, by means of which any excess of paraffine can also be removed."

Judge BLATCHFORD held that there was nothing in the Stenhouse patents which anticipated reissued patent No. 8,460.

It is insisted by the defendant's counsel that no drawings of a machine in accordance with the Stenhouse patents were shown to Judge BLATCHFORD and Judge LOWELL, and that they held the Hammerschlag invention was not disclosed in the Stenhouse patents without understanding those patents, or the prior state of the art. The defendant cannot thus avoid the force of the opinions of these two learned judges. In disposing of the contempt motion in the *Scamoni Case*, Judge BLATCHFORD again considered the reissued patent and the Stenhouse patents, and stated that, while no drawings accompanied the latter, he had carefully examined the specifications.

The defendant makes waxed paper on two machines, which are so nearly alike that they need not be noticed separately. He passes a web of paper from a supply reel under a heated pipe or guide, which is submerged in a bath of paraffine, and then passes the paper up between two cylinders or squeeze-rollers which are located over a vat containing the melted paraffine. These squeeze-rollers remove the surplus wax, force the wax into the fibre of the paper, and smooth or polish the surface. In short, the defendant, by his machines, makes waxed paper by the action of heat, pressure, and friction; the process being substantially the same as the process covered by the fifth claim under the broad construction already referred to. The complainant's expert witness, Knight, in speaking of the defendant's machines and process, says:

"Referring to the fifth claim in reissue No. 8,460 and complainant's exhibits 'Bancroft Patent' and 'Bancroft Machine No. 2,' I find that the operation of the machine made in accordance with said exhibits would carry out the process pointed out in said fifth claim in all its essential conditions of spreading and forcing the wax upon and through the paper, removing surplus wax, and smoothing the surface by the combined agency of heat, pressure, and

friction. In the words of Judge LOWELL, I find that the wax is spread, equalized, polished, and diffused by the defendant's machine. The lower roller, or cylinder, in defendant's machine is described in the exhibit 'Bancroft Patent' as of polished metal. In the exhibit 'Bancroft Machine No. 2,' it is shown hollow, and connects with steam-pipes, which serve to heat the bath of melted wax, and to remelt the wax, and to smooth the surface of the waxed paper after it leaves the pressure rolls; while the upper pressure cylinder or roller is described in the exhibit 'Bancroft Patent' covered with a jacket of rubber, or other suitable material, and suitable means are provided for carrying the web of paper under the surface of the melted wax in the bath, as in several other mechanisms which have been enjoined in the course of litigation under the fifth claim in question. The manifest and necessary effect of the apparatus shown and described in the exhibit 'Bancroft Patent,' and represented in the exhibit 'Bancroft Machine No. 2,' will thus be to spread and diffuse the wax on and through the paper, to remove surplus wax, and smooth the surface of the waxed paper, by the combined agency of heat, pressure, and friction; and the defendant's apparatus, therefore, in my opinion, carries out all the essential conditions of the art or process pointed out in said fifth claim of reissued patent 8,460."

Adopting, as I do, the broad construction that has been given to the fifth claim, I think this witness was correct in saying that the defendant makes waxed paper by a method which is essentially the same as the Hammerschlag process.

One of the reasons urged against the identity of the two processes, and against infringement of the fifth claim, is that the defendant passes the paper under a roller submerged in a bath of paraffine, thus applying the wax to both surfaces of the paper, and then passing it through two squeeze-rollers located over the vat. The defendant may not observe the same order in the various steps of the process that we find described in the reissued patent, but it does not follow that the processes are different because the various steps do not succeed each other in precisely the same order. The invention being for a process or an art, the inventor was not restricted to the particular means described in his patent for carrying out his process.

In speaking of the defendant's machine and process, in *Hammerschlag v. Wood*, Judge LOWELL said:

"The defendant's machine, considered as a combination of particular devices, differs somewhat from that of the patent, and is more simple; it gets rid of one cylinder. The principal difference is that it passes the web through the bath directly, instead of passing the cylinder through it, and then passing the paper over the cylinder. I find, however, that the wax is spread, equalized, polished, and diffused by the defendant's machine, and, if the fifth claim of reissued 8,460 is to have the broad interpretation which Judge BLATCHFORD appears to me to give it, it is done in a substantially similar way."

The record in this case contains the same evidence, in the way of alleged anticipating machines and patents, that has been before the courts in prior suits involving the validity of the claim in question, and additional cumulative evidence of the same character.

It may be that, with the Stenhouse machines, and other devices described in the record are capable of being used to some extent in waxing paper, and that with slight modification some of them could be used

successfully for that purpose; but the evidence shows that, prior to the Hammerschlag invention, the supply of waxed paper was limited and expensive, and imperfect in quality. It remained for Hammerschlag to devise a means or process of producing an article superior in quality and finish to anything that had been previously produced, and in quantities and at prices which brought it within the reach of the public. His patent has been sustained by the courts in a number of contested cases; and a proper regard for uniformity of decision, especially in litigation of this character, should incline other courts to hold the patent valid against the same, or substantially the same, defenses, until all controversy over its validity is put at rest by a decree of the supreme court of the United States.

LANDESMANN *v.* JONASSON and others.

(*Circuit Court, S. D. New York.* September 4, 1887.)

PATENTS FOR INVENTIONS—IMPROVEMENT IN CLOAKS—INVENTION.

In letters patent No. 296,021, of April 1, 1884, to Jacob Landesmann, for an improvement in that class of ladies' cloaks known as "Russian Circulars," the improvement consists in extending the inner front parts to the back seams, making a close fitting waist, and leaving the outer part loose and flowing. *Held*, that the improvement was not patentable, neither the tight-fitting garment nor the outside part being new, and the ordinary skill of those practicing the art of cloak-making being adequate to put the two together.

In Equity.

M. B. Philipp, for orator.

Wm. A. Jenner, for defendants.

WHEELER, J. This suit is brought upon letters patent No. 296,021, dated April 1, 1884, and granted to the orator for an improvement in that class of ladies' cloaks known as "Russian Circulars," which consists in extending the inner front parts to the back seams, making a close-fitting waist, and leaving the outer part loose and flowing. The defenses set up and relied upon are that this improvement does not constitute a patentable invention; and that, if it does, the orator was not the first inventor. The statute authorizing the grant of patents seems to contemplate that the invention for which a patent may be granted must be outside of the ordinary skill of those who practice the art to which the invention belongs. Rev. St. U. S. § 4888. There were among those practicing this art designers of styles for fashion, as well as for the comfort of the wearers, and makers to carry out the designs. There were cloaks with close-fitting waists before, as well as these on which the improvement was made with the flowing outer portions. What was accomplished, and what was claimed in the patent, was the putting of a tight waist into a Russian circular in place of the former loose waist. This new style appears to have gone into extensive use for a time, and

was fashionable. After a while the fashion changed, and they went comparatively out of use. The question upon this part of the case appears to be whether this change made in this style of cloaks belonged to the genius of an inventor or to the skill and taste of a designer and maker. These cloaks were warmer, and more convenient in some respects, than Russian circulars of the former styles; but apart from their style they do not appear to have had any superiority in comfort or convenience over other cloaks known and in use. This was new, and if everything new was patentable this would be; but every new thing is not patentable. It must be new and useful, substantially. Rev. St. § 4886; *Atlantic Works* v. *Brady*, 107 U. S. 192, 2 Sup. Ct. Rep. 225; *Slawson* v. *Grand Street R. Co.*, 107 U. S. 649, 2 Sup. Ct. Rep. 663; *Hollister* v. *Benedict*, 113 U. S. 59, 5 Sup. Ct. Rep. 717; *Thompson* v. *Boisselier*, 114 U. S. 1, 5 Sup. Ct. Rep. 1042; *Gardner* v. *Herz*, 118 U. S. 180, 6 Sup. Ct. Rep. 1027; *Pomace Holder Co.* v. *Ferguson*, 119 U. S. 335, 7 Sup. Ct. Rep. 382.

If the designer of such cloaks thought that a close-fitting waist in a Russian circular would be desirable, the skill of a cloak-maker would readily devise one. The waist, when constructed according to the method of the patent, does not appear to be different from ordinary close-fitting waists. The tight-fitting garment was not new, and the outside part was not new, and the ordinary skill of those practicing the art of cloak-making would appear to be adequate to putting them together. On much consideration, what the patent was granted for appears to fall without the domain of patentable invention. Upon this conclusion, and the authorities cited, the bill of complaint cannot be maintained. This result makes the determination of the question of priority unnecessary.

Let there be a decree dismissing the bill of complaint, with costs.

UNITED STATES v. AMERICAN BELL TEL. CO. and others.[1]

(*Circuit Court, D. Massachusetts.* September 26, 1887.)

PATENTS FOR INVENTIONS—CANCELLATION—POWER OF GENERAL GOVERNMENT. In the absence of any specific statute, the United States cannot maintain a bill in equity to cancel a patent for an invention. *Attorney General* v. *Chemical Works*, 2 Ban. & A. 298, *post*, 608, followed.

Bill in Equity by the United States, by direction of the solicitor general acting as attorney general against the American Bell Telephone Company and Alexander Graham Bell, to cancel letters patent of the United States No. 174,465, dated March 7, 1876, and No. 186,787, dated January 30, 1877, granted to Alexander Graham Bell, relating to the art of transmitting speech by electricity, on the ground that they were obtained by fraud. Defendants demurred to the bill generally and specially.

[1] Reported by E. C. Day, Esq., of the Editorial Staff of the National Reporter System.

E. N. Dickerson, *Chauncey Smith*, and *J. J. Storrow*, for the demurrer.

These patents have been vindicated in the courts. *Telephone Co.* v. *Dolbear*, 15 Fed. Rep. 448; *Same* v. *Telephone Co.*, 27 Fed. Rep. 663. When this bill was filed the records in these suits were under advisement by the supreme court. This bill asks this court to usurp the place of the supreme court; to find that all those decisions are wrong; to restrain those courts from enforcing their orders; to enjoin the supreme court from hearing those cases; to enjoin this court and all other circuit courts from obeying the supreme court mandates in those cases; to enjoin the Bell Company from asserting any right under those patents in any tribunal whatever. This cannot be done. *Attorney General* v. *Chemical Works*, 2 Ban. & A. 298, *post*, 608; *Neilson's Hot-Blast Patent*, Webst. Pat. Cas. 665; *U. S.* v. *Colgate*, 21 Fed. Rep. 318.

The attorney general has no power to bring, nor this court any power to entertain, a bill to cancel a patent for inventions under any circumstances. The attorney general is an officer of limited powers; this court is a court of limited jurisdiction. They can only exercise such powers as have been conferred upon them by law.

The terms of the patent act, and the practice and decisions under it, show that the proceeding has not been authorized. From 1790 to 1836 the power existed by statute in certain cases. Those statutes were repealed in 1836. Since that time only one patent has been canceled by bill, (*Gunning's Case*, 18 Fed. Rep. 511,) and in that case the patentee confessed that his patent was void. The other cases (four in number) have been dismissed on demurrer.

Where the patent system is the creation of statute this proceeding rests on positive enactment. In England, where the system rests solely on royal prerogative, *scire facias* to cancel patents has been adopted both by the crown and by express statute. Congress has the "sole power" over patents, and by the acts of 1790 and 1793 gave *scire facias* in certain cases. The power rested solely on the statute, and could not be exercised without it. *Ex parte Wood*, 9 Wheat. 603, (1824.) Act of 1836 repealed all provisions allowing proceedings to cancel patents, except in the case of interfering patents, which was retained by *express enactment*.

A bill in equity to cancel a patent for an invention cannot be maintained where a *scire facias* cannot. To grant a patent is an act of sovereignty. Its cancellation is equally an act of sovereignty. A bill will lie to cancel a patent for lands because the king may come into chancery in respect to his property like any other party. *Attorney General* v. *Vernon*, 1 Vern. 277. So the United States, as a property owner, may file a bill to cancel a patent for lands. But the United States does not grant a patent for an invention out of that which was property in its hands before the grant, or will become property in its hands after the expiration or cancellation of the patent.

The right to grant or cancel a patent for an invention is a governmental prerogative which congress alone has power to exercise. To assert that the "government" which grants can cancel, is to say that congress,—the legislative power, and not the judicial power,—can authorize the suit to recall. *Mowry* v. *Whitney*, 14 Wall. 439. The power can only be exercised in the manner prescribed by congress, and not otherwise. *McCulloch* v. *Maryland*, 4 Wheat. 317; *Osborn* v. *Bank*, 9 Wheat. 738; *McClurg* v *Kingsland*, 1 How. 206; *Evans* v. *Jordan*, (a suit on a patent,) 9 Cranch, 199; *Kohl* v. *U. S.*, 91 U. S. 367. This is the basis for suits to cancel patents for land. *U. S.* v. *Schurz*, 102 U. S. 396, and citations.

Congress has not only by failing to give the power in the case of patents for inventions, by any existing legislation, but by its course of legislation,—its former grant of it, and the repeal of that grant,—prohibited it.

The power invoked has never been sustained by the supreme court, nor has any case been before it which called for its decision. It has never been elab-

orately considered at circuit but once, and then the power was denied. *Attorney General* v. *Chemical Works*, 2 Ban. & A. 298, 9 O. G. 1062, and *post*, 608. In *Rubber Co.* v. *Goodyear*, 9 Wall. 796, (an infringement suit,) the court decided that the question of fraud in procuring an extension was not open in an infringement suit, and left it to be regulated by "the principles of general jurisprudence." An action was then brought to cancel the patent, (*Rubber Co.* v. *Goodyear*, 9 Wall. 811,) and the bill was dismissed for want of equity; the patent having expired. *Mowry* v. *Whitney*, 14 Wall. 441, was an action to cancel a patent brought in the name of a private individual, and the court held the action could not be maintained. In *Mahn* v. *Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174, no reference was made to proceedings to cancel except to distinguish them from defenses in an infringement suit. *Gunning's Case*, 18 Fed. Rep. 511, held a bill would lie to cancel for *fraud;* but the action was not defended, and the fraud was admitted. In *U. S.* v. *Colgate*, *post*, 624, Judge WALLACE dismissed the bill as not resting on charges of fraud, and the patent had already been sustained. In *U. S.* v. *Frazer*, 22 Fed. Rep. 106, bill was dismissed as not involving fraud, and the ground could be considered in an infringement suit.

This bill does not state a case for equitable interference, within the general rules of equity jurisprudence.

The bill must affirmatively show that complainant is authorized to file it, and that the court is empowered to grant the relief.

The case made by the general frame of the bill, which is the only case the court deals with, (*Eyre* v. *Potter*, 15 How. 42,) rests on the general principles of equity jurisdiction relating to the cancellation of deeds, and can be extended no further. The bill avers that it is the right, and in proper instances the duty, of the attorney general to bring the bill for cancellation. If the power to cancel, like the power to grant, is a sovereign power, it cannot be exercised without the positive authority of congress. If the bill is to be maintained on the general equity power to cancel deeds, then the United States is to be governed by the rules governing a bill of a private suitor to cancel a deed. *U. S.* v. *Railroad*, 98 U. S. 569; *Fontain* v. *Ravenel*, 17 How. 369; *People* v. *Ingersoll*, 58 N. Y. 1; *City of Georgetown* v. *Coal Co.*, 12 Pet. 78; *Irwin* v. *Dixion*, 9 How. 27; *Miller* v. *Kerr*, 7 Wheat. 1; *Attorney General* v. *Detroit*, 26 Mich. 269; *Attorney General* v. *Ice Co.*, 104 Mass. 239; *Davenport* v. *Dodge*, 105 U. S. 242. This doctrine is true also when equity is invoked in aid of the prerogative right. *Root* v. *Railway Co.*, 105 U. S. 189, 192. Whatever be the foundation of the bill, it must not only make out a right, *e. g.*, that the patent is invalid, but must show grounds calling for the interposition of equity. The United States as a plaintiff in equity is subject to the rules of equity. *Brent* v. *Bank*, 10 Pet. 596, 614; *U. S.* v. *Throckmorton*, 4 Sawy. 58, affirmed on appeal, 98 U. S. 61; *U. S.* v. *Tichenor*, 12 Fed. Rep. 415; *U. S.* v. *Beebe*, 17 Fed. Rep. 37, 41; Story, Eq. Pl. 813; 2 Story, Eq. Jur. § 1520, and note 3. The bill must show on its face by specific allegations not only an equity in support of it, but that there is no equity to impair it; and where there are any facts or circumstances from which a countervailing equity may reasonably be inferred, such inference must be displaced by positive averments in the bill. *Miller* v. *Kerr*, 7 Wheat. 1; *U. S.* v. *Atherton*, 102 U. S. 372; *Sullivan* v. *Railroad Co.*, 94 U. S. 806; *Lansdale* v. *Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350; *Stearns* v. *Page*, 7 How. 819, 829; *Moore* v. *Greene*, 2 Curt. C. C. 202, 19 How. 69; *Badger* v. *Badger*, 2 Wall. 87, 94; *The Key City*, 14 Wall. 653; *Harwood* v. *Railroad Co.*, 17 Wall. 78; *McQuiddy* v. *Ware*, 20 Wall. 14, 19; *Marsh* v. *Whitmore*, 21 Wall. 178, 185; *U. S.* v. *Throckmorton*, 98 U. S. 61; *Wood* v. *Carpenter*, 101 U. S. 135, 140; *Quinby* v. *Conlan*, 104 U. S. 420; *Ambler* v. *Choteau*, 107 U. S. 586, 590, 1 Sup. Ct. Rep. 556; *Wollensak* v. *Reiher*, 115 U. S. 96, 5 Sup. Ct. Rep. 1137; *Van Weel* v. *Winston*, 115 U. S. 228, 6 Sup. Ct. Rep. 22; *Blake* v. *Stafford*, 6 Blatchf. 196,

200; *Hazard* v. *Griswold*, 21 Fed. Rep. 178; *Wallingford* v. *Mutual Soc.*, 5 App. Cas. 685. This it does not do.

The bill rests mainly on the jurisdiction of equity to cancel or reform contracts in cases of fraud practiced by the grantee on the grantor, or *mutual* mistake. The mistake of the grantor alone is no ground. Kerr, Fraud & M. 479; *Rooke* v. *Kensington*, 2 Kay & J. 753; *Fowler* v. *Fowler*, 4 De Gex & J. 250; *Griffiths* v. *Jones*, L. R. 15 Eq. 279; *Sells* v. *Sells*, 1 Drew. & S. 42. No case of *mutual* mistake is made out, nor is there an allegation of a single fraudulent act of Bell or his representatives.

Equity will not interfere to cancel a deed or contract, simply because it is void, if the invalidity can be shown in any suit brought to enforce it, (*Insurance Co.* v. *Bailey*, 13 Wall. 616; *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *Phelps* v. *Harris*, 101 U. S. 375; *Hapgood* v. *Hewitt*, 119 U. S. 226, 7 Sup. Ct. Rep. 193,) except to avoid a multiplicity of suits, in cases where the decision on the bill to cancel will be binding on all the parties, (*Orton* v. *Smith*, 18 How. 263;) or in cases where the facts showing invalidity rest merely in the memory of living witnesses, and the suit to enforce the contract may be delayed until such witnesses are dead. The bill does not state a case within these rules. The grounds which make the patent invalid could every one be set up in an infringement suit, and there is no suggestion in the bill to the contrary.

No controlling decision can be made here. The power invoked is unilateral since the defendants cannot file a cross-bill to reform the letters patent. *Butterworth* v. *U. S.*, 112 U. S. 50, 5 Sup. Ct. Rep. 25. Equity will not exert her power in favor of a plaintiff unless he is the sole party in interest, or so situated with reference to the parties in interest as to render a decision against him binding on them. *Kerrison* v. *Stewart*, 93 U. S. 155, 161; *Orton* v. *Smith*, 18 How. 263.

The bill must show some interest to be benefited by the decree. *Marye* v. *Parsons*, 114 U. S. 328, 5 Sup. Ct. Rep. 932; *U. S.* v. *Railroad Co.*, 98 U. S. 589; *U. S.* v. *Minor*, 114 U. S. 244, 5 Sup. Ct. Rep. 836.

The United States granted away by these letters no property which it owned; the cancellation will give it nothing it can sell to another. Nor does the patent prevent an identical grant to another, nor the enforcement of that grant on lawful grounds. Rev. St. 4904, 4915. But a land patent precludes a second grant, hence the ground of equitable interference. *Van Wyck* v. *Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336; *Moore* v. *Robbins*, 96 U. S. 530; 4 Op. Atty. Gen. 149; 13 Op. Atty. Gen. 456. If the United States sues as trustee for the people, the bill must state an equity arising out of their interests. *Orton* v. *Smith*, 18 How. 264; *Kerrison* v. *Stewart*, 93 U. S. 161.

A suit to cancel and a suit to enforce have in *actual interest* as close connection as if between the same parties. *Bronson* v. *Kinzie*, 1 How. 311; *White* v. *Hart*, 13 Wall. 648. There is therefore no equity to maintain a bill to cancel against a patent sustained in an infringement suit. Decrees in equity bind all persons whose substantial interests are represented in the cause. *Weale* v. *Water-Works*, 1 Jac. & W. 369; *Adair* v. *New River Co.*, 11 Ves. 429. When a patent has been once declared valid, courts will follow that decision unless some new ground is shown. *Purifier Co.* v. *Christian*, 4 Dill. 448; *Excavating Co.* v. *Lauman*, 12 Fed. Rep. 788; *Rumford Co.* v. *Hecker*, 10 O. G. 289; *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 793. Equity will not interfere against titles which have been judicially determined, unless upon ground which could not elsewhere be presented. *Smith* v. *McIver*, 9 Wheat. 532, 534; *Baltance* v. *Forsyth*, 24 How. 183; *Hendrickson* v. *Hinckley*, 17 How. 443; *Bank* v. *Cooper*, 20 Wall. 171; *Insurance Co.* v. *Bangs*, 103 U. S. 780. There is no equity to support a bill to cancel a sustained patent on grounds which are open in an infringement suit. *Neilson's Hot-Blast Patent*, Webst. Pat. Cas. 665; *U. S.* v. *Colgate*, 21 Fed. Rep. 318; *Same* v. *Same*,

post, 624; *Asbestos Co.* v. *Salamander Co.*, 13 Blatchf. 453; *Celluloid Co.* v. *Vulcanite Co.*, Id. 375; *U. S.* v. *Frazer*, 22 Fed. Rep. 106; *Town of Mt. Zion* v. *Gillman*, 9 Biss. 479, 14 Fed. Rep. 123. It can be inferred from the bill that these patents have been universally sustained. *U. S.* v. *Atherton*, 102 U. S. 372; *Marquez* v. *Frisbie*, 101 U. S. 478. The court will take judicial notice of the fact that the patent has been sustained. *U. S.* v. *Railroad*, 98 U. S. 569; *Same* v. *Same*, 91 U. S. 72.

On a bill by the United States seeking to cancel a grant regular on its face, reciting that all the requirements of the law have been complied with, when the bill shows on its face that 11 years have elapsed since the issue of the grant; that it is now in the hands of a third person who is not alleged to have had knowledge of the defects,—the fact that the grant is by the United States, and is alleged to have been made in violation of the interests of the public, does not take the case out of the ordinary rules which equity applies to those who ask her aid, and in the face of such recitals the grant must stand. *Fletcher* v. *Peck*, 6 Cranch, 87, 133; *Railroad* v. *Attorney General*, 118 U. S. 694, 7 Sup. Ct. Rep. 66; *Grant* v. *Raymond*, 6 Pet. 218; *U. S.* v. *Atherton*, 102 U. S. 372; *U. S.* v. *Throckmorton*, 4 Sawy. 58, 98 U. S. 61; *U. S.* v. *McLaughlin*, 30 Fed. Rep. 162; *U. S.* v. *Minor*, 29 Fed. Rep. 134; *U. S.* v. *Beebee*, 17 Fed. Rep. 37, 41; *The Siren*, 7 Wall. 152; *Brent* v. *Bank*, 10 Pet. 596, 614; *Lytle* v. *Arkansas*, 9 How. 328. The supreme court has applied the doctrine of estoppel by recitals in such cases to actions on county bonds. *Zabriskie* v. *Railroad*, 23 How. 381; *Commissioners* v. *Aspinwall*, 21 How. 539; *Hotel Co.* v. *Wade*, 97 U. S. 13; *Lexington* v. *Butler*, 14 Wall. 282; *East Lincoln* v. *Davenport*, 94 U. S. 801; *Clay Co.* v. *Savings Soc.*, 104 U. S. 579; *Rock Creek* v. *Strong*, 96 U. S. 271; *Sherman Co.* v. *Simonds*, 109 U. S. 735, 3 Sup. Ct. Rep. 502; *San Antonio* v. *Mehaffy*, 96 U. S. 312; *Nauvoo* v. *Ritter*, 97 U. S. 389.

Whether the patentee was entitled to the patent must be tried in every action by him for infringement. *Mahn* v. *Harwood*, 112 U. S. 358, 5 Sup. Ct. Rep. 174; *Gardner* v. *Herz*, 118 U. S. 191, 6 Sup. Ct. Rep. 1027.

Equity will not cancel against a purchaser for value when the invalidity of the grant can be set up as a defense in the litigation likely otherwise to arise. *U. S.* v. *Minor*, 114 U. S. 233, 243, 5 Sup. Ct. Rep. 836, 29 Fed. Rep. 134.

The recitals in the patent are *prima facie* true, and in this action are absolutely true, except so far as they are displaced by specific allegations in the bill. *Brown* v. *Piper*, 91 U. S. 42; *Terhune* v. *Phillips*, 99 U. S. 592; *King* v. *Gallun*, 109 U. S. 99, 3 Sup. Ct. Rep. 85.

The grant of the patent is an adjudication which binds the United States as any other adjudication. *Butterworth* v. *U. S.*, 112 U. S. 50, 5 Sup. Ct. Rep. 25. And cannot be impeached for fraud of the agent of the United States. *U. S.* v. *Throckmorton*, 98 U. S. 61; *U. S.* v. *Atherton*, 102 U. S. 372; *Attorney General* v. *Chemical Works*, 2 Ban. & A. 298, *post*, 608. And it is immaterial that no appeal was taken from the decision of the commissioner of patents. *Leggett* v. *Avery*, 101 U. S. 256; *Vulcanite Co.* v. *Davis*, 102 U. S. 222.

But fraud in obtaining a patent for an invention is of no importance; for if the holder "is not justly entitled to it under the law," the objection can be raised in any infringement suit. *Mahn* v. *Harwood*, 112 U. S. 354, 358, 5 Sup. Ct. Rep. 174; *Gardner* v. *Herz*, 118 U. S. 191, 6 Sup. Ct. Rep. 1027.

Defects in the procedure in obtaining this patent cannot now be taken advantage of, since if they exist it is too late to correct them. *Fletcher* v. *Peck*, 6 Cranch, 83, 133; *Polk's Lessee* v. *Wendell*, 5 Wheat. 293, 304; *Grant* v. *Raymond*, 6 Pet. 218; *Railroad* v. *Attorney General*, 118 U. S. 693, 7 Sup. Ct. Rep. 66; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Lytle* v. *Arkansas*, 9 How. 314. The patent is conclusive against the grantor on these questions, (*Tarr* v. *Folsom*, 1 Holmes, 312, 5 O. G. 92, 1 Ban. & A. 24; *Anilin* v.

Cochrane, 16 Blatchf. 155, 4 Ban. & A. 215;) especially so in favor of a subsequent purchaser, (*Seymour* v. *Osborne*, 11 Wall. 541.)

The allegations of the bill are too vague. The deceit alleged is stated to have been accomplished by the language of the specifications. But the specifications have been sustained as covering the telephone. *Telephone Interferences*, 15 O. G. 776; *Telephone Co.* v. *Dolbear*, 15 Fed. Rep. 448; *Same* v. *National Imp. Tel. Co.*, 27 Fed. Rep. 663. There is no allegation of *willful intent to defraud*, nor any allegation of concealment, nor any allegation of recent discovery of fraud on the part of the United States. *In re Broderick's Will*, 21 Wall. 519; *Lockwood* v. *Cleveland*, 20 Fed. Rep. 164.

The fact that this form of action involving such enormous power is so unprecedented is a reason why this court should sustain the demurrer. *Mississippi* v. *Johnson*, 4 Wall. 500.

No power exists in the United States to cancel a patent in the absence of specific statute.

The English patent system was carried on as a part of the royal prerogative. Our constitution changed the character of the system by assigning the power to congress, and making the whole the creation of congressional legislation. There was no implied adoption of the English patent system, as there was of the common-law system. In countries where the power to cancel patents is retained it is now given by positive provision of statute. None of those countries have the examination before the issue of the patent, which takes the place, under the act of congress 1836, of the suit to cancel.

The basis of *scire facias* in England was—*First.* The original absence of any other mode of attacking a patent. *Second.* The branch of the government which grants a patent has the power to take it away. *King* v. *Butler*, 3 Lev. 220, 1 Strange, 141; *Queen* v. *Aires*, 10 Mod. 354; Hind. Pat. 377. Subject only to the need of the permission of the proper officer in order to prevent abuse, it was settled that a private citizen had a *right* to it. Hind. Pat. 384, 385, and cases cited. Gods. Pat. 271. The power of the chancellor to annul patents was not a part of his equity jurisdiction, but because, as the keeper of the great seal, he represented the person of the king. Hind. Pat. 378, 380, 383. *Third.* The ultimate basis was that the patent was granted on representation alone. Hind. Pat. 377.

This system was destroyed by statute, (Act 15 & 16 Vict. *c.* 83, § 15;) but *scire facias* was retained by express enactment. Act 1883, 46 & 47 Vict. *c.* 57, § 116, abolishes *scire facias*, and substitutes "petition to the court" by the attorney general or any authorized by him.

The bill in equity to cancel a patent rests solely on the right of the king, as any private individual, to come into equity in respect to his property. *Attorney General* v. *Vernon*, 1 Vern. 277. This is the United States doctrine as applied to patents for lands. *U. S.* v. *Hughes*, 11 How. 552, 4 Wall. 232; *U. S.* v. *Stone*, 2 Wall. 525; *Cotton* v. *U. S.*, 11 How. 229; *Jackson* v. *Lawton*, 10 Johns. 24. But the United States has no property rights in patents for invention, and a bill will not lie where *scire facias* would not. *Mowry* v. *Whitney*, 14 Wall. 436.

Under the federal constitution the power invoked is in congress, (Const. U. S. art. 1, § 8;) and not in the executive. *Floyd Acceptances*, 7 Wall. 676. No federal officer and no federal court can exercise governmental or judicial powers, unless given it by legislation. Id.; *McCulloch* v. *Maryland*, 4 Wheat. 317; *Osborn* v. *Bank*, 9 Wheat. 738; *McClurg* v. *Kingsland*, 1 How. 206; *Evans* v. *Jordan*, 9 Cranch, 199; *Kohl* v. *U. S.*, 91 U. S. 367. The act of congress of 1836 repealed the right here invoked.

Legislation which undertakes to cover the whole subject excludes all previous rules, whether statutes or common law. Sedg. St. & Const. Law, (2d Ed.) 30, 341, 343, 365, note; *Boston* v. *Shaw*, 1 Metc. 138; *Ellis* v. *Paige*, 1 Pick. 43; *Bartlet* v. *King*, 12 Mass. 537; *Nichols* v. *Squire*, 5 Pick 168;

Com. v. *Cooley*, 10 Pick. 39; *Pollock* v. *Railroad Co.*, 124 Mass. 159; *King* v. *Cornell*, 106 U. S. 396, 1 Sup. Ct. Rep. 312; *State* v. *Wilson*, 43 N. H. 418; *Davies* v. *Fairbairn*, 3 How. 636; *Dexter* v. *Allen*, 16 Barb. 18; *Com.* v. *Cromley*, 1 Ashm. 179; *Goddard* v. *Boston*, 20 Pick. 410.

Under our patent system proceedings not given by statute cannot be implied by analogy. *Butterworth* v. *U. S.*, 112 U. S. 50, 5 Sup. Ct. Rep. 25. The power now invoked did not exist under the acts of 1790 and 1793. *Ex parte Wood*, 9 Wheat. 603.

Congress intended to repeal *scire facias* by the act of 1836. See Phil. Pat. c. 25, and cases cited. Congressional legislation shows the intention not to authorize bills to cancel patents. Act of 1790, 1 St. 109; Act of 1793, Id. 318; Act of 1800, 2 St. 37; Act of 1819, 3 St. 481; Act of 1832, 4 St. 559. Congress by the act of 1836 intended to repeal the power to cancel. See Sen. Doc. 398, 23d Cong. 1st Sess.; Sen. Doc. No. 338, 24th Cong. 1st Sess. Congressional action since then shows that the power invoked does not exist. Sen. Jour. 31st Cong. 1st Sess. 260; H. B. 442, 1st Sess. 29th Cong.; H. B. 102, 1st Sess. 30th Cong.; S. B. 200, 2d Sess. 31st Cong.; S. B. 310, 1st Sess. 32d Cong.; S. B. 405, 1st Sess. 33d Cong.; S. B. 295, 1st Sess. 34th Cong.; Rep. 116, 2d Sess. 45th Cong.; Rep. 1400, 1st Sess. 47th Cong.; Rep. No. 4, 1st Sess. 48th Cong. The repeated refusal of congress to legislate is authority for the non-existence of the power. *U. S.* v. *Railroad Co.*, 120 U. S. 239, 7 Sup. Ct. Rep. 490.

The decisions and *dicta* sustain our view. *Crompton* v. *Belknap Mills*, 3 Fish. 547; *Goodyear* v. *Rubber Co.*, 2 Cliff. 351, 2 Fish. 499; *Rubber Co.* v. *Goodyear*, 9 Wall. 811; *Rubber Co.* v. *Goodyear*, Id. 796; *Merserole* v. *Paper Co.*, 6 Blatchf. 356; *Doughty* v. *West*, 6 Blatchf. 429; *Whitney* v. *Mowry*, 4 Fish. 208; *Mowry* v. *Whitney*, 14 Wall. 434; *Celluloid Co.* v. *Goodyear*, 13 Blatchf. 375; *Attorney General* v. *Chemical Works*, 2 Ban. & A. 298, *post*, 608; *U. S.* v. *Gunning*, 18 Fed. Rep. 511; *U. S.* v. *Frazer*, 22 Fed. Rep. 106; *U. S.* v. *Colgate*, *post*, 624.

The whole bill is an attempt to put into the statute what congress might have put in but did not. This is forbidden. *U. S.* v. *Railroad Co.*, 98 U. S. 617.

John Goode, Special U. S. Atty., for complainant.

The bill is not multifarious in that it joins allegations and prayers for relief in respect to two patents, since the two taken together make but one case. *Campbell* v. *Mackay*, 1 Mylne & C. 603; *Gaines* v. *Chew*, 2 How. 619; *Oliver* v. *Piatt*, 3 How. 333; 1 Coop. Eq. Pl. 182; Mitf. Eq. Pl. (Jeremy,) 181; Story, Eq. Pl. § 271 *et seq.*; Adams, Eq. 309, 310; 1 Daniell, Ch. Pl. & Pr. 384 *et seq.*; *Attorney General* v. *Cradock*, 3 Mylne & C. 85; *Gaines* v. *Mausseaux*, 1 Woods, 118; *Fellows* v. *Fellows*, 4 Cow. 682; *Bedsole* v. *Monroe*, 5 Ired. Eq. 313; *McLean* v. *Bank*, 4 McLean, 430. The mere setting out of more than one letters patent does not render the bill multifarious. *Case* v. *Redfield*, 4 McLean, 526; *Nourse* v. *Allen*, 4 Blatchf. 376; *Fire Alarm Tel. Co.* v. *Chillicothe*, 7 Fed. Rep. 351; *Seymour* v. *Osborne*, 11 Wall. 516; *Bates* v. *Coe*, 98 U. S. 48; *Nellis* v. *Manufacturing Co.*, 13 Fed. Rep. 451; *Manufacturing Co.* v. *Railroad Co.*, 15 Blatchf. 444; *Gillespie* v. *Cummings*, 3 Sawy. 259; *Shickle* v. *Foundry Co.*, 22 Fed. Rep. 105; *Barney* v. *Peck*, 16 Fed. Rep. 413; *Deering* v. *Harvester Works*, 24 Fed. Rep. 90; *Manufacturing Co* v. *Marqua*, 15 Fed. Rep. 400; *Lilliandahl* v. *Detwiller*, 18 Fed. Rep. 176; *Electric Light Co.* v. *Brush-Swan Co.*, 20 Fed. Rep. 502.

The bill sufficiently alleges a wrong, for which there must be a remedy.

Every government has the inherent right to revoke a grant made by it which has been procured by fraud, or which has been made through inadvertence or mistake. *Attorney General* v. *Vernon*, 1 Vern. 276; *King* v. *Butler*, 3 Lev. 220; *Queen* v. *Aires*, 10 Mod. 354.

The attorney general has the power to bring an action to redress a public wrong. *Lord Proprietary* v. *Jenings*, 1 Har. & McH. 92; *Attorney General* v. *Railway Co.*, 35 Wis. 425; *Attorney General* v. *Academy*, 52 Wis. 469, 9 N. W. Rep. 391.

The United States has power to maintain this action, and no additional legislation is necessary. *U. S.* v. *Gunning*, 18 Fed. Rep. 511; *Mowry* v. *Whitney*, 14 Wall. 434.

The United States may properly proceed by bill in equity to cancel patents for land issued ignorantly or in mistake, (*U. S.* v. *Stone*, 2 Wall. 525;) also when it has been defrauded. *U. S.* v. *Hughes*, 11 How. 552; *Field* v. *Seabury*, 19 How. 324; *Hughes* v. *U. S.*, 4 Wall. 232; *Moore* v. *Robbins*, 96 U. S. 536; *U. S.* v. *Throckmorton*, 98 U. S. 61; *U. S.* v. *Minor*, 114 U. S. 233, 5 Sup. Ct. Rep. 836; *Mahn* v. *Harwood*, 112 U. S. 355, 5 Sup. Ct. Rep. 174, dissenting opinion MILLER, J., *Doughty* v. *West*, 6 Blatchf. 433; *Rubber Co.* v. *Goodyear*, 9 Wall. 788. Such has been the practice of the department of justice. 1 Op. Atty. Gen. 458; 4 Op. Atty. Gen. 120.

U. S. v. *Frazer*, 22 Fed. Rep. 106, was not such a case as authorized the institution of a suit in the name of the United States, since the aggrieved party could have brought suit under act of 1836, § 16. *Attorney General* v. *Chemical Works*, 2 Ban. & A. 299, *post* 608, does not decide against the power of the United States, but only the power of the attorney general, to institute the suit.

The great weight of authority is in favor of the bill. Curt. Pat. 663; Walk. Pat.

The only effect of the act of congress of 1836 was to take away from courts the power to annul patents as an incident to a private suit, since that was all that was given by the Acts of 1790 and 1793. The power in the government to vacate a patent is inherent, and a common-law right. The act of 1790 merely conferred the power on private individuals, and the repeal of that act by the act of 1836 can have no effect on the power of the government.

There is no difference, as regards the principle we now contend for, between patents for inventions and patents for land. *U. S.* v. *Gunning*, 18 Fed. Rep. 511; *Mowry* v. *Whitney*, 14 Wall. 434; *Rubber Co.* v. *Goodyear*, 9 Wall. 797. A patent is a contract between the government and the patentee. The consideration is the invention or discovery of the patentee. And if there is a failure of consideration, the contract may be avoided by the party wronged. The inventor can only acquire the right granted by complying with the provisions of the law.

The bill sufficiently states a case entitling plaintiff to the relief prayed for.

Delay in bringing a suit in a patent case is not always laches, (*Green* v. *French*, 4 Ban. & A. 171;) and the bill shows that the suit has been prosecuted with the utmost diligence.

Hunton & Chandler, Special U. S. Attys., for complainant.

The executive department is charged with the execution of the laws, and if it decides that it is necessary to institute suit in the name of the government, the court has no discretion affecting the bringing of the suit. That part of the demurrer alleging that plaintiff has not stated a case that would justify the court, in the exercise of its discretion, in entertaining the bill, sets up no legal ground of demurrer.

No express power is necessary to be conferred upon the executive to file this bill. The United States, as a public and political corporation, has the power inherent in corporations to bring actions to enforce its rights and redress its wrongs. 1 Dill. Mun. Corp. § 31; *Indiana* v. *Woram*, 6 Hill, 33; *Delafield* v. *Illinois*, 2 Hill, 162; Ang. & A. Corp. §§ 369, 370; *U. S.* v. *Bank*, 15 Pet. 401; *Cotton* v. *U. S.*, 11 How. 231; *Dugan* v. *U. S.*, 3 Wheat. 181; Story, Const. § 1674; Spear, Fed. Jud. 101; Cooley, Const. Lim. 15, [12.]

Upon the principle that the king can do no wrong is based the power of the government to redress wrongs done in its name. Broom, Leg. Max. 43, 44. This doctrine applies to patents. Id. 44, and citations. This too is the origin of *quo warranto*, (High, Extr. Rem, §§ 592, 593;) also the old writ of *scire facias*, (*King* v. *Butler*, 3 Lev. 223; Bac. Abr. "Scire Facias," C, 133; 2 Tidd, Pr. 1139, 8th Ed.; 2 Chit. Archb. 8th Ed. 1023; *Brewster* v. *Weld*, 6 Mod. 230; Fost. Sci. Fa. 12, 228; Hind. Pat. 379.)

This inherent right has never been repealed or taken away. The government's right to sue is not affected by statutes relating to suits between individuals. *Tobin* v. *Reg.*, 14 C. B. (N. S.) 505; Chit. Prerog. 266, 383; *Reg.* v. *Copeland*, Car. & M. 516; Broom, Leg. Max. 58; Sedg. St. & Const. Law, 395; *Josselyn* v. *Stone*, 28 Miss. 753; *U. S.* v. *Hoar*, 2 Mason, 314; 1 Kent, Comm. 460.

The fact that congress has permitted by statute certain defense to be made to a patent by a private person when sued in an action for infringement cannot be construed to abridge the power or right of the government to sue. Fost. Sci. Fa. 245; Hind. Pat. 64; Gods. Pat. 270.

Scire facias was practically a double remedy, by the crown, and by the subject in the name of the crown. *Smith* v. *Upton*, 6 Man. & G. 251, note; Gods. Pat. 270; *Brewster* v. *Weld*, 6 Mod. 229; *Rex* v. *Eyre*, 1 Strange, 43; 2 Bac. Abr. "Prerogative," F 1. And the United States, by giving private citizens remedies, in no way abridges its own powers to repeal patents at its own instance. The remedy of the goverment reaches results that cannot be reached in private litigation. Fost. Sci. Fa. 243; 21 Jac. I. c. 3, § 2; 3 Inst. 182, 183; Webb, Pat. 31; Gods. Pat. 262; *Arkwright* v. *Mordaunt*, Dav. Pat. Cas. 69; Id. 37; *Reg.* v. *Arkwright*, Dav. Pat. Cas. 61; Hind. Pat. 305; Webb, Pat. 26, 106; *Trew* v. *Guppy*, 1 Mylne & C. 487.

The officers of the government had no power to grant a patent to Bell for the invention of another, (Broom, Leg. Max. 42; *Thomas* v. *Waters*, Hardr. 443; 2 Rolle, Abr. 164; *King* v. *Butler*, 3 Lev. 220;) nor unless he conformed strictly to the law of procedure, (Walk. Pat. § 178; *Grant* v. *Raymond*, 6 Pet. 218; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 647.) If the law of procedure was not followed, the patent is void. Broom, Leg. Max. 66; *Rex* v. *Wilkes*, 4 Burrows, 2539; *Yick Wo* v. *Hopkins*, 118 U. S. 369, 372, 6 Sup. Ct. Rep. 1064; *Dynes* v. *Hoover*, 20 How. 80; 2 Whart. Ev. § 794, note 4, § 796; *Windsor* v. *McVeigh*, 93 U. S. 282. The demurrer admits the allegations of defects in procedure, and such admission is fatal.

Lapse of time cannot affect the right of the government to bring this action. Broom, Leg. Max. 50; Bac. Abr. "Prerogative" E 6; Sedg. St. & Const. Law, 106.

The bill need not state the evidence upon which the case is to be made out by the government. Story, Eq. Pl. §§ 28, 252, 253; *Chicot* v. *Lequesne*, 2 Ves. 317, 318; *Wheeler* v. *Trotter*, 3 Swanst. 177; *Nesmith* v. *Calvert*, 1 Woodb. & M. 34; *Clark* v. *Periam*, 2 Atk. 337; *St. Louis* v. *Knapp Co.*, 104 U. S. 658.

The demurrer is bad on its face as being a demurrer to the whole bill and also a demurrer to separate and distinct parts of the bill for and upon like grounds. Story, Eq. Pl. §§ 442, 444; Eq. Rules, 32, 36; Daniell, Ch. 584; *Manufacturing Co.* v. *Prime*, 14 Blatchf. 371; *Heath* v. *Railway Co.*, 8 Blatchf. 412; *Livingston* v. *Story*, 9 Pet. 632, 658; *Atwill* v. *Ferrett*, 2 Blatchf. 43, and citations.

Charles S. Whitman, special counsel for complainant.

The cases which deny the existence of the power claimed in this bill are *dicta*. The only point necessary to be decided in *Attorney General* v. *Chemical Works*, 2 Ban. & A. 298; *post*, 608, was that the information should be filed in the name of the United States.

The learned judge is not supported in his view, that a patent in the United States is not a monopoly in the sense of the common law. 8 Coke, Inst. 181, defines a monopoly. There is no difference in principle between the English patent and the United States. The English patent was granted for a *new* invention. *Darcy* v. *Allen*, 11 Coke, 84; *Clothworkers of Ipswich*, Godb. 252; 3 Coke, Inst. 85, 181; Bac. Abr. "Monopoly and Prerogative;" Shep. Abr. pt. 3, 61; Hawk. P. C. pt. 1, c. 79, § 2. The relations between the government and patentee are the same in England and the United States. *Shaw* v. *Cooper*, 7 Pet. 318; Coryt. Pat. 41; Hind. Pat. 1151; *Cartwright* v. *Eamer*, 14 Ves. Jr. 131; *Neilson* v. *Hartford*, Web. P. R. 341.

The examination required before issuing a patent cannot be intended to take the place of an action to cancel. The remedy is defective. See Commissioner of Patents report to Congress, 1868; *U. S.* v. *Gunning*, 22 Fed. Rep. 653.

Patents for inventions in England are treated as on the same footing as patents for land. *Morgan* v. *Seaward*, 1 Webst. Pat. Cas. 187. It has never been considered in this country or England that the government granted away any interest in property, when it issued letters patent for inventions. Hind. Pat. 235; Drew. Pat. 4. The supreme court has held that the case of the government is stronger in repealing a patent for invention than in repealing a land grant. *Rubber Co.* v. *Goodyear*, 9 Wall. 788.

Mowry v. *Whitney*, 14 Wall. 432, is relied on as a case of interfering patents, but the justice who rendered the opinion expresses his view of the case as otherwise. *Mahn* v. *Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174.

The act of 1836 did not introduce a new system, it merely authorized a return to an old one. The only effect of the repeal of the clause relating to *scire facias* was to take away the power to cancel patents in private suits. The practice under the act of 1790 was inconvenient, (*Stearns* v. *Barrett*, 1 Mason, 164,) hence it was repealed.

U. S. v. *Frazer*, 22 Fed. Rep. 107, holds that the United States will not allow the use of its name to fight out a contest between private individuals.

Defenses in infringement suits offer no protection against vexatious litigation. *Tilghman* v. *Proctor*, 102 U. S. 707; Smith, Pat. 30.

A patent cannot be impeached in an infringement suit for fraud or mistake in its issue. *Doughty* v. *West*, 6 Blatchf. 429: *Celluloid Co.* v. *Vulcanite Co.*, 13 Blatchf. 375; *Foster* v. *Lindsay*, 2 Ban. & A. 175; *Gear* v. *Grosvenor*, 1 Holmes, 215; *Crompton* v. *Belknap Mills*, 3 Fish. Pat. Cas. 547; *Paper Co.* v. *Paper Co.*, 8 Blatchf. 543; *Whitney* v. *Mowry*, 4 Fish. Pat. Cas. 207; *Tilghman* v. *Mitchell*, 9 Blatchf. 18; *Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Railroad Co.* v. *Dubois*, 12 Wall. 47; *Seymour* v. *Osborne*, 11 Wall. 516; *Eureka Co.* v. *Bailey Co.*, Id. 488; *Mowry* v. *Whitney*, 14 Wall. 434.

Also *A. G. Thurman*, *Grosvenor P. Lowry*, *W. C. Strawbridge*, and *George M. Stearns*, for the Government.

Also *Geo. L. Roberts*, for defendants.

Before COLT, Circuit Judge, and NELSON, District Judge.

COLT, J. This is a demurrer to a bill in equity filed by the United States by direction of the solicitor general, acting as attorney general, against the American Bell Telephone Company and Alexander Graham Bell. The main purpose of the bill is to cancel two patents granted to Bell, relating to the art of transmitting speech by electricity, on the ground that they were obtained by fraud. The bill contains numerous allegations. We will refer to some of the more important in order to show its general character.

It charges that Bell was not the first inventor of the speaking telephone;

that Phillip Reis, of Germany, and others, had previous to his invention devised an apparatus for the transmission of speech by electricity; that at the time of issuing the first patent, which covers the process or method, Bell was not able to transmit articulate speech by the method or with the apparatus described in his application; that he purposely framed his application and claim in ambiguous and general terms to cover antecedent and future inventions, and to deceive and mislead the examiner of the patent-office; that he did in fact mislead the examining officers of the patent-office, and caused them to regard his alleged invention as an improvement in telegraphy, and not as an invention of the telephone; that Elisha Gray of Chicago filed a *caveat* in the patent-office on the same day that Bell filed his application, but prior in point of time; that the claim in said *caveat* was for "the art of transmitting vocal sounds or conversation telegraphically through an electric circuit;" that the examining officer of the patent-office, contrary to the statute, communicated to Bell the fact and the date of the filing of said *caveat*, and the nature of the claim contained therein; that thereupon Bell, by his attorneys, unlawfully and contrary to the fact obtained a determination of the patent-office that said *caveat* was filed after said application; that on or about the twenty-sixth of February, 1876, the examining officer did exhibit to Bell the drawings and *caveat* of Gray, and describe to him the construction and mode of operation of the telephone therein described, and that Bell did proceed without delay to make substantial amendments of his specification and claims; that such amendments relate to those parts of Bell's invention which constitute the cardinal feature of his patent, to-wit, the transmission of sounds by gradual or undulatory changes in the electric current, as distinguished from alternate or pulsatory changes; that the second patent, No. 186,787, was obtained by fraud upon Amos E. Dolbear.

The bill prays that this court may decree that said patents are, and have been since the date of sealing and delivery, null and void; that they were wrongfully procured to be issued by means of fraud, false suggestion, concealment, and wrong on the part of said Bell, and that the American Bell Telephone Company may be perpetually enjoined from setting up any right or claim under said letters patent, or from alleging the same in any court within the United States as evidence of any grant or right conferred on said Bell.

The first and principal question raised by this demurrer is whether, in the absence of any specific statute, the United States, by direction of the attorney general, can maintain a bill in equity to cancel a patent for an invention. The question is by no means free from difficulty, and the decisions of the courts in the few cases where the point has been raised are conflicting. Upon consideration we are of the opinion that the carefully considered decision of Judge SHEPLEY, of this circuit, in *Attorney General* v. *Chemical Works*, 2 Ban. & A. 298, *post*, 608, to the effect that the government, in the absence of any express enactment, has no power to bring a bill in equity to cancel a patent, is sound, and should be followed by this court in this case. Our whole patent system

rests upon a constitutional provision and the statutes passed by congress. By article 1, § 8, of the constitution, congress has the power of securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries, and to make all laws which shall be necessary and proper for carrying into execution this power. To the constitution and the acts of congress, therefore, and to these sources alone, we must look for the rights and remedies of patentees. Congress could have provided that the government should have the right to bring suit to cancel a patent for an invention on the ground of fraud, but congress has not seen fit to incorporate such a provision into the patent laws, and that is a sufficient answer to this bill. As was said by Mr. Justice MILLER, in *U. S.* v. *Railroad*, 98 U. S. 569, 616:

"Congress might also have directed the attorney general, either as part of this proceeding or as an independent one, to ask the court to declare the franchise of the company forfeited. It might have ordered a bill to inquire if the company was insolvent, and, if so, to wind up its affairs and distribute its assets. In short, there are many modes in which the legislature could have called into operation all the judicial powers known to the law. But it has not done so, and that is the constantly recurring answer to this bill."

We think the history of patent legislation under the constitution tends to show that congress never intended this power to be exercised under the present law. The act of April 10, 1790, (1 St. 109,) was the first statute passed on the subject of patents. Section 5 of the act provided that where a patent was obtained surreptitiously or upon false suggestion, the judge of the district court, upon affidavit being filed, should grant a rule to show cause why process should not issue to repeal the patent. By section 10 of the act of February 21, 1793, (1 St. 318,) the time was extended from one to three years after issuing the patent for instituting proceedings before the judge of the district court for its repeal. In addition to the proceeding under section 5, the act of 1790 also provided by section 6 that in an action for the penalty the defendant might set up certain defenses to the patent. By section 6 of the act of 1793, these defenses were greatly enlarged. It thus appears that by the Acts of 1790 and 1793, where a patent was obtained surreptitiously or upon false suggestion, a process might issue for its repeal in the nature of a *scire facias* at common law. In *Ex parte Wood*, 9 Wheat. 603, Mr. Justice STORY, in construing section 10 of the act of 1793, declared that the jurisdiction given to the court is not general and unlimited, but is confined to cases where the patent was obtained surreptitiously or upon false suggestion, and that the object of the statute was to provide some means to repeal patents so obtained, which were the cases where a *scire facias* issued at common law; and, further, that "as the patents are not enrolled in the records of any court, but among the rolls of the department of state, it was necessary to give some directions as to the correct time and manner of instituting proceedings to repeal them." It does not appear that Judge STORY recognized any jurisdiction of this court to entertain suits to cancel patents independent of the express provisions of the statute law. On the contrary, he deemed it necessary that congress

should give directions as to the time and manner of instituting proceedings to repeal.

The next important legislation on this subject was the act of July 4, 1836, (5 St. 117,) which, with some amendments not important here to consider, remains the law to-day. This act established a patent-office with a commissioner, chief clerk, and examiners, and directed them to examine all applications for patents, and to grant only those which possessed the elements of patentability. In this act, wherein congress created a complete patent system, it was not deemed necessary to retain the old proceeding to cancel a patent found in the Acts of 1790 and 1793. After observing the working of the old law for more than 40 years, congress deliberately eliminated this provision in the new act, and it may be presumed substituted provisions which in its opinion afforded better security to the public as well as to the patentee.

The design of the new law was to have such proceedings taken, and such an examination made before a patent was granted, as to guard against the issuing of invalid patents, and so prevent the abuses complained of under the old system. In *Butterworth* v. *U. S.*, 112 U. S. 50, 5 Sup. Ct. Rep. 25, it is held that the proceedings in the patent-office are essentially judicial in their character, and, further, that the framework of the system excludes any appellate power not therein specifically provided for,—such as an appeal to the secretary of the interior. But congress did not stop here. By section 15 of the act a defendant in an infringement suit may set up various defenses to the validity of the patent; he may show that for the purpose of deceiving the public the description and specification filed by the patentee was made to contain less than the whole truth relative to his invention, or more than was necessary to produce the desired effect, or that he had surreptitiously and unjustly obtained a patent for that which was invented by another, or that the invention had been described in some public work prior to his invention, or that he was not the first and original inventor, or that the invention had been in public use or on sale with the consent of the patentee prior to his application. By section 16 an applicant, having been refused a patent on the ground that it would interfere with an unexpired patent previously granted, was permitted to file a bill in equity in the circuit court, and try the question whether or not he was entitled to a patent; or in the case of two interfering patents any party interested might bring a bill in equity against the other party in the circuit court, and the court may cancel either patent in whole or in part. By these several provisions of the act of 1836 it would seem that congress thought the public as well as the patentee were sufficiently protected without retaining the old proceedings to cancel a patent found in prior acts.

The supreme court have decided that a defendant in an infringement suit is not limited to the statutory defenses. He may show that the commissioner has exceeded his power in granting or reissuing a patent, or that the patented thing does not amount to a patentable invention. *Mahn* v. *Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174; *Gardner* v. *Herz*, 118 U. S. 180, 6 Sup. Ct. Rep. 1027. As the law now stands it is dif-

ficult to conceive of a good defense to a patent which cannot be raised in an infringement suit. In *Rubber Co.* v. *Goodyear*, 9 Wall. 788, and *Mowry* v. *Whitney*, 14 Wall. 434, it was held that the question whether the extension of a patent had been improperly obtained could not be inquired into in an infringement suit, but the statute relating to extensions has been repealed, except as to patents granted prior to March 2, 1861.

The intent of congress is further shown by the fact that although repeated attempts have been made to amend the law so as to give some process by which an invalid patent may be vacated, the legislature has refused to act. In the present condition of the law there would seem to be no necessity for invoking the power assumed by this bill, and the course of legislation not only fails to show any intention on the part of congress to clothe the government with this power, but rather goes to show its intentional exclusion. If the power of the government to cancel a patent for an invention exists, it must be by implication, and it must spring from the general principles of equity jurisprudence; and here it becomes important to inquire into the history and character of this power and the procedure under it in England. In England the patent system was based upon the royal prerogative. The grant of a patent was a matter of grace and favor, and the crown might annex to the grant any conditions it pleased. The causes for which a patent may be revoked are stated in the proviso to be, if the grant is contrary to law, or prejudicial or inconvenient to her majesty's subjects, or if the invention was not new, or not invented by the patentee. Hind. Pat. 264. In England the power to revoke a patent was in its nature sovereign. The proceeding for avoiding and canceling a patent was by writ of *scire facias* taken in the common-law side of the court of chancery, being the court in which the patent issued. *Scire facias* lay to repeal a patent in three cases:

(1) When the king by his letters patent granted the same thing to several persons, the first patentee shall have a *scire facias* to repeal the second patent.

(2) When the king granted a thing upon false suggestion, he may by his prerogative *jure regis* have a *scire facias* to repeal his own grant.

(3) When the king has granted anything which by law he cannot grant, he, *jure regis*, for the advancement of justice and right, may have a *scire facias* to repeal his own letters patent. 4 Inst. 88. Hind. Pat. 234.

To quote from the opinion of Judge SHEPLEY in the *Rumford Chemical Works Case*:

"As the letters patent issued under the great seal, and the enrollment of every patent remained of record in the court of chancery, the lord chancellor, in the common-law court of chancery, or, in the words of Sir Edward Coke in the fourth Institute, the 'one ordinary *coram domino rege in cancellaria*, wherein the lord chancellor or lord keeper of the great seal proceeds, according to the right line of the laws and statutes of the realm,—*secundum legem et consuetudinem Angliæ*,' has power to hold plea of *scire facias* to repeal letters patent under the great seal, and to cancel the patent, and also the enrollment of it. *King* v. *Butler*, 3 Lev. 221; 2 Vent. 344. * * * These legal proceedings were in the office called 'The Petty Bag,' the office of the

court of chancery in which all common-law proceedings of the court were carried on, all the pleadings and other common-law proceedings being entitled 'In the Petty Bag Office in Chancery.' The action of *scire facias* was not only a remedy provided by law for the crown in behalf of the public, but also for any subject of the crown who could show that a void or illegal patent operated to his prejudice. Thus, in *Butler's Case*, before cited, Lord Chancellor FINCH said: 'Where a patent is granted to the prejudice of the subject, the king of right is to permit him, upon his petition, to use his name for the repeal of it.' Every person is presumed to have such an interest in a patent for an invention that, if he alleges that it is illegal or void, he is entitled, as of right, to a *scire facias* in the name of the queen, in order to repeal it. *Queen* v. *Aires*, 10 Mod. 354; *Queen* v. *Ballivos*, 1 P. Wms. 207; Vin. Abr. 'Prerogative,' T. b.; U. b. 8. Such proceedings were always in the name of the crown. 'The only means which the law provides for the repealing of letters patent' (for inventions) 'is by action of *scire facias* at the suit of the queen,' (Hind. Pat. 64,) and, as we have seen, this was a *quasi* common-law proceeding, with the right of trial by jury. This right and this mode of proceeding were preserved by the express provisions of the modern statutes, which, while providing for a new seal to patents, and for filing the specifications in such office as the new commissioners might designate, also enacted that 'the writ of *scire facias* shall lie for the repeal of any letters patent issued under this act in the like case as the same would lie for the repeal of letters patent which may now be issued under the great seal.' No instance can be found, it is believed, of any other proceeding in England than a *scire facias* to repeal letters patent for an invention. It is contended in the case at bar that the case of the *Attorney General* v. *Vernon*, 1 Vern. 277, is an authority for the repeal of letters patent by a bill in chancery. But this case was without a precedent, and has never been followed in England, and cannot be claimed to be a precedent for a bill in equity to repeal letters patent for an invention which issue under the great seal and are recorded in chancery."

It appears, therefore, that the power to cancel a patent in England was in the nature of a royal prerogative, and that the proceeding was by writ of *scire facias*. It is admitted that this form of chancery proceeding is not in use in this country, and it is equally true that the prerogative rights of the crown of England have not descended upon the president of the United States. With us the people are the source of power, and each branch of the federal government can exercise only those powers which are delegated to it by the people, and are found in the constitution and the statutes. The constitution does not give the federal judiciary any of the powers which were exercised in England by the chancellor as the representative of the king, and by virtue of the king's prerogative as *parens patriæ*.

"When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states; and this power still remains with them, except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. The state as sovereign is *parens patriæ*. * * * The courts of the United States cannot exercise any equity powers except those conferred by acts of congress, and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised at the time of the formation of the constitution of the United States. Powers not judicial, exercised by the chancellor merely as the representative

of the sovereign, and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the circuit courts."

Such is the language of the supreme court in *Fontain* v. *Ravenel*, 17 How. 369–384.

The decisions of the federal courts respecting patents for lands are not in our opinion applicable to patents for inventions. In the case of land the government is the owner of property, and if that property is fraudulently conveyed it has the same right as an individual to recover it back. Its rights and remedies are the same as a private citizen's in such a case. But in issuing letters patent for an invention, to quote Judge SHEPLEY:

"Nothing is granted which belonged before to the United States. The issue of letters patent is in compliance with an act of congress. The rights and remedies of the parties are dependent solely on the statute enactments, and do not grow out of any previous ownership of the supposed subject of the grant, as in the case of a conveyance of lands."

The cases cited bearing on the question of the power of the government to bring in this suit, are *Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Mowry* v. *Whitney*, 14 Wall. 434; *Attorney General* v. *Chemical Works*, *supra*; *U. S.* v. *Gunning*, 18 Fed. Rep. 511, and 23 Fed. Rep. 668; *U. S.* v. *Frazer*, 22 Fed. Rep. 106; *U. S.* v. *Colgate*, 21 Fed. Rep. 318; *Mahn* v. *Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174. The question has never been directly before, nor passed upon by, the supreme court, though the plaintiff insists that certain *dicta* of that court in *Rubber Co.* v. *Goodyear* and *Mowry* v. *Whitney* recognize the existence of this power. *Rubber Co.* v. *Goodyear* and *Mowry* v. *Whitney* were cases of extended patents, and the court decided that the question whether an extended patent had been obtained by fraud was not open in an infringement suit. In these cases the court did not decide that the government, through the attorney general, could bring a bill for the purpose of vacating a patent; that point was not before the court for determination. All the court said was, and this is the extent of the *dictum*, that no one but the government, either in its own name or in the name of its appropriate officer, could institute judicial proceedings to cancel a patent, except in the cases provided for in section 16 of the act of July 4, 1836. The case of *Mahn* v. *Harwood* was upon a reissued patent, and the majority of the court held that the defense of laches in applying for a reissue could be set up in an infringement suit. Mr. Justice MILLER, in a dissenting opinion, takes the position that this cannot be done, inasmuch as congress, by statute, has specifically mentioned the five defenses that may be raised in an infringement suit, and he then goes on to say that congress intended all other causes for impeaching a patent should be prosecuted in the usual mode of *scire facias*, or bill in chancery brought by the proper law officers of the government to set it aside.

In this circuit, in the case of *Attorney General* v. *Chemical Works*, the question was fairly presented and decided in the learned and carefully considered opinion of Judge SHEPLEY, and the conclusion reached that the power sought to be invoked by this bill does not exist in the absence of a specific statute.

In *U. S.* v. *Gunning*, a bill was brought to repeal the Gunning patent. It was demurred to on the ground of want of authority in the plaintiff to bring, or the court to entertain, the suit, and for want of equity. Judge WALLACE overruled the demurrer. This case is in direct conflict with *Attorney General* v. *Chemical Works*.

In *U. S.* v. *Frazer*, 22 Fed. Rep. 106, a bill was brought to cancel two patents on the ground that the defendant falsely and fraudulently made oath that the alleged improvements had not been before known or used, when in fact they had been publicly known and used more than two years prior to the application therefor. Judge BLODGETT, in sustaining the demurrer, said:

"It is true that it is an imposition on the patent-office to falsely make an affidavit that a device for which a patent is asked has not been known and used prior to the invention thereof by the applicant for the patent. Such conduct may justly be said to be fraudulent; but it is a fact which goes to the validity of his patent, and may be pleaded by any person against whom the patentee brings suit; and it seems to me that it would be better to leave the litigation of questions like this, which constitute a defense in patent cases, to the parties directly interested, rather than that the government should lend its name to a suit really in the interest only of certain private parties. The practice here inaugurated will, if followed, transfer nearly all litigation on patents, except mere questions of fact as to infringement, to the office of the attorney general, instead of leaving it in the hands of the persons directly interested. * * * I do not intend to be understood as holding that a bill in chancery will not lie in any case to annul a patent obtained by fraud, but only that this bill does not, in my opinion, make such a case as requires or authorizes the United States to allow the use of its name to fight out a contest between these individuals."

The opinion of Judge BLODGETT would seem to be that if the attorney general can bring a bill to cancel a patent in any case, he cannot bring such a bill on grounds which constitute a defense in infringement cases, and the language of Mr. Justice MILLER in *Mahn* v. *Harwood* would appear to go no further than to suggest that a bill might lie by the proper law officers of the government to cancel a patent in those cases where the statutory defenses do not apply. It would seem, then, that if this power exists its exercise should be limited to cases where the statutory defenses fail to reach the case. To hold otherwise would turn patent litigation largely into the hands of the government, which plainly was not the intention of the present law. *Rubber Co.* v. *Goodyear* and *Mowry* v. *Whitney* were cases of extended patents, where the extension was obtained by alleged fraud or false swearing in the patent-office, and that defense under the statute could not be set up in an infringement suit.

But that is not the case now before us for consideration. The main grounds on which the validity of the Bell patents are attacked in this bill can be raised in an infringement suit. Among the defenses provided by section 4920 of the Revised Statutes, in any action for infringement, are:

First. That for the purpose of deceiving the public the description and specification filed by the patentee in the patent-office was made to contain less than the whole truth relative to his invention or discovery, or more than is neces-

sary to produce the desired effect. *Second.* That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another who was using reasonable diligence in adapting and perfecting the same. *Third.* That it had been patented or described in some printed publication prior to his supposed invention or discovery. *Fourth.* That he was not the original or first inventor or discoverer of any material or substantial part of the thing patented.

The necessity which might possibly arise in some cases for the exercise of this power by the government seems to be wanting in the present case.

The question of power raised by this bill is an important one, and in view of the conflict of authority it can only be definitely settled by the supreme court. It is manifestly our duty in the present case, unless clearly satisfied that Judge SHEPLEY was wrong, to follow the law as established in this circuit in the most learned and exhaustive opinion to be found on the subject.

The demurrer to the bill is sustained, and the bill dismissed.

ATTORNEY GENERAL *ex rel.* HECKER *v.* RUMFORD CHEMICAL WORKS and others.[1]

(*Circuit Court, D. Rhode Island.* May, 1876.)

PATENTS FOR INVENTION—CANCELLATION—POWER OF ATTORNEY GENERAL.

The attorney general of the United States has no power to maintain in his own name, "as he is the attorney general of the United States," a bill in equity to repeal letters patent for an invention.

Bill or information to repeal reissued letters patent No. 2,597, dated May 7, 1867, and No. 2,979, dated June 9, 1868, granted on surrender of original letters patent issued April 22, 1856, to Eben N. Horsford, for a new and improved preparation or substance, being a substitute for a pulverulent acid for use in the manufacture of dry powders when a dry acid is required, and afterwards assigned to the Rumford Chemical Works. The bill stated three grounds, viz.: (1) Want of novelty by reason of prior publications; (2) interpolation; (3) insufficiency in the instructions given in the specifications. In the title the plaintiff was styled "The Attorney General, upon the relation of George V. Hecker." In the stating part of the bill, "Informing, showeth unto your honors George H. Williams, as he is attorney general of the United States of America." The prayer is: "Your informant prays this honorable court to adjudge and decree." The subpœna requires the defendants "to appear and answer the bill of complaint of George H. Williams, the attorney general of the United States." Defendants filed a motion to take the bill from the files, and set aside the service of subpœna, for the reasons: (1) The bill was filed and the subpœna issued and served without authority of law. (2) Plaintiff has no legal interest in the matters set forth. (3) The court has no

[1] NOTE. The opinion of Judge SHEPLEY in this case was pronounced in 1876, but has never been published in an accessible form. In view of the reliance placed on it by Judge COLT in the case of *U. S.* v. *Telephone Co.*, *ante*, 591, it is reprinted at this time. [ED.

jurisdiction of the matters involved, or to grant the relief prayed for. (4) The bill is not signed by counsel. A demurrer was also filed, stating as the grounds thereof: (1) George H. Williams had no lawful authority to file such information, or to commence or continue this proceeding. (2) This court has no jurisdiction to entertain said information, because it does not appear thereby that the same is filed by a citizen of one state against a citizen of another state. (3) George H. Williams, "as he is attorney general of the United States," had no lawful authority to file the said information or to continue this proceeding. (4) The information and this proceeding are not in the name of or in behalf of the United States. (5) The informant has not signed said information, nor has counsel signed the same. (6) This court has no jurisdiction to entertain this proceeding, because (*a*) the United States are not parties plaintiff or petitioners; (*b*) this proceeding does not arise under the constitution or laws of the United States; (*c*) the information does not state a cause for equitable relief. Hearing on the bill and demurrer.

Wm. M. Evarts, *Clarence A. Seward*, and *Charles S. Bradley*, for defendants.

Clarence A. Seward, for defendants, in support of the motion and demurrer.

If either of the grounds of the motion are well taken, the defendant may make such motion. It is the usual practice, (Daniell, Ch. 295, 411,) and the court has discretion to grant it, (*Maclean* v. *Dawson*, 4 De Gex & J. 155.) If the bill was filed without authority, the court may order it to be taken from the files. *Wartnaby* v. *Wartnaby*, Jac. 377; *Blake* v. *Smith*, Younge, 596; Story, Eq. Pl. § 66. If the bill is not signed by counsel, the court will of its own accord order it to be taken from the files, (*French* v. *Dear*, 5 Ves. 547, 550,) and the defendant may move for such an order, (*Partridge* v. *Jackson*, 2 Edw. Ch. 520.)

George H. Williams appears in no other capacity than an individual, and discloses no such personal interest as entitles him to a standing in court for the purpose of repealing a patent. *Merserole* v. *Paper-Collar Co.*, 6 Blatchf. 361. There is no averment that George H. Williams is a citizen of a state other than Rhode Island, and, if jurisdiction is claimed on the ground of citizenship, the defect is fatal. 3 Abb. Nat. Dig. 534.

The attorney general *qua* attorney general has no power to institute this proceeding. The powers of the attorney general are not to be amplified by any reference to the powers of the attorney general in England, and, if he has the power to institute this action, it must exist by some law or custom of this country. There is no reported case of a suit by the attorney general in his own name, or "as he is attorney general," so that there is no custom in this country. The published decisions of the attorney general's department are against the existence of any such power. 7 Op. Atty. Gen. 50. All suits in behalf of the United States must be brought in the name of the United States, except in cases expressly provided for. *Benton* v. *Woolsey*, 12 Pet. 27. The attorney general is purely a creation of law, and has no larger powers than the law gives him. His power to conduct litigations is expressly limited to such as are "in the interest of the United States." Rev. St. p. 60, § 359.

All precedent is against the present form of allegation. "On behalf of said state" is the usual form of procedure in the several states of the Union. *Lord Proprietary* v. *Jennings*, 1 Har. & McH. 92; *Respublica* v. *Griffiths*, 2 Dall. 112; *State* v. *Deliesseline*, 1 McCord, 52; *State* v. *Dover*, 9 N. H. 468; *Com.* v. *Hite*, 6 Leigh, 588; *State* v. *Ashley*, 1 Pike, 279. If any fraud exists in this case, it is against the United States, and it is the proper party to assert the remedy. *Mowry* v. *Whitney*, 14 Wall. 441. This principle prevails also in England with reference to the capacity of the United States. *U. S.* v. *Wagner*, 2 Ch. App. 594. The United States attorney for the district in

which the suit was brought was the proper officer to commence such a proceeding, (Rev. St. p. 145, § 771; *U. S.* v. *Corry*, 23 Mo. Law Rep. 157; *U. S.* v. *Doughty*, 7 Blatchf. 424;) and the words "George H. Williams, as he is attorney general of the United States," should be stricken out, which would leave no legal plaintiff on record. The fact that the bill is signed by Mr. Gardner, United States attorney for the district of Rhode Island, cannot be relied on to sustain jurisdiction. As the United States is not mentioned as plaintiff, the district attorney has no legal client, and his signature does not form a part of the bill. *U. S.* v. *McAvoy*, 4 Blatchf. 418. This defect cannot be cured by amendment. *Attorney General* v. *Fellows*, 1 Jac. & W. 254. The attorney general having resigned since the institution of this suit, there is no provision for substituting his successor, and, when the law intends an action to survive, there is always a positive statutory provision to that effect.

If this proceeding is maintainable at all, it can only be maintained in the name of, or on behalf of, the United States, which fact does not appear on the face of the information. Even in England, the writ of *scire facias* to repeal a patent must be in the name of the crown, and the attorney general there has no authority to substitute his own name and official title therefor. *Reg.* v. *Archipelago Co.*, 1 El. & Bl. 351; *King* v. *Else*, Dav. Pat. Cas. 144; *King* v. *Arkwright*, Id. 61; *King* v. *Butler*, 3 Lev. 220; *Rex* v. *Hare*, 1 Strange, 146; *Reg.* v. *Ballivos*, 1 P. Wm. 207; *Queen* v. *Mill*, 10 C. B. 379; *Reg.* v. *Cutler*, 3 Car. & K. 215; *Queen* v. *Hancock*, 5 De Gex, M. & G. 331; *Queen* v. *Mill*, 14 Beav. 312; *Queen* v. *Betts*, 15 Adol. & E. 540; *Bynner* v. *Reg.*, 9 Adol. & E. (N. S.) 523. This is confirmed by the language of the writ. Hind. Pat. 16 Law Lib. (O. S.) 715, form No. 5.

The attorney general has no statutory right to delegate the power to sign his name, and the absence of his signature to the information is fatally defective. The rule in England on this point is inflexible. Daniell, Ch. Pr. 364. This court has no jurisdiction because the United States is not a party; and if there is a wrong, and this court can redress it, it can only do so for a wrong against the United States, and on its prayer and in its suit. *U. S.* v. *Doughty*, 7 Blatchf. 424. The relator is not looked upon as a party. *Attorney General* v. *Mayor*, 1 Moll. 95; *Attorney General* v. *Wright*, 3 Beav. 447; *Attorney General* v. *Wyggeston's Hospital*, 16 Beav. 313; *Attorney General* v. *Barker*, 4 Mylne & C. 262. The attorney general having resigned, no one has been appointed to appear in this case as the special representative of the United States, (Rev. St. p. 61, § 366,) and the relator has no standing in court.

This court has no jurisdiction to entertain this proceeding. This court acquires jurisdiction by statute alone. *U. S.* v. *Eckford*, 6 Wall. 488. The information is not embraced within any of the provisions of the statutes conferring jurisdiction on this court. Rev. St. p. 110, par. 2; Id. p. 111, par. 9; act of March 3, 1875. It is not an action on behalf of the United States. The words, "as he is the attorney general," are descriptive, and do not embrace the corporation or government of which he is an officer. *Hills* v. *Bannister*, 8 Cow. 31; *Taft* v. *Brewster*, 9 Johns. 334; *Barker* v. *Insurance Co.*, 3 Wend. 94; *Moss* v. *Livingston*, 4 N. Y. 208.

If the United States is a party plaintiff, its rights as such are no larger than the rights of an individual suitor. *U. S.* v. *McRae*, 8 Eq. Cas. 69, 77; *U. S.* v. *Prioleau*, 2 Hem. & M. 559; *People* v. *Brandreth*, 36 N. Y 196; *U. S.* v. *Nourse*, 6 Pet. 494; *U. S.* v. *Arredondo*, Id. 711. Therefore, in the absence of statute, the United States can only ask such relief as equity accords a private citizen presenting a proper case. Equity cancels outstanding fraudulent deeds of private citizens, on the ground that they constitute a cloud upon the title. For the same reason equity will sustain a bill by the government to cancel a patent for lands. *U. S.* v. *Stone*, 2 Wall. 525; *Bagnell* v. *Broderick*, 13 Pet. 450; *U. S.* v. *Hughes*, 11 How. 568.

But this furnishes no ground for the assertion that the United States can

ask the same relief in respect to patents for invention. The United States government did not succeed to the prerogative of the crown to grant monopolies. Patents for invention are not known to the common law of the United States. The constitution is the only source of power to grant them. How far the people since the Revolution succeeded to the prerogative of the crown to appeal to courts to vacate grants on account of fraud has never been definitely settled. *People* v. *Clarke*, 9 N. Y. 359. But it has been definitely settled that a private citizen cannot maintain a bill to repeal letters patent for an invention. *Merserole* v. *Paper-Collar Co.*, 6 Blatchf. 356. The power here invoked has never been settled by judicial decision. *Mowry* v. *Whitney*, 14 Wall. 439, and the remarks in the other cases are not decisive of this point, since it was not before the court. An outstanding patent does not constitute a cloud on the title of the United States, for it has no title. It grants nothing which belonged to it prior to the grant. And so long as the patent is not sought to be enforced it is of no injury to the public. *Ex parte Wood*, 9 Wheat. 603. There being no statute authorizing this proceeding, and no inherent jurisdiction, it follows that if a private individual cannot ask the court for this relief the United States cannot.

The English chancery court exercises jurisdiction to repeal patents (1) because English patents are expressly made subject to that jurisdiction; (2) the jurisdiction cannot be exercised by a bill in equity, but only by *scire facias*. Fost. Sci. Fa. 246, 250; Hind, Pat. 64. And it required positive statute to save this right. St. 11 & 12 Vict. *c.* 94, par. 14; 12 & 13 Vict. *c.* 109, p. 14; 15 & 16 Vict. *c.* 83, p. 15.

Attorney General v. *Vernon*, 1 Vern. 277, is relied on as a precedent for the doctrine that letters patent may be repealed by bill in chancery. But in that case the letters patent were for lands, and the bill was entertained on the ground that the grant was a cloud on the title. It has never been followed in England or in this country. Of the cases relied on *Jackson* v. *Lawton*, 10 Johns. 24 decides that a land grant cannot be collaterally attacked; *Mowry* v. *Whitney*, 14 Wall. 439, decides that an extension of letters patent for an invention cannot be collaterally attacked; *Walker* v. *Wells*, 17 Ga. 549, cites it as authority, but the court refused to be bound by it.

If congress had intended the circuit courts to have this power, they would have said so. Act of 1790 (1 U. S. St. at Large, 109, § 5) provides a remedy for the repeal of letters patent. Act of 1793 (1 U. S. St. at Large, 318, § 6) retained this remedy. *Stearns* v. *Barrett*, 1 Mason, 153; *Delano* v. *Scott*, Gilp. 489; *Ex parte Wood*, 9 Wheat. 609. These acts were repealed by the act of July 4, 1836, which entirely reconstructed the patent system, and provided new modes of procedure. No right is conferred by this act upon the United States to file a bill in its own name, or in the name of the attorney general, for the repeal of a patent. If a patent may be repealed in England under the principles of general law, it is because the defects on such principles inhere in the grant. Here the provisions for authorizing a patent to be issued, and providing how it may be defeated, removes the allegation of illegality inherent in the grant. *White Water Valley Co.* v. *Vallette*, 21 How. 425.

The Acts of 1790 and 1793 created and conferred a new jurisdiction to be exercised in a prescribed manner. The statute being affirmative, the remedy could not be pursued in any other manner. Dwar. St. 41; *Hardmann* v. *Bowen*, 39 N. Y. 199; *Stafford* v. *Ingersol*, 3 Hill, 41; *Renwick* v. *Morris*, 7 Hill, 575; *McKeon* v. *Caherty*, 3 Wend. 495; *Pollard* v. *Bailey*, 20 Wall. 520; *Ex parte Wood, supra*. The act of 1836, by the repeal of these provisions, took away the jurisdiction originally given, created a new jurisdiction, and gave new remedies. And the court cannot substitute for this new remedy one not contemplated by the legislature. *U. S.* v. *Tilton*, 11 Mo. Law Rep. (N. S.) 598; *U. S.* v. *Nourse*, 6 Pet. 493; *U. S.* v. *Boisdore's Heirs*, 8 How.

121; *McNulty* v. *Batty*, 10 How. 79; *Farmers' Bank* v. *Deering*, 8 Pat. Off. Gaz. 312.

Causten Browne, Charles F. Blake, and *Albert G. Browne, Jr.*, for informant.

The right to grant monopolies for limited terms for new and useful inventions is a right inhering in every sovereign political power, whether monarchical or republican. *Livingston* v. *Van Ingen*, 9 Johns. 507, 559, 560. It was a right at common law in England, and the statute of monopolies (21 Jac. 1, *c.* 3) was declaratory merely, (Hind. Pat. *c.* 2; Chit. Prerog. 177, 178; 1 Brodie, Const. Hist. 214, note; 2 Brodie, 28.) The passage of that statute was occasioned by the royal abuse of the common law right, viz., granting patents that were void for want of authority, or that were void for want or failure of the consideration of benefit to the public. 1 Brodie, Const. Hist. 214, 215; 4 Macauley, Hist. (Boston Ed. 1856,) 103, 104; 8 Hume, Hist. (Cooke's Ed. 1793,) 159 *et seq.*, 238; 9 Hume, Hist. 57, 199; Hallam, (Harper's Ed. 1849,) 153, 154; Bract. L. i. *c.* 8; Year Book, 19 Hen. VI. 63; Co. Lit. 115*b*; Chit. Prerog. 386. The power of the crown as *parens patriæ* has no special application to this class of rights. Bac. Abr. "Prerogative," D, 5; Chit. Prerog. 152–162, *c.* 9.

The right existing for the benefit of the public, and not for the advantage of the sovereign, or the exclusive advantage of the patentee, is one of the ordinary functions of government. Hind. Pat. 103, *n. a. d.*; *Kendall* v. *Winsor*, 21 How. 322, 327, 328; 3 Hamilton's Works, 253; *Harmer* v. *Plane*, 14 Ves. 130, 132.

Whatever the nature of the right, it was possessed by every one of the states before the adoption of the federal constitution. *Livingston* v. *Van Ingen*, 9 Johns. 507, 560, 573; Story, Const. § 1152; Rawle, (2d Ed.) 106; Federalist, No. 43; 2 Curtis, Hist. 340; Ancient Charters and Laws of the Colony of Massachusetts Bay, 170. The nature and incidents of the rights thus possessed are to be interpreted by the nature and incidents of the rights possessed and exercised by the parent country. Resolves of the Declaration of Rights of the Colonies, October 14, 1774; Story, Const. §§ 155–157, 162, 163, 175, 176, 194, note 2; *Patterson* v. *Winn*, 5 Pet. 233; Quincy, 258; same App. 512–540; Clark's Colonial Law, (1834 Ed.) 15, 16; Chit. Prerog. 33; *Wilbur* v. *Tobey*, 16 Pick. 177, 182.

It is part of the powers and duties of the law officer of every government where the common law prevails, in the absence of statute, upon general principles of jurisprudence, to institute proceedings when necessary to enforce the rights of government, or correct their erroneous exercise. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 698; 5 Dan. Abr. *c.* 138, art. 2, § 1; *Florida* v. *Georgia*, 17 How. 478, 495; *Parker* v. *May*, 5 Cush. 336; *Com.* v. *Fowler*, 10 Mass. 290, 295; *Goddard* v. *Smithett*, 3 Gray, 116, 122; *State* v. *Dover*, 9 N. H. 468; *Baptist Association* v. *Hart's Ex'rs*, 4 Wheat. 1, 50; *Charles River Bridge* v. *Warren's Bridge*, 7 Pick. 446, 506; *Respublica* v. *Griffiths*, 2 Dall. 112. Such power was exercised in England by the attorney general in relation to erroneous grants of letters patent before the statute of monopolies. 1 Brodie, Const. Hist. 526–536; Id. 215; 4 Inst. 72, 85. And also ever since the statute. 4 Inst. 88; Bac. Abr. "Scire Facias," *c.* 3; 2 Bl. Comm. 348; 3 Bl. Comm. 260, 261; 4 Bl. Comm. 159; Hind. Pat. 397, 408; *Queen* v. *Prosser*, 11 Beav. 306; *Mowry* v. *Whitney*, 14 Wall. 434, 440. They were not and are not exercised by him as servant of the crown, but as a public officer, at his discretion, for the public benefit. *Queen* v. *Prosser*, 11 Beav. 306, 313, 314; *King* v. *Butler*, 3 Lev. 220, 222; Broom, Max. 40, 41. The powers thus derived from the common law to institute proceedings to cancel grants of patents was exercised by the law officers of the states without statutory authority, in respect to grants of land before the adoption of

the federal constitution, and when the grant was of record in the executive, instead of judicial department, the process adopted was an information in equity. *Lords Proprietary* v. *Jenings*, 1 Har. & McH. 92, 144; *Norwood* v. *Attorney General*, 2 Har. & McH. 201; *Smith* v. *Maryland*, Id. 244; *Op. Atty. Gen.*, 1 Har. & McH. (App.) 555, 556.

The absence of decisions showing the exercise of this power in respect to grants of patents for inventions before the adoption of the federal constitution is sufficiently explained by the scanty development of the mechanic arts until after that time. Sen. Doc. 338, (1st Sess. 24th Cong.;) Ann. 2d Cong. (1793,) p. 853 *et. seq.;* House Doc. 38, (1st Sess. 21st Cong.;) also the scarcity of reports published.

The nature and incidents of the rights, powers, and duties vested in the United States in respect to patents for invention are to be construed by reference to the nature and incidents of like rights, powers, and duties existing in the states at the adoption of the federal constitution. *Penhallow* v. *Doane*, 3 Dall. 54, 92; *Ware* v. *Hylton*, Id. 199, 224, 316; 2 Curt. Const. Hist. 340; Patent Act 1793, *c.* 11, § 11 The United States, therefore, took the right to grant letters patent as it had been possessed by the states, with the incident of the power and duty of the law officer of the government which makes the grant, to bring suits for the benefit of the public to repeal erroneous grants, independently of statutory authority. 3 Dall. 320, 335. And this power is not restricted by Rev. St. 359, which imposes a duty, but does not create a power. It is the duty of the attorney general to direct the district attorney to bring the information. *U. S.* v. *Doughty*, 7 Blatchf. 424.

Even if the attorney general's power is dependent on statute, the United States is interested in an information to cancel a patent regular on its face, procured by fraud, or in excess of authority: (*a*) Because it is a necessary party to the suit. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 698; *Florida* v. *Georgia*, 17 How. 478, 495; *Baptist Ass'n* v. *Hart's Ex'rs*, 4 Wheat. 50; *Rubber Co.* v. *Goodyear*, 9 Wall. 788. (*b*) It is its error sought to be corrected, (*c*) which can not be done by any collateral proceeding. *Field* v. *Seabury*, 19 How. 323, 332; *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 797; *Mowry* v. *Whitney*, 14 Wall. 434.

The form of this action is immaterial. An information in equity in this country for this purpose is the equivalent of *scire facias* in England. *U. S.* v. *Stone*, 2 Wall. 525, 535, 536; *Mowry* v. *Whitney*, 14 Wall. 434, 440.

Act of 1793 was not exclusive of the common-law remedy. Statutes in derogation of common law are to be construed strictly. The statutory remedy must be as complete as the common-law remedy, in order to be exclusive and not merely cumulative. Courts do not favor repeal by implication. The intention to take away the common-law remedy must be manifest, or the statute will be adjudged affirmative merely, or in aid of the common law. *Melody* v. *Reab*, 4 Mass. 471; *Barden* v. *Crocker*, 10 Pick. 383; *Jennings* v. *Com.* 17 Pick. 80; *Turnpike Co.* v. *Hayes*, 5 Cush. 458; *Gooch* v. *Stephenson*, 13 Me. 371; *Lang* v. *Scott*, 1 Blackf. 405; *Stafford* v. *Ingersol*, 3 Hill, 38, 41; *Renwick* v. *Morris*, Id. 621, 624; *Turnpike* v. *Coventry*, 10 Johns. 389, 393; *Scidmore* v. *Smith*, 13 Johns. 322; *Colden* v. *Eldred*, 15 Johns. 220; *Wheaton* v. *Hibbard*, 20 Johns. 290, 293; *Crittenden* v. *Wilson*, 5 Cow. 165, 168; *Wetmore* v. *Tracy*, 14 Wend. 250, 255, 256; *Turnpike Co.* v. *People*, 15 Wend. 267; *Carver* v. *Manufacturing Co.*, 2 Story, 432; *Sawin* v. *Guild*, 1 Gall. 485, 486; *Wheaton* v. *Peters*, 8 Pet. 591; *Wood* v. *U. S.*, 16 Pet. 343; *Daviess* v. *Fairbairn*, 3 How. 636; *McCool* v. *Smith*, 1 Black, 459.

The rule that "where a new right is given, and a specific remedy given, for its violation, the remedy is confined to that given by statute," has no application to this case, which is not seeking the remedy for the violation of the new right given by statute, but which is to contest defendants claim to any right whatsoever.

If the statutes of 1790 and 1793 excluded the United States from all common-law remedies, the repeal of that statute must be construed to revive them. The argument that the provision in the act of 1836 allowing the pleading of special matter to avoid patents in actions on them at law was a substitute for the power of repeal, is unfounded, since similar provisions were in the Acts of 1790 and 1793. St. 1790, c. 7, § 6; St. 1793, c. 11, § 6; St. 1819, c. 19; St. 1836, c. 357, § 15; 1 Bl. Comm. 92; *Polk* v. *Wendall*, 9 Cranch, 87; *Spalding's Lessee* v. *Reeder*, 1 Har. & McH. 187, note; *Bladen's Lessee* v. *Cockey*, Id. 230; *Sears* v. *Parker*, 1 Hayw. 126; *University* v. *Johnston*, Id. 373; *Foreman* v. *Tyson*, Id. 496; *Miller* v. *Twitty*, 3 Dev. & B. 14; *Alexander* v. *Greenup*, 1 Munf. 134; *Jackson* v. *Lawton*, 10 Johns. 23; *Jackson* v. *Hart*, 12 Johns. 77; *Whitney* v. *Emmett*, 1 Bald. 303: *Grant* v. *Raymond*, 6 Pet. 218; *Finley* v. *Williams*, 9 Cranch, 164; *Patterson* v. *Winn*, 11 Wheat. 380; *Delano* v. *Scott*, 1 Gilp. 489.

The provisions relating to repeal of patents in the Acts of 1790 and 1793 were remedies given to individuals, not to the United States, (St. 1793, § 10; St. 1790, § 5;) and were supplementary merely to the common-law remedy.

The English patent system, and decisions thereunder, are guides to the construction of our own legislation. *Evans* v. *Eaton*, 7 Wheat. 356; *Pennock* v. *Dialogue*, 2 Pet. 1, 18; *Grant* v. *Raymond*, 6 Pet. 218; *Shaw* v. *Cooper*, 7 Pet. 292; *Wilson* v. *Rousseau*, 4 How. 646; *Hogg* v. *Emerson*, 6 How. 437; *Lowell* v. *Lewis*, 1 Mason, 182; *Whittemore* v. *Cutter*, 1 Gall. 429; *Wyeth* v. *Stone*, 1 Story, 273; *Woodworth* v. *Sherman*, 3 Story, 171; *Woodworth* v. *Rogers*, 3 Woodb. & M. 135; *Sullivan* v. *Redfield*, 1 Paine, 441; *Brooks* v. *Bicknell*, 3 McLean, 250; *Stimpson* v. *Railroad*, 1 Wall. C. C. 164.

The government *cannot* "remove the taint of *illegality*" from a patent for an *old* invention by authorizing its issue. Congress has no power to authorize the issue of a patent for an *old* invention. In *White Water Valley Co.* v. *Vallette*, 21 How. 414, the legislature *had* the power to remove that taint.

There is no difference in principle between proceedings to cancel patents for land and patents for inventions. *Field* v. *Seabury*, 19 How. 323; *Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Mowry* v. *Whitney*, 14 Wall. 434. See, also, 5 Elliot, Debates, 439; Curt. Pat. (4th Ed.) §§ 8, 503; *Woodworth* v. *Hall*, 1 Woods & M. 389; 1 Op. Atty. Gen. 456.

There is no distinction between the case at bar and *U. S.* v. *Stone*, 2 Wall. 525, and *U. S.* v. *Hughes*, 11 How. 552, and 4 Wall. 232. Both of those were filed by the law officers of the government without special statutory authority. *U. S.* v. *Hughes* showed on its face that the United States had no property in the land covered by the patents sought to be canceled. See, also, *State* v. *Reed*, 4 Har. & McH. 6.

But it is claimed that a void land grant casts a cloud upon the title of the United States as proprietor. But a void patent for an invention casts a cloud upon the rights of every member of the public to use or manufacture the article, and upon the title of the rightful patentee, which equity will protect. *Martin* v. *Graves*, 5 Allen, 601; *Clouston* v. *Shearer*, 99 Mass. 210; *Ex parte Wood*, 9 Wheat. 603.

In *U. S.* v. *Stone*, *supra*, the patent was expressly held void for "want of authority" to issue it. These letters patent sought to be canceled in this action are admitted by this demurrer to have been issued without authority.

Unless the government can maintain this bill there is a failure of justice, since the commissioner of patents is powerless to revoke the patent. *U. S.* v. *Stone*, 2 Wall. 525, 535; Hind. Pat. c. 10, § 7.

There is no distinction in the process to repeal patents provided for in the Acts of 1790 and 1793, between willful and constructive fraud in the procuring of the patent. Bac. Abr. "Trespass," B. The cases cited by defendant (*Stearns* v. *Barrett*, 1 Mason, 153; *Ex parte Wood*, 9 Wheat. 603; *Delano* v. *Scott*, 1 Gilp. 489) do not bear the construction put upon them.

The intention of congress in the several patent acts was to leave the remedy in all cases, except in the particular instances mentioned, to be regulated by principles of *general jurisprudence*, (*Rubber Co.* v. *Goodyear*. 9 Wall. 788;) which is defined to be the general principles of common law, (*Mowry* v. *Whitney*, 14 Wall. 434, 439, 440.) The remedy at common law was *scire facias*, which was maintainable (1) when the king had granted a thing by false suggestion; (2) when he had granted a thing he had no power to grant. The case at bar falls within both of these classes, and the question of motive of the defendant is immaterial, since the injury is done by an outstanding void patent, which on its face is *prima facie* valid. *Whittemore* v. *Cutter*, 1 Gall. 429; *Railroad Co.* v. *Stimpson*, 14 Pet. 448; *Woodworth* v. *Rogers*, 3 Woodb. & M. 153; *Wilson* v. *Barnum*, 1 Wall. C. C. 347; *Delano* v. *Scott*, 1 Gilp. 489, 494; *Whitney* v. *Emmett*, 1 Bald. 303, 315; *Grant* v. *Raymond*, 6 Pet. 218, 242; *Wilson* v. *Rousseau*, 4 How. 646.

This power is necessary to the establishment of a complete system of equity jurisprudence, 7 Dana, Abr. c. 225, art. 1.

Before SHEPLEY and KNOWLES, JJ.

SHEPLEY, J. The information in this case is by "George H. Williams, as he is attorney general of the United States of America," at the relation of George V. Hecker, of the city of New York, against the Rumford Chemical Works, a corporation duly organized under the laws of the state of Rhode Island, and a citizen of said state, and domiciled therein, and against George F. Wilson, a citizen of the state of Rhode Island, as president of said corporation, and its general manager.

The information showeth that letters patent of the United States were on the twenty-second day of April, 1856, granted to Eben N. Horsford for a new and improved preparation or substance being a substitute for a pulverulent acid for use in the manufacture of dry powders and other similar powders when a dry acid is required; that thereafter the letters patent became vested in the Rumford Chemical Works, as assignee of Horsford. Two surrenders and reissues of the patent are then set out in the information, the first reissue being dated May 7, 1867, and numbered 2,597, and the second, June 9, 1868, and numbered 2,979. The reissue 2,979 is alleged to have been wrongfully and fraudulently obtained, and to be null and void by reason of claiming that which is not described in the original letters patent of Horsford, and that which was not the invention of Horsford as described in his original patent. The third claim of the reissued patent is alleged to be void, not only as claiming an invention not described in the original patent, and not the invention of Horsford at the date thereof, but for want of any such description in either the original or reissued letters patent of the invention therein claimed, in such full, clear, and exact terms as to comply in that respect with the requirements of law. The fourth claim is alleged to be void also, because the subject-matter thereof is not described in the original patent, and because the subject-matter of the claim is not described with sufficient accuracy to enable a person skilled in the art most nearly allied thereto to successfully make and use the same.

The information further shows that on the seventeenth of June, 1868, the Rumford Chemical Works filed a bill in equity in the circuit court of the United States for the Southern district of New York, against one John E. Lauer, alleging infringement of letters patent No. 2,979; that Lauer was an employe of the relator, George V. Hecker, and his partner, John Hecker; that the alleged acts of infringement were done in the course of said employment, and the defense of the suit was assumed by the Heckers; that, after a full hearing before his honor, Judge BLATCHFORD, one of the judges of said court, it was adjudged and decreed that the first and second claims of said patent were void for want of novelty; that on or about the thirteenth day of

September, 1869, the Rumford Chemical Works filed another bill in equity, in the same court, against the Heckers, alleging infringement of said letters patent No. 2,979; and that thereupon, and after the decree in the suit in equity against Lauer, upon the application of the complainant, the cause against Lauer was reopened and further proofs were taken in the cause. Proofs were also taken in the cause against the Heckers, and, by stipulation of the parties, the testimony taken in the *Lauer Case* was used in the *Hecker Case*, and, after a full hearing, it was adjudged and decreed in both cases that the first, second, and third claims of reissued patent No. 2,979 were void for want of novelty, and that the defendant George V. Hecker had infringed the fourth claim of said letters patent.

An allegation is then made that the question of the validity of the fourth claim was not argued or heard in that trial, and that it is invalid for the reasons before stated; that the cause was referred to a master to take account of profits made by the defendants in infringement of the fourth claim, and it does not appear that such accounting has been completed, or any final decree made in the cause. The information sets out the grounds upon which the court adjudged and decreed the first, second, and third claims of the patent to be void for want of novelty, and also the grounds upon which it is now alleged that the first, second, third, and fourth claims of the reissued patent are void for want of novelty or patentability; and that, before the expiration of the original term for which letters patent were granted, the same were extended for the term of seven years, and the extended term was duly assigned to the Rumford Chemical Works. The information proceeds to give the requisite notice of prior publications relied upon to prove that Horsford was not the original and first inventor of the inventions described and claimed in the several claims of the patent.

Allegation is then made that, since the filing of the bills against Lauer and Hecker, the Rumford Chemical Works have instituted a large number of suits, in different circuits, against persons charged with infringing reissue No. 2,979, which alleged infringements consist, in some cases, in the resale of packages of flour prepared and sold to them by Hecker, for which preparation and sale the Heckers, and Lauer, their employe, were sued in the aforementioned suits; that, all such suits being against customers of the said Heckers, they are obliged to assume the defense, and that thereby they are subjected to great vexation and expense, inasmuch as in those suits the complainant endeavors to maintain the validity of all the claims of the patent. The information further alleges that the Rumford Chemical Works has instituted a suit in equity against George V. Hecker, in the circuit court of the United States for the district of New Jersey, for alleged infringement of reissue No. 2,979, and threatens to institute other suits against other defendants for using and selling the same flour for the making and using of which the Heckers were sued in the Southern district of New York; that although the fourth claim of the patent was adjudged to be valid, yet the informant believes that the decree was unadvisedly made, and that the judgment of the court sustaining said claim cannot be revised at the private instance of the defendants therein, save by the supreme court of the United States, on appeal from the final decree, which final decree cannot be made until the completion of the accounting, and during the pendency of the accounting the decree is being used for harassing and vexatious litigation under said claim; that there are valid and subsisting patents, granted according to law and now owned by the Heckers, the use of the inventions secured by said patents being greatly impeded and injured by the aforesaid doings of the Rumford Chemical Works, and by the existence of the reissued patents aforesaid. The prayer is that the reissued patent No. 2,979 should be declared void, and be canceled and annulled, and that the Rumford Chemical Works be enjoined from prosecuting any suit at law or in equity for alleged infringements of the

same. The bill is signed by George H. Williams, attorney general of the United States, by John A. Gardner, attorney of the United States in and for the district of Rhode Island. A motion was made and filed to set aside the service of the subpœna, and take the information from the files. The evidence offered under this motion was ordered to be filed and made a part of the record in the cause.

Inasmuch as the principal questions presented on the hearing of the motion are raised by the demurrer, the court decided to hear the parties on the bill and demurrer, and further consideration of the motion is unnecessary. Defendants demur to the bill on the grounds, briefly stated—*First*, that informant does not state any case which entitles him to relief against these defendants; *second*, that the informant had no lawful authority to file this information; *third*, that the information and this proceeding are not in the name or in behalf of the United States; *fourth*, that the informant, "as he is attorney general of the United States," had no lawful authority to file this information; *fifth*, that the informant has not signed the said bill or information, nor has counsel signed the same; *sixth*, that this court has no jurisdiction under the constitution and laws of the United States, to entertain this information and proceed therewith; *seventh*, that this court has no jurisdiction to entertain the said information, or to proceed therewith, because it appears that the United States are not parties thereto, or petitioners or plaintiffs therein; *eighth*, that this court has no jurisdiction, because it does not appear that the parties are citizens of different states.

A patent for a useful invention is not, under the laws of the United States, a monopoly in the old sense of the common law. The whole patent system of the United States rests upon the basis of the constitutional provision conferring upon congress the power to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. So long as such writings and discoveries were not communicated to the public, authors and inventors had a possession of, which was equivalent to a property in, their writings and discoveries. When communicated to the public, by the common law that property was lost. In consideration that an inventor will disclose the secret of his invention, and put it in immediate practice, and afford to the public the opportunity to practice it, when it becomes public property at the expiration of the term of the patent, the government grants to the author of a new and useful invention the exclusive right in that invention for a term of years. This grant is not the exercise of any prerogative to confer upon one or more of the subjects of a government the exclusive property in that which would otherwise belong to the common right. It more nearly resembles a contract, which under the authority conferred by the constitution, congress authorizes to be entered into between the government and the inventor, securing to him, for a limited time, the exclusive enjoyment of the practice of his invention, in consideration of the disclosure of his secret to the public, and his relinquishment of his invention to the public at the end of the term. To the legislation of congress, and to this alone, we must resort, under our form of government, for guidance as to the extent, limitations, and conditions of the respective rights of inventors and the public, and as to the forms of remedy and the remedial jurisdiction, as well as the remedy itself, under our system of patent law. So far as any inquiry may relate to the relations between the government and the grantee of letters patent of the United States, but little light can be reflected from the English decisions. Originating, as their system of patent law did, in a supposed right of the king, residing in his royal prerogative, to create monopolies, and continued under the authority of the act of Parliament of 21 James I., which, while prohibiting by the statute of monopolies the granting of exclusive privileges in trade, excepted letters patent for the sole working or making of any manner of new manufacture within the realm

to the first and true inventors of such manufactures, it evidently rests upon a different basis from a system founded solely upon the express grant of power in a written constitution.

As in England the grant of a patent is a matter of grace and favor, the crown may annex any conditions it pleases to the grant. Every English patent contains a proviso which makes the grant it contains revocable by the queen, or by any six of her privy council, for certain causes, which are mentioned in the proviso. These causes are stated in the proviso to be, if the grant be contrary to law, or prejudicial or inconvenient to her majesty's subjects, or if the invention was not new, or not invented by the patentee. Hind. Pat. c. 10, § 7. This provision is an affirmance of the law that the queen cannot do anything against the law, or against right and justice; hence the maxim that the queen cannot do wrong. Therefore all her letters patent which are contrary to law or common justice, or which are to the prejudice of the commonwealth, or to the general injury of the people, are null and void, and every grant from the queen has this condition either expressly or tacitly annexed to it, that it be not a grievance or prejudice to her majesty's subjects, and if a grant be contrary to this condition it is void. Co. Litt. 90 B; Chit. Prerog. 178; Bac. Abr. "Prerog." F 2; Shep. Abr. "Prerog." pt. 3, 48, §§ 5, 7. The statute of monopolies, 21 Jac. I. c. 3, § 6, provides also that patents for inventions "shall not be contrary to law, nor mischievous to the state by raising prices of commodities at home, or hurt of trade or generally inconvenient." Letters patent are not demandable in England as matter of right. In practice they are rarely refused, but are granted on application properly made, the reason being that the grant is entirely at the risk of the petitioner for the patent. As the letters patent issued under the great seal, and the enrollment of every patent remained of record in the court of chancery, the lord chancellor, in the common-law court of chancery,—or, in the words of Sir Edward Coke in the fourth institute, the "one ordinary *coram domino rege in cancellaria*, wherein the lord chancellor or lord keeper of the great seal proceeds according to the right line of the laws and statutes of the realm *secundum legem et consuetudinem angliæ*,"—has power to hold plea of *scire facias* to repeal letters patent under the great seal, and to cancel the patent, and also the enrollment of it. *King* v. *Butler*, 3 Lev. 221, and 2 Vent. 344. The *scire facias* being a judicial writ, and founded upon a record, properly issued from the court of chancery, as the patent was a record in chancery. Sir Edward Coke says, (4 Inst. 88:) "Our lord chancellor of England is called *cancellarius, a cancellendo, i. e., a digniori parte;* being the highest point of his jurisdiction to cancel the king's letters patent under the great seal, and damning the enrollment thereof by drawing strikes through it like a lattice." The form of a writ of *scire facias*, which issued from the court of chancery, commanded the sheriff to give notice to the patentee to appear in chancery, and show why the letters patent and enrollment should not be canceled, and the letters patent restored into chancery, there to be canceled.

These legal proceedings were in the office called the "Petty Bag," the office of the court of chancery, in which all common-law proceedings of the court were carried on, all the pleadings and other common-law proceedings being entitled, "In the Petty Bag Office in Chancery." The action of *scire facias* was not only a remedy provided by law for the crown in behalf of the public, but also for any subject of the crown who could show that a void or illegal patent operated to his prejudice. Thus, in *Butler's Case*, before cited, Lord Chancellor FINCH said: "Where a patent is granted to the prejudice of the subject, the king, *of right*, is to permit him upon his petition to use his name for the repeal of it." Every person is presumed to have such an interest in a patent for an invention that, if he alleges that it is illegal or void, he is entitled, as of right, to a *scire facias in the name of the queen*, in order to repeal it. *Queen* v. *Aires*, 10 Mod. 354; *Queen* v. *Ballivos*, 1 P. Wms. 207;

Vin. Abr. "Prerogative," T. b.; U. b. 8. Such proceedings were always in the name of the crown. "The only means which the law provides for the repealing of letters patent [for inventions] is by action of *scire facias* at the suit of the queen," (Hind. Pat. 64,) and, as we have seen, this was a *quasi* common-law proceeding, with the right of trial by jury. This right, and this mode or proceeding, was preserved by the express provisions of the modern statutes, which, while providing for a new seal to patents, and for filing the specifications in such office as the new commissioners might designate, also enacted that "the writ of *scire facias* shall lie for the repeal of any letters patent issued under this act in the like case as the same would lie for the repeal of letters patent which may now be issued under the great seal." No instance can be found, it is believed, of any other proceeding in England than a *scire facias* to repeal letters patent for an invention. It is contended in the case at bar that the case of *Attorney General* v. *Vernon*, 1 Vern. 277, is an authority for the repeal of letters patent by a bill in chancery. But this case was without a precedent, and has never been followed in England, and cannot be claimed to be a precedent for a bill in equity to repeal letters patent for an invention which issue under the great seal, and are recorded in chancery. The question related to letters patent which purported to grant to Col. Vernon certain rights and privileges connected with the honor of Sudbury, and the manor of Sudbury, and other landed estates. Lord Chief Baron MONTAGUE, as to the objection that there was no precedent of any such suit brought into this court, said: "This court creates precedents," and the Lord Chancellor JEFFRIES, in allusion to what had been proved in the case, that Vernon had been a devoted and loyal adherent of the late King Charles I., and had by reason thereof suffered greatly in his person and estate, and been imprisoned in the Tower, answered: "That Col. Vernon has been very loyal, and that his service and sufferings for the crown have been considerable, must be admitted;" but he goes on to decree that the patent must be delivered up and canceled upon two grounds—*First*, that "Col. Vernon had before that time tasted of the king's bounty both in England and Ireland;" and also, "though Col. Vernon was an honest gentleman and of good quality, the honor of Sudbury is of that vast extent, and so many noblemen hold of it that it is not fitting for a person of his degree."

Comparing the system of rights and remedies, so far as they refer to the relations between the government and the subject in England and this country, we find these strongly marked differences: Letters patent for inventions in England are grants made by the crown *de gratia speciale;* the words "of our special grace" in the patent importing that the grant proceeds merely from the grace and bounty of the crown, the grantee having no right or title to the grant, except through the favor of the crown. 2 Co. Inst. 78; Hind. Pat. 50. In this country they are issued, neither in fact nor by publication, by any special grace or favor, and in no sense *ex mero motu*, but as a matter of right, under the provisions of a statute, to the inventor who has complied with the conditions which the statute imposes. In England, before the statutes of 12 & 13 and 15 & 16 Vict., the letters patent issued under the great seal, and were on record in the court of chancery. In the United States the record of the patent is in the patent-office, and under the seal of the patent-office. In England the patent issues to the applicant as a matter of course on his application, the grant being entirely at the risk of the petitioner. By our statute the letters patent are not issued until the commissioner of patents has caused an examination to be made, and until it appears, upon such examination, that the claimant is justly entitled to a patent under the law, and that the same is sufficiently new and important. From the decision of the examiner, or of the examiner-in-chief in charge of the interferences, an appeal is provided to the board of examiners, and from their decision the party dissatisfied may appeal to the commissioner in person. If such party, except a party to an interference, is

dissatisfied with the decision of the commissioner, he may appeal to the supreme court of the District of Columbia, sitting *in banc;* and after all these proceedings, if the patent be refused, the applicant may have a remedy by bill in equity. Also, in case of interfering patents, the remedy is not by *scire facias* at the instance of the relator, as in England, but the statute provides for a suit in equity by the owner or other person interested in the working of the invention, brought against the owner of the interfering patent. In England the law gives to the party aggrieved by the issue of the letters patent his right to his remedy of *scire facias*, brought and conducted at his expense by the attorney general, in the name and in behalf of the queen, to repeal the patent. No statute in this country confers or recognizes the existence of any such right, nor can any precedent be found for the suing out of a writ of *scire facias*, or the bringing of a bill in equity to repeal the patent by the attorney general in the name and behalf of the United States, either with or without a relator.

Under our system of patent law, where the issue of letters patent is either a *quasi* decision at the patent-office, or an actual judicial decision on appeal from the commissioner's decision, and where the statute so carefully guards the rights of defendants in actions brought by owners of patents, we could entertain no doubt, in the absence of any statute provisions authorizing proceedings by the attorney general of the United States, either as in this instance, in his own name, "as he is attorney general," or in the name and behalf of the United States, that no right to institute such a proceeding existed, were it not for the high respect which this court entertains for any suggestion coming from the supreme court of the United States, whose decisions are binding upon this court, and whose *dicta* even are entitled to be treated with the respect and consideration due the high authority and profound learning of that court.

The case of *Mowry* v. *Whitney*, 14 Wall. 434, was one of two interfering patents. Mowry having been sued by Whitney for practicing the invention described in Mowry's patent, which Whitney alleged to be an infringement of his (Whitney's) prior, existing, and extended patent; and, Whitney having obtained a decree against Mowry in that suit in chancery, Mowry filed, in his own name, a bill against Whitney, alleging in substance that Whitney had obtained the extension of his patent by false suggestion, by falsely representing that his profits under the patent had been very small, when, in fact, they had been very large. There was a demurrer to the bill upon the grounds—*First*, that the extended patent had expired by its own limitation before the bill was filed; *second*, that the complainant could not, in his own right, maintain such a suit. The court did not deem it necessary to decide the first point. In deciding the second, the court, (Mr. Justice MILLER,) stating the ancient mode of vacating a patent in the English courts by *scire facias*, states the three cases in which this may be done in those courts: *First*, when the king, by his letters patent, has by different patents granted the same thing to several persons, the first patentee shall have a *scire facias* to repeal the second; *second*, when the king has granted a thing by false suggestion he may by *scire facias*, repeal his own grant; *third*, when he has granted that which by law he cannot grant, he, *jure regis*, and for the advancement of justice and right, may have a *scire facias* to repeal his own letters patent. The learned judge then, observing that the sixteenth section of the patent act of 1836 seems to have in view the same distinction made by the common law in regard to annulling of patents, proceeds to decide that the remedy under that section, to try the conflicting claim in chancery, is limited to individuals claiming under conflicting patents, or one whose claim to a patent has been rejected because his invention was covered by a patent already issued, and authorizes the court to annul or set aside a patent so far as may be found necessary to protect the right, and that the suit by individuals is limited to that class of cases, and that the general public is left to the protection of the government and its of-

ficers. The case decided, and only decided, that an interfering patentee or an individual could not, in his own name or in his own right, maintain such a bill in equity to vacate a patent upon the ground of false suggestion or fraud in obtaining the patent. The authority of this decision, or the conclusiveness of the reasoning in support of the decision, has never been doubted. In England, when the king had granted letters patent for an invention by false suggestion, the *scire facias*, brought by the king's attorney general, to repeal the king's own grant, was in the king's name and on his own behalf, and not at the suit of a subject. And here, by the act of 1836, it was not intended to confer upon an interfering patentee the right to try such a question by a suit in his own name, which would be conclusive only *inter partes*, and leave the same question open, as the court in that case observes, to innumerable vexatious suits to set aside the patent, since a decree in favor of the patentee in one suit would be no bar to a suit by another party. It is true that, in deciding this question, the learned judge says, what is unquestionably true, that "the general public is left to the protection of the government and its officers" in cases like the one alleged in *Mowry* v. *Whitney*, of false suggestion or fraud in obtaining a patent. The court did decide that "no one but the government, either in its own name or the name of its appropriate officer, or by some form of proceeding which gives official assurance of the sanction of the proper authority, can institute judicial proceedings for the purpose of vacating or rescinding the patent which the government has issued to an individual, except in the cases provided for in section 16 of the act of July 4, 1836." The court did not decide, and in that case was not called upon to decide, what protection to the general public, by the government and its officers, had been provided by law; or whether, in the absence of any express statute provision, or in addition to such statute provisions as are designed to protect the rights of the general public, any further and additional right exists in any executive department of the government to institute any form of proceeding to repeal the grant, by virtue of any supposed prerogative, or any supposed relation of the government to the general public, like that under which the king *jure regis* may institute proceedings to repeal his own grant, or as *parens patriæ* may intervene in his own name for the benefit of his subjects, at their relation and expense, to repeal a grant supposed to be prejudicial to them. Whether any power had been conferred by statute upon any officer of the government to institute such proceedings, or whether any such right or power existed anywhere in the executive department, in the absence of statute provisions conferring the power and prescribing the mode of proceeding, is a question which the court can only decide "when a case arises in which the United States or the attorney general shall initiate a suit to have a patent declared null *ab initio*," and the court, in the language last quoted, defers its decision upon the effect of such a proceeding (under a particular state of facts stated in the opinion) to the time when such a case shall arise.

This leads us to the consideration of the protection afforded by the provisions of the patent acts to the rights of the general public, and to the history of the legislation upon that branch of the subject. The fifth section of the act of 1790, the first act of congress in relation to the subject, (1 St. at Large, 111,) provided a form and mode of proceeding to repeal a patent "obtained surreptitiously, by or upon false suggestion," upon complaint made under oath before the judge of the district court where the defendant resided, and motion within a year after issuing of the patent, but not afterwards. The patent issued under this act without any oath of the applicant and any previous examination, and want of novelty and originality are not included in the list of defenses authorized by the sixth section. The act of 1793 extended the time of limitation for commencing proceedings to repeal the patent to three years, and enlarged the defenses in actions for infringement, opening

the defenses of want of novelty and originality. These provisions clearly show that it was deemed necessary that authority for proceedings to repeal letters patent conferred by statute.

In *ex parte Wood*, 9 Wheat. 609, the courts say: "As the patents are not enrolled in the records of any court, but among the rolls of the department of state, it was necessary to give some directions as to the character, time, and manner of instituting proceedings to repeal them." These acts of 1790 and 1793, including these provisions conferring jurisdiction upon the federal courts, over proceedings for the repeal of letters patent, were repealed by the act of 1836. That act was substantially re-enacted and codified by the act of 1870, and in the Revised Statutes of 1874. The act of 1836 contained no provision authorizing any proceeding to repeal letters patent upon the ground that they were obtained "surreptitiously, by or upon false suggestion;" but the sixteenth section provided a remedy in the case of conflicting patents, and for a repeal of the one which the court should adjudge had been improvidently issued. This takes the place of the remedy to which, in case of conflicting grants, the subject is entitled to, as matter of right, in England.

For the protection of the general public, in place of the provision for a proceeding in the nature of a *scire facias* to repeal the patent, to be instituted within three years, as provided in the act of 1793, it sought to provide safeguards against the issue of letters patent upon false suggestion, and ample security against any injury to the citizen, to whom it opened every possible defense against injury resulting from any mistake or oversight of the commissioner in issuing the patent. In fact, every defense against a patent that can well be imagined was left open to the citizen whose interests were affected by it, excepting only the one which in *Whitney* v. *Mowry* the supreme court decided was not open,—the question of fraud upon the government in obtaining the grant. To guard against such a fraud, it provided for the examination by the examiner, and for a commissioner, and the subsequent proceedings hereinbefore stated; it being made the duty of the examiner and the commissioner to protect the rights of the public. The jurisdiction conferred by Acts of 1790 and 1793 upon the federal courts to repeal a patent, and which, without express grant, it is believed did not inhere in those courts, is nowhere conferred by the Acts of 1836 or 1870 or in the Revised Statutes of 1874. It would seem to be a great stretch of power and assumption of jurisdiction for one circuit court, in the absence of any such express authority conferred by act of congress, to repeal and vacate a patent which may have been originally granted upon the decree of another circuit court, upon appeal from the commissioner, and adjudged valid, perhaps, in litigation respecting it, in still another circuit court in another circuit. The better opinion upon this brief and imperfect review of the legislation of congress upon this subject would seem to be that congress had deliberately transferred the jurisdiction over the question of the protection of the rights of the general public, to the *quasi* judicial decision of the examiner and the commissioner, or the actual judicial decision of the federal courts upon appeal from the commissioner, and fully protected the rights of the individuals against whom the patents might be sought to be enforced by opening to them every defense essential to the preservation of their rights and the protection of their interests.

The decision in the federal courts, sustaining proceedings in equity to vacate letters patent granting lands obtained by fraud, furnish no precedent in case of letters patent for inventions. The United States as an owner of lands, has equal rights, and is entitled to equal remedies, with an individual owner. In granting lands, the United States conveys that in which it has the fee. In issuing letters patent for inventions, nothing is granted which belonged before to the United States. The issue of the letters patent is in compliance with an act of congress. The rights and remedies of the parties are dependent solely on the statute enactments, and do not grow out of any previous

ownership of the supposed subject of the grant, as in the case of a conveyance of lands. But if this court has jurisdiction over any proceeding to vacate a patent, and declare it null *ab initio*, upon the ground of false suggestion, or the ground that the government has undertaken to grant that which by law it cannot grant, it is perfectly clear that "the attorney general of the United States, as he is attorney general," has no authority, as such, and in his own name, to file an information or commence proceedings by bill in equity. It is undoubtedly in the power of congress to confer upon any public officer the authority to commence suits in his own name on behalf of the United States. Such authority has been conferred by statute upon the postmaster general to institute suits in his own name for the recovery of debts and balances due the general post-office. No such authority to institute suits in his own name has been conferred by statute upon the attorney general. In the absence of any such authority, the information (if the court has jurisdiction to entertain it) should be in the name of the United States, and, I think, should be filed by the attorney of the United States, in the district in which the information is filed, "in the name and behalf of the United States." The United States, then being a party to the proceedings, it would not abate by the death or resignation of the public officer who filed it. George H. Williams has resigned, and ceased to be attorney general; as an individual he cannot maintain his proceeding. The United States is not made a party; the relator is not the party. "The relators are not plaintiffs." *U. S.* v. *Doughty*, 7 Blatchf. 424; *Attorney General* v. *The Mayor*, 1 Moll. 95; *Attorney General* v. *Wright*, 3 Beav. 447. "Relators should know they are not parties to informations, and have no right, of their own authority, to make any application to the court." There is no party plaintiff before the court, unless it be George H. Williams as an individual citizen. "This court can recognize the United States as a plaintiff on the record only when the record shows that the United States appears as plaintiff, by the district attorney of this district." *U. S.* v. *Doughty*, 7 Blatchf. 425. In England the *scire facias*, in the common-law division, or in the petty bag in chancery, to repeal a patent, was always in the name of the sovereign. "The *scire facias*," says Lord CAMPBELL in *Reg.* v. *Archipelago Co.*, 1 El. & Bl. 351, "in all cases must be in the name of the king." The form of the writ recites that A. B., "attorney general for our said lady, the queen, who for our said lady, the queen, prosecutes in this behalf;" and that this has been the invariable rule in England will appear by an examination of every reported case in that country, in which this jurisdiction to repeal letters patent by *scire facias* has been exercised.

In *Benton* v. *Woolsey*, 12 Pet. 27, where no objection was made to an information filed by the district attorney "in behalf of the United States," the court thought, in the absence of any objection, "the United States may be considered the real party, though in form it is the information and complaint of the district attorney." The usual and proper mode is for the district attorney to file an information in the *name* and in behalf of the United States, and probably only in that form could one be sustained, if objected to. The power (conferred by section 359 of the Revised Statutes of the United States on the attorney general) to, in person, conduct and argue any case in any court of the United States in which the United States is interested, or to direct the solicitor general, or any officer of the department of justice, to do so, clearly does not authorize him to bring such suit in his own name, or authorize the solicitor general or any officer of the department of justice to do so. If the power given to him, wherever he deems it for the interest of the United States to conduct and argue any case in any court of the United States in which the United States is interested, confers upon him any authority to commence or institute proceedings, except through the district attorneys, who are subject to his orders and supervision, which is at least doubtful, there is no right expressly given, or to be implied from any words in this or any other statute, to

bring the suit in his own name, instead of in the name of the real party, the United States.

The conclusion, therefore, follows that this information to repeal letters patent for an invention, being in the name of George H. Williams, as he is attorney general of the United States, and not in the name and behalf of the United States, is not authorized by any statute, sanctioned by any precedent, or supported by the authority of any judicial decision; and the demurrer must be sustained, and the information dismissed.

UNITED STATES *v.* COLGATE.[1]

(*Circuit Court, S. D. New York.* December 11, 1884.)

PATENTS FOR INVENTIONS—CANCELLATION—SUSTAINED PATENTS.

The United States can not maintain an action to repeal letters patent for an invention on grounds that have been sustained in a suit for the infringement of the letters patent.

This was an action to repeal letters patent. The case first came up on motion for a preliminary injunction, which was refused. 21 Fed. Rep. 318. Hearing on the demurrer to the bill for want of power in the court, and failure of the bill to state a case calling for relief in equity.

WALLACE, J., (*orally.*) There are no allegations in the bill charging fraud or false suggestion on the part of the applicant in his application for a patent. At most, the allegations show that there was no novelty in the invention, and inferentially that he, knowing the prior state of the art, which was public knowledge, must have known there was no novelty. All the facts alleged to show want of novelty seem to have been considered in the case of *Colgate* v. *Telegraph Co.*, 19 Fed. Rep. 828, where they were set up in the answer, and where the patent was sustained. This branch of the bill, therefore, does not require much consideration.

The other aspect of the bill which charges that the commissioner of patents was without jurisdiction to issue a patent, after the decision of the chief justice under the statute, is worthy of more consideration. The statute of 1849 was evidently intended for the benefit of applicants entitled to a patent, and to enable them to right any errors which might be made by the commissioner. The proceeding, where there are no interfering applicants, is practically one between the applicant and the commissioner. It would not seem reasonable to construe such a statute as intended to preclude a new application, on new facts bearing either upon novelty or abandonment, to the commissioner after his action had been sustained by the appellate authority on a former application. The decision of the appellate tribunal is confined to the record of the proceedings before the commissioner, and the determination is, in effect, that the commissioner was, or was not, justified upon the facts before him in refusing a patent. There is no decision that upon a new application, and upon different facts, the patent should be refused. If the bill alleged that the new application was founded upon the same papers as the one rejected, and no new facts existed to authorize the commissioner to come to a different conclusion,

[1] NOTE. This case was decided in 1884, but the opinion has never been published. In view of the citation of the opinion by counsel and by Judge COLT in *U. S.* v. *Telephone Co.*, *ante*, 591, it is printed at this time. [ED.

the case would be stronger for the complainant. As there are no such allegations, it is not necessary to determine what effect should be given to them. I am disposed to give an opportunity to the complainant to amend the bill in this respect if so advised.

The decision of the court is that the demurrer be sustained, and judgment ordered dismissing the bill, unless the complainant, within 20 days, brings on a motion to amend the bill by alleging that the record was the same, and that no new facts were presented to the commissioner at the time of the making of the application for the patent which he granted. Such motion will be heard on affidavits, and I can then judge of the probability of the truth of any such allegation.

SEIBERT CYLINDER OIL-CUP CO. *v.* MANNING and others.

(*Circuit Court, S. D. New York.* November 5, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—CONTRACT.

Two corporations, owning somewhat similar patents, agreed each not to sue the other or its agents, etc., under any letters patent owned by it, so long as the mutual covenants in the agreement were performed by each party. One of these covenants on the part of plaintiff corporation was not to grant licenses for a certain territory, and one on the part of the other corporation was to make monthly returns and payments. Plaintiff corporation sued an agent of the other corporation for infringement, and in the bill, which was in the usual form, set out by way of anticipation that the agent relied upon this agreement, but that it was at an end, having been rescinded for failure of the other corporation to make returns. Defendant interposed a plea to the effect that the contract was still in force, for the reason that plaintiff had granted licenses in the prohibited territory before default of the other corporation. The validity of the patent involved was not questioned, nor its infringement, save as above, denied. *Held*, on counter-motions for preliminary injunction and to dismiss bill, (1) that the circuit court had jurisdiction, the case being an ordinary suit to prevent the violation of a right secured by a patent which the defendant sought to defeat by a collateral agreement; and (2) that the injunction should issue unless defendant give bond to meet any decree against him, and the corporation employing him, which was the real defendant, file a report of sales since the date of its last report under the agreement, and continue to file such a report monthly, as provided for therein.

In Equity. On counter-motions, the one for preliminary injunction, and the other to dismiss bill for want of jurisdiction.

Edmund Wetmore, for complainant.

Francis Forbes and *Alexander P. Hodges*, for defendants.

WALLACE, J. This suit is brought to restrain the infringement of the complainant's patent for an improvement in lubricators. The bill, besides setting out such facts as are ordinarily alleged, showing title and acts of infringement by the defendants, sets out also, by way of anticipating the defense, that the defendants are selling lubricators manufactured by the Detroit Lubricator Company, which sale constitutes the infringement complained of, and pretend that they have a right to sell the same without suit by or molestation from the complainant, because on or about the first day of December, 1883, the complainant and the

said Detroit Lubricator Company made an agreement in writing wherein it was covenanted that "so long as the covenants and agreements to be observed and performed by the parties, respectively, are observed and performed, each party agrees not to sue, or directly or indirectly authorize to be sued, the other party, its agents or vendees, under any of the letters patent now or hereafter owned by it." The bill further alleges that the defendants pretend that the said agreement is still in force, and further alleges that such pretense is unfounded, because the said Detroit Lubricator Company did not observe and perform certain covenants on its part in the agreement contained, and the agreement was annulled and rescinded prior to the commencement of the suit. The defendants have interposed a plea to the bill, in which they set up the agreement between the complainant and the Detroit Lubricator Company as a defense to the suit, and aver that said agreement is still in force. The complainant has moved for a preliminary injunction, and the defendants have moved to dismiss the bill, upon the ground that the suit is not one arising under the patent laws, and the bill does not contain the requisite averments to give the court jurisdiction otherwise.

It is apparent from the affidavits presented upon the motion for an injunction that the real dispute between the parties is whether the covenant not to sue, contained in the agreement between the complainant and the Detroit Lubricator Company, is still in force, or whether that covenant, and one other covenant in the agreement, on the part of the Detroit Lubricator Company, to make monthly returns and payments to the complainant for the sale of lubricators, are at an end; the contention on the part of the defendants being that the Detroit Lubricator Company was released from its covenant to make returns and pay royalties, because the complainants had previously violated a condition of the agreement on its part not to authorize by license the use of its patents outside of the New England states, and had licensed the Nathan Manufacturing Company to use its patent. No issue is made by the pleadings, nor is any presented by the affidavits respecting the validity of the patent in suit, the complainants' title thereto, or the acts of infringement by the defendants. And it is conceded in behalf of the complainant that the bill cannot be maintained, and that the motion of defendants to dismiss it on the ground of want of jurisdiction should prevail, unless the controversy made by the bill and plea is one arising under the patent laws.

It is doubtless true that the covenant on the part of the complainant not to sue is equivalent to a license to the Detroit Lubricator Company and its vendees to use the patented invention, and protects them as effectually as an express license, so long as the Detroit Lubricator Company observes the conditions upon which the covenant is to continue in force. Nevertheless, the case can be distinguished from *Hartell* v. *Tilghman*, 99 U. S. 547, and other cases decided upon the authority of that decision, including *Trading Co.* v. *Glaenzer*, 30 Fed. Rep. 387, because the action is not, in substance, one to prevent the violation of the rights of a patentee or owner of a patent under a contract of which the patent is the subject-matter, but is the ordinary action to prevent the violation

of a right secured by a patent which the defendant seeks to defeat by a collateral covenant; and, until the supreme court shall otherwise decide, the doctrine of *Hartell* v. *Tilghman* should not be extended to a case like the present.

It would seem that an action could be maintained on the law side of this court to recover damages for the infringement in question, and, although the defendant should in such an action rely upon the covenant not to sue as the only defense, setting it up in his answer, while admitting every fact averred in the complaint, he could not thus oust the court of jurisdiction. Although the only issue would be whether the covenant was in force, and a bar to the action, the action would nevertheless be one arising under the patent laws of the United States, and the defendant could not oust the court of jurisdiction by any admission he might see fit to make in his pleadings. If this court would have jurisdiction of the action on the law side, it has on the equity side when the relief sought is an injunction, and the facts authorize such relief. Certainly, jurisdiction is not defeated because the complainant alleges, in addition to the ordinary averments entitling him to the relief sought, such facts, by way of anticipation, as are essential to enable him to controvert the facts which the defendant may present by a plea or an answer. In the present case the complainant would not be at liberty to show that the covenant not to sue is not in force, because the Detroit Lubricator Company has not observed some condition in the agreement upon which the covenant is to cease, or at least it is doubtful whether the complainant could do so. Although formerly a complainant by a special replication could put in issue some fact on his part necessary for the evidence of new matter in the defendant's plea or answer, but not alleged in the bill, this is not now permissible. Equity Rule 45. It is needless to say that no facts are properly in issue unless charged in the bill. Story, Eq. Pl. §§ 257, 878.

If this court has no jurisdiction of the controversy, the complainant would seem to be without remedy, because by the decisions of the state court of last resort it is held that in such a case he can and must resort to this court, and that the state courts have no jurisdiction. *Store Service Co.* v. *Clark*, 100 N. Y. 365, 3 N. E. Rep. 335; *Manufacturing Co.* v. *Reinoehl*, 102 N. Y. 167, 6 N. E. Rep. 264.

Upon the facts appearing in the affidavits, the case is one where the motion for an injunction should be granted, unless the defendants execute an undertaking conditioned to secure the complainant for the amount of any decree which may be recovered in the action. As the Detroit Lubricator Company is the real defendant, that corporation must file monthly reports henceforth with the clerk, as provided in the agreement between it and the complainant, and also a report of all lubricators containing the patented invention sold since it ceased to file monthly reports, as a condition of withholding the injunction.

BATES, Adm'r, etc., *v.* ST. JOHNSBURY & L. C. R. Co.

(*Circuit Court, D. Vermont.* October Term, 1887.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DAMAGES—LICENSE FEE.
   Defendant used, without license, plaintiff's patent. The referee found that while plaintiff had an established license fee, he was accustomed to vary it, and had authorized an agent to settle for infringements at a rate that would net the patentee one-half of the established license fee. This latter rate the referee decided was a fair measure of damages. *Held*, that the finding of the referee was conclusive.
2. INTEREST—ALLOWANCE AS DAMAGES.
   Although damages do not carry interest as such, interest may be allowed as part of the damages by the trier of fact, it being only a mode of stating the amount found.

Elisha May, for plaintiff.
Stephen C. Shurtleff, for defendant.

WHEELER, J. This is an action for damages for infringement of a patent granted to the plaintiff's intestate for improvements in railroad car platforms, couplers, and buffers, and has been heard on the report of a referee. There is no question but that the patent, which expired July 25, 1883, was valid; nor but that the defendant made use of the patented devices on its cars from July 1, 1880, until after the expiration of the patent. It appears from the report that the patentee was in the habit of authorizing the makers of cars to put his patented improvements upon them, and of collecting for the use of the improvements afterwards of the railroad companies making use of them. It is argued for the defendant that such authorized use would not furnish a cause of action for infringement. This argument might be well founded as to cars upon which the improvements were so authorized to be placed. But the referee has further reported that it does not appear who attached the improvements to these cars, and has not reported that the habit extended to them. The use would be an unlawful infringement unless license or authority should be shown, and on those statements neither appears. The plaintiff is therefore entitled to recover.

The referee has further reported that the patentee had a usual price of $100 per car for the right to use his improvements, from which he sometimes varied according to special circumstances, and that $550, being $50 per car, is the fair value of the damage to the patentee done by this infringement. The plaintiff claims that on this finding he is entitled to recover $100 per car. There is no question but that an established license fee is a proper measure of damages for an infringement of the same extent. *Clark* v. *Wooster*, 119 U. S. 322, 7 Sup. Ct. Rep. 217.

But this is not an unvarying rule, and does not carry the right of recovery beyond the actual damages when the circumstances vary and the actual damages are made to appear. *Birdsall* v. *Coolidge*, 93 U. S. 64. The use by the defendant in this case was but for a small part of the term of the patent. It is not made to appear whether the extent of the use

of the cars, or the extent of time during which they were used, were circumstances which governed the patentee in varying his price, except by inference; but it is plain that the length of time to be paid for would be important, and as circumstances might vary it this circumstance ought to be allowed its due weight in fixing the value of what was unlawfully taken. This value was a question of fact, in view of the usual price and its variations, and all the other circumstances, and within the province of the referee. His finding of the amount of the actual damages is conclusive.

He has also found interest from January 1, 1884, when a demand of payment appears to have been made, as a part of the damages. Although damages do not carry interest as such, interest may be allowed as a part of the damages by the trier of fact in awarding damages. This is only a mode of stating the amount found. *Littlefield* v. *Perry*, 21 Wall. 205.

Judgment on report for plaintiff for $550, and interest, $124.02, in all $674.02.

MAY *v.* SAGINAW CO.

(*Circuit Court, E. D. Michigan.* October 17, 1887.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—ACTION AGAINST COUNTY.
   An action will lie against a county for the infringement of a patent.
2. COURTS—FEDERAL JURISDICTION—CLAIM AGAINST COUNTY.
   A state statute vesting in the board of supervisors of each county "exclusive power to adjust all claims against their respective counties" is no bar to a prosecution for a tort in the federal court.
3. PATENTS FOR INVENTIONS—ASSIGNMENT—SCOPE OF.
   An assignment of an expired patent by an administrator of the patentee, purporting to convey "all the right, title, interest, claims, and demands whatsoever, which the estate has in, to, by, under, and through the said improvements and letters patent," covers the right to sue for and collect claims for past infringements.

(*Syllabus by the Court.*)

On Motion for New Trial.

This was an action of trespass on the case, for the infringement of a patented improvement in the construction of prisons. The patent having expired, the case was begun at law, tried by a jury, and a verdict rendered for the plaintiff in the sum of $1,500. Defendant thereupon moved for a new trial, upon the grounds stated in the opinion.

M. C. Burch and *George H. Lothrop*, for plaintiff.

C. F. Burton and *C. J. Hunt*, for defendant.

BROWN, J. The *first* reason assigned for a new trial, viz., that a county cannot be sued for the infringement of a patent, is covered by the decision of Judge JACKSON, of this circuit, in *May* v. *County of Logan*, 30 Fed. Rep. 250, and is no longer open to question in this court.

The *second* ground, that the county is not suable without showing notice of demand, is based upon that provision of the state constitution vesting in the board of supervisors "exclusive power * * * to adjust all claims against their respective counties, and the sum so fixed and defined shall be subject to no appeal." This provision, however, has no application to claims for torts, and was not intended to deprive the courts of common law of their original jurisdiction over such claims. *Endriss* v. *County of Chippewa*, 43 Mich. 317, 5 N. W. Rep. 632. And even if it were, it would have no application to non-residents suing in the federal courts. *Suydam* v. *Broadnax*, 14 Pet. 67; *Bank* v. *Jolly's Adm'rs*, 18 How. 503. The cases of *May* v. *Buchanan Co.*, 29 Fed. Rep. 469, and *May* v. *Cass Co.*, 30 Fed. Rep. 762, are not in point, as the statutes are quite different. I have repeatedly upheld provisions similar to those of the Iowa Code.

The *third* ground, that plaintiff showed no title to sue, is based upon the opinion of the circuit court for the Western district of Wisconsin, in *May* v. *Juneau Co.*, 30 Fed. Rep. 241, in which it was held that the terms of the assignment to plaintiff of her husband's interest in the patent were not broad enough to cover claims for infringements prior to the assignment. This case is undoubtedly in point, and is entitled to our careful consideration. In coming to the conclusion which he did, that the assignment vested no title in the plaintiff, it seems to us that undue weight was given by the learned judge to the cases of *Moore* v. *Marsh*, 7 Wall. 515; and *Dibble* v. *Augur*, 7 Blatchf. 86. In the first of these cases, Moore, the patentee, brought suit against Marsh for an infringement. Defendant pleaded that, *after* the date of the alleged infringement, the plaintiff had sold and assigned an undivided half of the patent. To this plea the plaintiff demurred. The question, therefore, was whether an assignment by a patentee of his interest in the patent was a bar to an action by him to recover damages for an infringement committed *before* such transfer. The court, without hesitation, held that it was not. The case merely decides that a patentee, who has sold his right under a patent, may recover for an infringement, during the time he was the owner of it. It is singular that it should ever have been controverted. In *Dibble* v. *Augur*, 7 Blatchf. 86, an opinion is expressed, which, at first blush, would seem to justify the inference that the authority is precisely in point. The case, however, ought to be read in connection with the peculiar facts which control and modify, to a certain extent, the language of the judge who delivered the opinion. It was a bill filed by Dibble, as trustee, by three sewing-machine companies, *cestuis que trust*, and by Robertson, the patentee, against Augur, the defendant. The bill was founded upon a patent granted to Robertson in 1859 for an improvement in sewing-machines. During the life of the patent, and in May, 1868, Robertson assigned to Dibble "all his (said Robertson's) right, title, interest, claim, or demand whatsoever, in, to, or under the said letters patent." On the same day an agreement was made between the three companies and Robertson, which was also signed by Dibble, reciting that the said companies were desirous of purchasing

said patent, and providing: *First*, that Robertson should assign the patent to Dibble, and release the said companies and their customers from all claims for damages for infringing the same; and, *second*, that Robertson was to have the right, in the name of Dibble or otherwise, to sue for all damages for past infringements by others than the said companies, and also to sue for all damages for future infringements by others than the said companies and their customers. On the sixteenth of June, 1868, Robertson assigned to Dibble, as trustee for the three companies and for Robertson, all claims for past infringements. Upon the facts of this case, it was contended that the right to recover for infringements of the patent committed prior to February, 1868, did not pass to Dibble by the two instruments of May 8th, and that, when the bill was filed, the right to recover for such infringements was in Robertson alone, and that the particular remedy was by a suit at law in his name. But the court held that the effect of the two papers of May 8th was to vest in Dibble, as trustee for the three companies, all Robertson's interest in the patent, and also to vest in him as trustee for Robertson, all interest in claims for past and future infringements. "The two papers," says Judge BLATCHFORD, "must be construed in connection with each other." It is true, he says that the words "claim or demand whatsoever, in, to, or under the patent," are not sufficient to cover claims for past infringements; but he adds:

"Besides, the other paper of the same date clearly shows that Robertson did not intend to convey to Dibble, individually or otherwise than as trustee for him, Robertson, any claim for any past infringement of the patent against others than the three companies, * * * and as by the paper of the sixteenth of June, 1868, the title to the claim in respect to the alleged infringements was transferred by Robertson to Dibble, as trustee for the three companies and for Robertson, and as the bill is brought in the name of such trustee, and of the *cestuis que trust*, it will be allowed to stand."

Bearing in mind that this patent was still in force when assigned, and that the assignment was read in connection with the other instrument, reserving the right to the patentee to sue for past infringements, it seems to us that it cannot be treated as a general authority for the proposition that the language of such an assignment can in no case refer to claims and demands for past infringement.

Now let us examine the precise facts of this case. This patent was originally issued to Edwin May, the husband of the plaintiff, who died February 27, 1880. On June 7, 1880, his executor having resigned, one McGinnis was appointed administrator *de bonis non*, with the will annexed. On December 31, 1881, the administrator filed his petition in the probate court of Marion county, Indiana, setting forth that all the estate had been sold, and the proceeds distributed, "except the rights of said decedent in certain letters patent of the United States," and asked leave to sell "said rights" at private sale. Leave was granted to sell "such rights," in compliance with the prayer of the petitioner. The administrator thereupon proceeded to sell the same to the plaintiff, for the sum of $15, and on March 6, 1882, executed to her an assignment in which, after reciting that May, during his life-time, had obtained certain

letters patent for invention and discoveries, as follows, (here inserting a list and description of six patents,) the following language is used:

"I, the said George F. McGinnis, as administrator of the estate of the said Edwin May, deceased, have sold, assigned, transferred, and set over, and do hereby sell, assign, transfer, and set over unto the said Sarah May, all the right, title, interest, claims, and demands whatsoever, which the said estate of said Edwin May, deceased, has in, to, by, under, and through the said improvements, and the letters patent, and extensions thereof therefor aforesaid."

On the seventh day of March, 1882, the administrator filed his report of the sale, and brought the deed of assignment into court for approval; and the court, having examined such report, ratified and confirmed the sale; and, having examined the deed, ratified, confirmed, and approved the same. If the deed was broader in its terms than the petition and order, which were the basis of the sale, such irregularity was evidently cured by the order of March, 1882, ratifying and confirming the deed. This assignment is a contract, and like all other contracts is to be construed so as to carry out the intention of the parties to it. *Hendrie* v. *Sayles*, 98 U. S. 546, 554. Containing, as it did, a recital of the letters patent in suit, *which had already expired when the petition was filed*, there was nothing which could be conveyed by this assignment except the right to sue for past infringements, and unless it be construed to cover this, the assignment *as to that patent* was a nullity. *Bell* v. *McCullough*, 1 Fish. Pat. Cas. 380.

More than this. The words, "all * * * claims and demands whatsoever, * * * under and through the said improvements, and the letters patent," to be given any effect at all, must relate to claims and demands for past infringements, since a bare assignment of the patent would carry with it the right to sue for all future infringements. In the very case of *Moore* v. *Marsh*, 7 Wall. 515, the court observes, at page 522:

"It is too plain for argument that a subsequent assignee or grantee can neither maintain an action in his own name, or be joined with the patentee in maintaining it for any infringement of the exclusive right committed *before* he became interested in the patent. Undoubtedly the assignee thereafter stands in the place of the patentee, both as to the right under the patent and future responsibility."

It is a cardinal rule in the construction of all instruments that effect should, if possible, be given to all parts, and to every clause, *ut res magis valeat quam pereat*. Every word used is presumed to be employed for a purpose, and will not be treated as superfluous or redundant, if it can be given an effect consistent with the general tenor of the instrument. *Waldron* v. *Willard*, 17 N. Y. 466; *Sherman* v. *Elder*, 24 N. Y. 381. For these reasons we are constrained to differ with the learned judge in his construction of this assignment, and to hold that the right to sue for and collect for past infringements was the principal thing contemplated by the parties.

There is nothing of consequence in the remaining grounds of the motion, and a new trial must therefore be denied, and judgment entered upon the verdict.

THE RALEIGH.[1]

MUDGETT *v.* THE RALEIGH. WARD *v.* SAME. WILDER *v.* SAME.

(*District Court, S. D. New York.* October 26, 1887.)

1. MARITIME LIEN—SALE OF VESSEL BY MASTER—TRANSFER OF LIEN TO PROCEEDS—DISCHARGE OF VESSEL.
   It is well settled that, if a sale by the master is warranted by the existing circumstances of the ship, and is made *bona fide*, any prior lien upon her is transferred to the proceeds only, and the vessel cannot be held liable in the hands of a purchaser.
2. SAME — SALE OF WRECKED VESSEL—ALLEGATIONS OF FRAUD—OPINION OF EXPERTS AS TO ADVISABILITY OF SALE.
   Where the steam-ship R. was driven ashore, and filled with water and running ice, and the testimony indicated that she was regarded as a total wreck, not only by the master, but by agents and surveyors of the underwriters and others, and in that condition she was sold by the master, *held*, that the circumstances did not establish fraud in the sale; and that the vessel, as afterwards repaired, was not liable for supplies furnished prior to the accident.
3. SAME—AGENT OF VESSEL—ADVANCES—PRESUMPTION AS TO LIEN.
   A ship's husband, or her general agent, presumptively has no lien for advances made to discharge the obligations of the vessel.
4. SAME—EVIDENCE OF AGREEMENT FOR.
   M. & Co. were general agents of the steam-ship R., though they had not exclusive control of her. An action was brought by them against the vessel to recover advances made to her. There was no proof of any agreement that they should have a lien on the vessel, or any circumstances indicating an hypothecation of the ship in their favor. *Held*, on the evidence, that they had no lien, and could not recover.

Henry D. Hotchkiss, for libelants Mudgett and Wilder.
A. H. Alker, for libelant Ward.
Owen & Gray, for claimants.

BROWN, J. The libelants claim a lien upon the Raleigh for advances and supplies furnished by them respectively on account of the steam-ship during the year 1885 and January, 1886. On the twentieth of January, 1886, while the steamer was on a voyage from Baltimore to New York, she was driven ashore by ice in the Chesapeake bay, and afterwards abandoned and sold under the master's authority. One Petze, the claimant, became the purchaser. He subsequently raised and repaired her at an expense of about $11,000, about a year before the above libels were filed.

It is well settled that, if a sale by the master is warranted by the existing circumstances of the ship, and was made *bona fide*, any prior lien upon her would be transferred to the proceeds only; and that the vessel could not be held liable in the hands of the purchaser. The libelants contend that the circumstances of this case did not justify a sale; and, *secondly*, that the sale itself was fraudulent, and made in bad faith, and for the benefit of the master, who, it is claimed, became interested in

[1]Reported by Edward G. Benedict, Esq., of the New York bar.

the purchase. The claimant denies the latter charges, and further contends that the demand of Mudgett & Co. was never a lien upon the vessel, because their advances were made by them as the ship's agents in the city of New York.

The vessel was owned by a corporation in Boston, and was its only property. Captain Littlefield had been for several years the general manager of the company, and also master of the vessel. Mudgett & Co. had been the general agents of the ship in New York for several years in obtaining charters, collecting the freights, paying bills, procuring insurance, making entry, etc.; all, however, subject to the direction and control of Captain Littlefield, who was the general superintendent of the corporation and the master of the ship, who signed all charters, and occasionally collected some of the freights due.

It is well settled that a ship's husband or her general agent is not presumptively entitled to any lien upon a vessel for advances made to discharge her obligations. His business and the object of his employment by the owner, are presumptively to facilitate the ship in the transaction of her business, and to free her from charges; not to preserve incumbrances on her. Presumptively, he deals upon the credit of the owners; and he has no lien for his advances unless there is some agreement to that effect, or the circumstances show that such must be deemed to have been the reasonable intent of the parties. When such an agent pays the ship's obligations on the application of the master or the owners, the presumption is that he does so, not as a stranger, but as the agent of the ship and her owners, and upon the personal credit of the latter, or of the future business and earning of the ship. *The J. C. Williams*, 15 Fed. Rep. 558, and cases there cited; *White* v. *Americus*, 19 Fed. Rep. 848; *The Esteban de Antunano*, 31 Fed. Rep. 920.

This presumption, I think, applies equally to the facts of the present case, although Mudgett & Co. had not the exclusive control of the ship, as general agents often have where no owner, or general superintendent of the owners, is present. There is no proof of any agreement for a lien in favor of Mudgett and Co., nor do I find any circumstances indicating any hypothecation of the ship in their favor. They were in the habit of remitting to the owners the balances of freight due them; and the fair inference of fact from the testimony and the circumstances is that they looked for reimbursement to the future earnings of the vessel, and not to any lien upon the ship.

Upon the foregoing grounds, I feel constrained to decide that the libelants first named had no lien. In the last two cases the demands were undoubtedly liens upon the vessel at the time the supplies were furnished, and the claims in those cases are sufficient to raise the question secondly above referred to.

The very clear weight of testimony seems to me to show beyond doubt that, when the steamer was driven ashore and filled with water and running ice, she was regarded as a substantial wreck, not only by the master, but by the agents and surveyors of the underwriters and by others who examined her at the time, and who had no possible interest to report

otherwise than in accordance with their honest judgment upon the examination of the condition of the vessel. The insurers, though reinsured, paid the loss after a few days upon their surveyor's report of a total loss. There are doubtless circumstances in evidence calculated to raise some suspicion; but, taking the evidence altogether, I must hold these circumstances wholly insufficient to establish any fraud in the sale; or to show that the master, prior to the sale, had any knowledge or belief that the vessel was not a substantial wreck. The fact that it subsequently appeared that the ship was not injured so much as was supposed, does not prove fraud, or bad faith, nor tend to invalidate the sale. *The Amelie*, 6 Wall. 18; *The Sarah Ann*, 13 Pet. 387. The sum required to raise the ship was large. In her apparent condition as a wreck, it was the master's duty to do with her the best he could, and to act upon the best judgment that could be formed at the time. Nearly all the contemporaneous evidence sustains the master's judgment in ordering the sale, as the only thing practicable. There is no proof of the market value of the vessel as she lay sunk; nor that, when repaired, she was worth more than the cost of raising and repairing her. The evidence, therefore, does not even show that the master's judgment was erroneous; much less that the sale was fraudulent. The libels must, therefore, all be dismissed, with costs.

THE GRECIAN MONARCH.

McMORRAN *v.* THE GRECIAN MONARCH.

(*District Court, D. New Jersey.* October 22, 1887.)

ADMIRALTY—PERSONAL INJURIES—EXCESSIVE DAMAGES.

In a libel against a ship it appeared that libelant fell through an open hatchway, receiving severe wounds, and was seriously jarred, and thereafter was unconscious at intervals for two or three days, and after three months in the hospital was discharged with his wounds healed, although he complained of a lame back. Four years later he swore that he still felt the effect, but was uncorroborated as to this by his own medical experts, while the defendant's witnesses testified that he showed no signs of existing or permanent injury. *Held*, that the amount of damages given should be reduced from $3,638 to $1,200.

In Admiralty. Exceptions to commissioner's report.

Joseph F. Randolph, for libelant.

Butler, Stillman & Hubbard, for respondents.

WALES, J. The only exception entitled to serious consideration is the third one, which is taken to the amount of damages ($3,638) as excessive, and not warranted by the evidence. The question, argued by claimant's proctor, of the liability of the owners for any permanent injury which may have been received by the libelant in consequence of the defective or negligent equipment of the ship, has been settled, so far as this court

is concerned, by the interlocutory decree in favor of the libelant, and the only inquiry to which attention can now be given is whether the commissioner has erred in allowing the libelant greater damages than he is fairly entitled to. The libelant fell through an open hatchway which, when not in use for loading or discharging cargo, had always been protected before that time, and had been left unprotected without his knowledge. He fell a distance of 25 or 30 feet, receiving severe cuts on his head and leg, and being badly bruised and shaken up. Another one of the crew fell through the same hatchway, an hour after the libelant, and was killed. The libelant did not suffer a fracture of the skull or limb, but was unconscious, at intervals, for two or three days, and after three months treatment at the hospital was discharged, with his wounds apparently healed, although he complained of a pain in his back, which has continued ever since, according to his statement, and still continues, after the lapse of four years, being worse in damp weather, often accompanied by sleeplessness and excessive fatigue, and preventing him from doing any hard or continuous work.

I have carefully examined the testimony in relation to the nature and extent of the libelant's injuries to ascertain how long he had been disabled for work requiring daily bodily exertion, and whether such disability now exists and is likely to be permanent. McMorran's own representation of his condition must be taken with great caution, being unsupported by other testimony. The three medical gentlemen, and they were the only witnesses produced by the libelant, who were examined in support of the theory of an existing and permanent disability, could not discover any symptoms of chronic debility or soreness. The wounds caused by the cuts had entirely healed, and there were no superficial evidences of spinal trouble. These witnesses speak in answer to hypothetical questions, and neither confirm nor contradict the testimony of the libelant. The expert surgical testimony on the other side is almost conclusive that the libelant was not, as late as the month of November, 1885, —more than two and a half years subsequent to the accident,—permanently disabled. On a physical examination no objective symptoms of disease or soreness of the spine or back were discovered, and he was subjected to experimental tests which would have revealed any latent soreness or disease of those parts, had either existed.

I am led to the conclusion, therefore, that while the testimony does not sustain the finding of the commissioner to its fullest extent, there is still sufficient proof that the libelant could not have so far recovered from his hurts, on leaving the hospital, as to be able at once to return to his work, or to perform any hard and protracted labor. He must have been disabled for a considerable length of time, and it is only just that he should be allowed a liberal compensation for the loss of wages which he might have earned, and of which he was deprived by the negligence of the claimants. But, aside from McMorran's own testimony, there is nothing in the depositions which indicates that at the time they were taken—nearly three years after the accident—he was suffering from the effects of his fall; and, as the commissioner has not given any reason

for his judgment, or stated the mode of calculation by which he assessed the damages, I am unable to confirm the report unconditionally. Twelve hundred dollars will be an ample allowance for the loss of the libelant during the time he was actually disabled, and with his consent a decree will be entered for that amount, with costs; otherwise, the third exception will be sustained.

THE GEORGIA.[1]

NEGUS *v.* THE GEORGIA.

(*District Court, E. D. New York.* November 11, 1887.)

MARITIME LIENS—CHRONOMETER—FOREIGN SHIP.

A ship's chronometer is one of the necessities of the vessel. When, therefore, a foreign ship is supplied with a chronometer upon the credit of the vessel, and by direction of the master, a maritime lien on the ship is created for the value of the chronometer.

Goodrich, Deady & Goodrich, for libelant.
Benedict, Taft & Benedict, for libelant in another suit.

BENEDICT, J. This is a proceeding *in rem* to enforce a lien upon the brig Georgia for the sum due the libelant for the use of a chronometer used by the master of the brig during about a year. The only point made in defense is that no lien exists for such a demand, because it devolves upon the master of a vessel to provide himself with a chronometer, as one of the tools of his trade. In other words, that a chronometer is one of the necessities of the master of the ship, and not one of the necessities of the ship. There is no evidence tending to show that a chronometer is one of the tools of the master's trade, or that it is customary for the master to provide the chronometer. In the absence of such evidence, I do not see how the libelant's claim for a lien can be denied. Clearly, the ship cannot go to sea without a chronometer. As matter of fact, the presence of a chronometer on board is an absolute necessity, to enable the ship to perform her voyage. In this instance the chronometer was procured by the master on the credit of the vessel, as the receipt he gave shows, and his authority cannot be denied. It is, then, the ordinary case of a necessity of the ship supplied upon the credit of the ship by direction of the master, the ship being foreign. Upon such facts the maritime law declares the ship bound. Let the libelant have a decree.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

THE ACORN.

DENNY and others *v.* THE ACORN.

(*District Court, W. D. Pennsylvania.* August 31, 1887.)

MARITIME LIENS—CONTRACT FOR SERVICES—REFUSAL TO ACCEPT.

Mariners hired for a voyage, who, pursuant to the contract, presented themselves at the wharf where the boat lay, and offered their services, but without good reason were refused admission to the boat, may sue *in rem* in admiralty for their stipulated wages, the boat having prosecuted the voyage.

In Admiralty. *Sur* exceptions to libel.

Geo. C. Wilson, for exceptants.

E. J. Smail, for libelants.

ACHESON, J. According to the allegations of the libel, which for the present must be accepted as true, the libelants were hired as firemen on the steam-boat Acorn, for a trip from Pittsburgh to Cincinnati or Louisville, at certain wages; and, pursuant to the terms of the hiring, presented themselves at the wharf where the boat lay, ready and desirous to perform their part of the contract, but were refused admission to the boat, without good reason, other persons having been hired in their places. It was then too late for the libelants to procure employment on that rise upon any other boat, and thus they lost a trip. The Acorn made the voyage for which the libelants were hired.

Upon such a state of facts, why may not the libelants proceed *in rem* against the boat in this court for redress? They sue, not, as is supposed, for damages for breach of the contract, but for their stipulated wages, to which they are as much entitled as if there had been actual performance on their part. *Kirk* v. *Hartman*, 63 Pa. St. 97. If, after a voyage has begun, it is lost or abandoned by the wrongful act of the owner or master, it is not to be doubted that the seamen are entitled to full wages, recoverable in admiralty by suit *in rem*. *Sheppard* v. *Taylor*, 5 Pet. 675, 710. It has been distinctly held, also, that where a mariner has been improperly discharged from a vessel after shipping articles have been signed, but before the commencement of the voyage, he may sue in admiralty for his agreed wages, the voyage for which he was engaged having been prosecuted. *The City of London*, 1 W. Rob. 88. To the like effect was the ruling in the case of *The Dolphin*, 6 Ben. 402. I deem it unimportant that the libelants did not actually enter upon any maritime service, since they were wrongfully prevented by the owners of the boat or their agent from going aboard the Acorn.

The exceptions to the libel are overruled.

THE WOODWARD.

CASKEY and others *v.* THE WOODWARD.

(District Court, W. D. Pennsylvania. October 15, 1887.)

MARITIME LIENS—PRIORITY OVER INSURANCE LIEN.

In the distribution of the proceeds of sale of a vessel, maritime liens are to be preferred over liens created by state statute for premiums of insurance.

In Admiralty. *Sur* exceptions to the report of the commissioner appointed to distribute the fund in the registry of the court from the sale of said vessel.

Knox & Reed, for exceptants.

Willis F. McCook and *Geo. C. Wilson*, *contra.*

ACHESON, J. 1. That claimants who have maritime liens are to be preferred, in the distribution of the proceeds of sale of a vessel, over those having domestic liens existing only by virtue of state statute, has long been the established rule in this district. This right of priority was distinctly recognized in *Shrodes* v. *Collier*, 2 Pittsb. Leg. J. 319, by Mr. Justice GRIER, who, speaking of liens for materials, supplies, etc., at the home port, given by the Pennsylvania act of April 20, 1858, said: "The maritime liens being first satisfied, the surplus in the registry of the court should be distributed to the parties having these liens in their order." This subject was carefully considered by Judge BUTLER of the Eastern district of Pennsylvania, in the case of *The E. A. Barnard*, 2 Fed. Rep. 712, and the conclusion reached that liens given by state legislation for repairs to a vessel at her home port are to be subordinated to liens created by the maritime law. The reasoning of Judge BUTLER is cogent, and his opinion well sustained by the citation of numerous authorities. More recently, indeed, in the Sixth circuit, in the cases of *The Gen. Burnside*, 3 Fed. Rep. 228, and *The Guiding Star*, 18 Fed. Rep. 263, it has been held (contrary to the doctrine maintained in the earlier case of *The Superior*, 1 Newb. Adm. 176) that claims for materials, etc., which have arisen at the home port, for which a lien is given by local law, are entitled in distribution to be put on an equality with liens strictly maritime. But I am not convinced that this is the better opinion; and, even if I were so satisfied, I would not feel at liberty to change the rule of distribution which has so long prevailed in this district. Adhering, then, to that rule, I sustain the commissioner in postponing the statutory claims for insurance premiums to the maritime liens.

2. After careful consideration of the evidence, I am not satisfied that the commissioner erred in rejecting the claim of A. J. Sweeny & Co. for the new cylinder. The opinion of Mr. Rees as an expert witness is entitled to weight, and I cannot say that the commissioner attached too much importance to his testimony, or, upon all the proofs, reached an unwarrantable conclusion.

3. In respect to the claims of Leander B. Woods, T. M. Jenkins & Co., and H. Fry & Son, I think that the conclusions of the commissioner are clearly right.

And now, October 15, 1887, the exceptions to the commissioner's report and schedule of distribution are overruled, and the court confirms the same absolutely; and it is ordered that the fund in the registry of the court be paid out in accordance with the commissioner's distribution, unless an appeal is taken within 10 days.

THE CONNAUGHT.[1]

NORDLINGER *v.* THE CONNAUGHT.

(*District Court, E. D. New York.* November 9, 1887.)

DAMAGE TO CARGO—BURDEN OF PROOF—SHIPPING.

In an action for damage to cargo, where claimant proved a hard voyage of the vessel, and that the casks which contained the cargo damaged were weak, and libelant offered evidence that the casks were good, but gave no proof of their bad stowage, *held*, that the burden was on the libelant to show that the cargo was badly stowed, and, this burden not being sustained, libelant could not recover.

Chas. E. Hill, for libelant.
E. B. Convers, for claimant.

BENEDICT, J. The evidence in this case as to the character of the voyage of the ship in which the libelant's prunes were transported, and the weak character of the casks in which the prunes were contained, is abundantly sufficient to cast upon the libelant the burden of showing bad stowage. This burden has not been discharged. The libelant, instead of proving bad stowage, has offered testimony to show that the casks were good, and asks the court to infer bad stowage. This cannot be inferred from the facts proved here. On the contrary, from the evidence as to the character of the casks, the natural inference is that the character of the casks caused the damage to the prunes.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

RICHMOND & D. R. CO. v. FINDLEY and others.[1]

(*Circuit Court, N. D. Georgia.* June 14, 1887.)

1. REMOVAL OF CAUSES—SUBSTITUTED PARTY—RIGHTS OF.
Where a railroad company, by a contract of perpetual lease, acquired property of the lessor for which an action of ejectment was pending, *held*, the lessees' right of removal was only such as existed in the lessor.

2. SAME—INDEPENDENT CONTROVERSY—FORMAL PARTIES.
Where at the time of the lease an action of ejectment was pending against certain of the property so transferred, and the lessee, instead of defending the action, sets up by bill in equity only such matters as could by the law of the forum have been pleaded to the action of ejectment, such suit does not constitute a distinct and independent controversy, though the formal parties to the record are different. And such cause cannot be removed into the federal court unless the original action might also have been removed.

In Equity. Removal of cause. On motion to remand.

August 27, 1880, James A. Findley, as administrator of the estate of Elizabeth Findley, brought an action of ejectment in Hall superior court against James Weaver, tenant in possession, to recover a certain lot of land in Hall county. Weaver was in possession as an employe of the Atlanta & Charlotte Air Line Railway Company, a Georgia corporation. This company claimed title to said lot of land, upon which was located a part of its road-bed and track, and certain houses for the use of its employes. The Atlanta & Charlotte Company, on the twenty-sixth of March, 1881, executed a contract of perpetual lease of all its property, (including this lot of land sued for,) to the Richmond & Danville Railroad Company, a Virginia corporation. Neither company caused itself to be made a formal party defendant to the ejectment suit, as might have been done in Georgia. The Richmond & Danville Company, on August 25, 1884, filed a bill in equity in Hall superior court against James A. Findley, as administrator, James A. Findley, individually, and the other heirs at law of Elizabeth Findley, praying an injunction against the further prosecution of the ejectment suit, and for relief. Upon this a temporary injunction issued. February 18, 1885, the Richmond & Danville Company filed its petition for the removal of the equity cause to the United States circuit court for the Northern district of Georgia, on the ground of citizenship, under section 2 of the act of March 3, 1875, and the cause was accordingly removed. Upon the hearing in the circuit court, counsel for respondents moved for an order remanding the cause to the state court.

Pope Barrow, *Hopkins & Glenn*, and *S. C. Dunlap*, for complainants.
John B. Estes, *Claude Estes*, and *W. F. Findley*, for respondents.

NEWMAN, J. During the hearing of this case counsel for defendants suggested to the court that the case was improperly removed to this court,

[1] Reported by W. A. Wimbish, Esq., of the Atlanta bar.

and moved to remand it to the state court. The motion was only briefly argued at that time, without production of authority on either side. The court reserved its decision on the question, and heard the case to a conclusion, reserving its decision on the entire case also. Since the hearing, counsel on both sides have furnished some authorities on the question of removal, and I have examined the question and authorities with considerable care myself. This case was removed under the second section of the act of March 3, 1875. The supreme court of the United States in the case of *Gibson* v. *Bruce*, 108 U. S. 561, 2 Sup. Ct. Rep. 873, decided that a case could not be removed from a state court under the act of 1875, unless the requisite citizenship of the parties existed both when the suit was begun, and when the petition for removal was filed. In the case of *Cable* v. *Ellis*, 110 U. S. 389, 4 Sup. Ct. Rep. 85, a suit in equity involving titles to real estate, and priority of lien, which had been long pending in the state court when Cable became interested in the property by grant from one of the parties interested in the suit, and intervened in the case by leave of the state court at a time when the right of removal from the state to the federal court had expired as to the original parties, it was held that he was subject to the disabilities of the party from whom he took title, and the time for removal had expired, and that his right of removal was barred by that fact. In the case of *Railroad Co.* v. *Shirley*, 111 U. S. 358, 4 Sup. Ct. Rep. 472, it was held that the substituted party comes into a suit subject to all the disabilities of him whose place he takes, so far as concerns the right of removal of the cause; and the cases of *Gibson* v. *Bruce*, and *Cable* v. *Ellis*, *supra*, cited with approval. The doctrine of these cases is admitted by counsel for complainant here, but they say this is a new and distinct suit, and that the fact that the heirs at law of Elizabeth Findley are made parties to their bill, and that they ask special relief against them as such, makes it a different and distinct case from the ejectment suit. All the rights that the Richmond & Danville Company had or could set up in this controversy, either at law or in equity, are such rights as they acquired from the Atlanta & Charlotte Company. Before the agreement between these two companies, the administrator of the estate of Elizabeth Findley had commenced suit to recover this property. The Richmond & Danville, of course, took *lis pendens*, and any estoppel or prescription it might claim against either the estate of Elizabeth Findley, or her heirs at law, only ran to the time of the commencement of the ejectment suit. The Richmond & Danville Company sets up no separate or distinct right or equity as to itself. Nothing whatever has transpired between it and the estate or heirs at law of Elizabeth Findley; on the contrary, as I have stated, it took with a suit pending to recover this land. What then were the rights of the Atlanta & Charlotte Company? It could have set up everything as a defense that is contained in the bill filed by the Richmond & Danville Company, and it could have set it up, I think, by an equitable plea to the action of ejectment, or it might have filed its bill on the equitable side of the court, if it preferred. *Elder* v. *Allison*, 45 Ga. 14, 17.

It is stated in the bill and admitted in the answer that the estate of Elizabeth Findley owed no debts. That being true, the suit of the administrator was solely for the purpose of distribution, and was maintained by him simply for the use and benefit of the heirs at law. Why then could not any grounds of defense either of these companies had against the heirs at law have been made in an equitable defense to the action of ejectment, as it was their right by law to do? Although it appears that at the time that the Atlanta & Charlotte transferred its property to the Richmond & Danville Company, it had not made itself party formally to the action of ejectment; it was the real defendant, knew of the action, and was bound thereby. *Rodgers* v. *Bell*, 53 Ga. 94. And it is clear that the very same matters set up by the Richmond & Danville in this bill, would have been set up in some form by the Atlanta & Charlotte. The Atlanta & Charlotte, it is conceded, could not have removed this controversy in any shape to this court. The Richmond & Danville brought into a suit involving practically and really the same controversy made by this bill, after it commenced, and took whatever rights it acquired as to this property by the agreement of March, 1881, subject to the disabilities of the Atlanta & Charlotte Company. But it is stated by counsel for complainant that the case of *Bondurant* v. *Watson*, 103 U. S. 281 controls this case. I do not think so. That was a bill filed by Watson to protect himself against a judgment. The court say:

"The controversy in the original case between Walter E. Bondurant and Albert Bondurant *et al.*, had been ended by a final judgment. The case between Watson and Mrs. Bondurant had its origin in that judgment, but it was a new and independent suit between other parties *and upon new issues*. It was a suit in which the plaintiff sought to be protected against a judgment to which he was not a party, by which his property had been specifically condemned to be sold to satisfy a claim against others and not against him."

The complainant in that case, it will be observed, had distinct rights which he claimed independently of those claimed by any party to the original litigation. The original case had gone to judgment. He sought to be protected against the judgment on account of rights he had that were in no way involved in the controversy between the parties to the original suit.

Here the complainant acquires the control of property, to recover which a suit is pending, and then instead of defending that suit, sets up by bill in equity the same matters he could have pleaded in the original case, and claims the right to remove the case to this court when it could not have been removed by the party from whom he acquired his rights. I do not think he can do so. If the effect of the agreement of March 26, 1881, between these two companies is to unite the management of the companies, it seems to me the argument against removal would be stronger. *Crump* v. *Thurber*, 115 U. S. 56, 5 Sup. Ct. Rep. 1154, and cases cited. Under the fifth section of the act of March 3, 1875, if the court believes the case to have been improperly removed, it should proceed no further, but should remand it to the state court.

Believing this case to have been improperly removed to this court, I must direct that it be remanded to the state court, and an order will be passed accordingly.

BEADLESTON *v.* HARPENDING and another.[1]

(*Circuit Court, E. D. New York.* November 4, 1887.)

REMOVAL OF CAUSES—DECISION OF STATE COURT—REVIEW BY CIRCUIT COURT. Where, on application by a defendant in a suit in a state court to remove the cause to the United States circuit court, the state court, being of competent jurisdiction, has decided that on the face of the record the defendant is not entitled to such removal, he will not be permitted to contend for a contrary decision of the same point in the circuit court, upon a motion by plaintiff to remand the cause as not being removable.

O. H. La Grange, for plaintiff.
Seward, De Costa & Guthrie and *Robt. H. Griffin*, for defendants.

BENEDICT, J. This case comes up before this court upon a motion to remand.

The suit was originally commenced in the supreme court of the state of New York. Thereupon the defendants filed in the state court a petition for the removal of the cause to this court, upon the ground that the bill showed a separate controversy as to the defendant Alley, a citizen of the state of Massachusetts. This petition, with the necessary bond, when first presented to the state court, was accepted. Subsequently, upon further consideration of the bill, after hearing the parties, the state court determined to reject the removal petition and bond, and to proceed with the cause. A copy of the record having been filed in this court, the plaintiffs now move to have the cause remanded, as not being a removable cause. The defendant Alley opposes, upon the ground that the cause is removable because the bill discloses a separate controversy as to him.

In determining this issue thus presented, the question arises at the outset whether, after the determination of the state court that no separate controversy is disclosed by the bill, the defendant is permitted to contend for a contrary decision of this court, upon a motion like the present. If it were open to this court to decide that the state court was without jurisdiction to determine the question it undertook to determine when it decided to proceed with the cause, the case might be different. But the jurisdiction of the state court must be conceded upon the authority of the decision of the supreme court of the United States in *Railroad Co.* v. *Dunn*, 122 U. S. 513, 7 Sup. Ct. Rep. 1262, where it is said:

"It (the petition) presents then to the state court a pure question of law; and that is whether, admitting the facts stated in the petition for removal to

[1] Reported by Edw. G. Benedict, Esq., of the New York bar.

be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the state court has the right to decide."

We have here then no question of jurisdiction but the question whether, when the character of the plaintiff's bill in the very particular involved has been determined by a state court of competent jurisdiction between the same parties in the same action, the same question can be opened for a new and different determination by this court, upon a motion like the present. While the cause was in the state court for the purpose of determining whether the bill disclosed a separate controversy between the plaintiff and the defendant Alley, the state court decided that the bill did not disclose a separate controversy, and now, with that determination standing unreversed, the defendant upon this motion seeks to have this court decide that the bill does disclose a separate controversy. In my opinion the decision of the state court cannot be reviewed in this way. The prior determination of the state court, that the plaintiff's bill discloses no separate cause of action against the defendant Alley, standing unreversed, estops the defendant from asserting the contrary upon a motion like the present.

The reason of the rule forbidding parties to litigate anew questions already litigated between them in a court of competent jurisdiction, seems to be of full force in a proceeding like this. An added ground for the application of the rule in this instance is to be found in the fact that a contrary decision will compel the spectacle of a suit prosecuted in the state court upon the ground that the bill discloses no separate controversy, and at the same time prosecuted in the federal court upon the ground that the bill does disclose such a controversy.

Another reason for declining to review on this occasion the decision of the state court is afforded by the fact that, while the decision of the state court is open to be reviewed, not only by the court of appeals, but also by the supreme court of the United States, by a writ of error, the right to appeal from the decision of this motion has been taken away by the act of 1887.

Upon these grounds, the plaintiff's motion to remand is granted.

SMITH *v.* HARPENDING and another.

(*Circuit Court, E. D. New York.* November 4, 1887.)

On Motion to Remand.

G. M. Harwood, for plaintiff.

Robt. G. Ingersoll and *Robt. H. Griffin*, for defendants.

BENEDICT, J. This case comes up before the court upon a motion to remand. The facts bearing upon the question of removal are similar to the facts stated by this court in deciding the case of Mary Beadleston against the same defendants, (*ante*, 644.) The bill in this case differs from the bill in that

case, but in this case, as in that, the state court has, after hearing the parties, decided that the bill does not disclose a separate controversy as to the defendant Alley. The reasons for remanding the case stated in the case of Mary Beadleston are applicable here, and the same result must follow.

The motion to remand is granted.

ELLIS *v.* INSURANCE CO. OF NORTH AMERICA.

(*Circuit Court, S. D. Iowa, E. D.* 1887.)

1. INSURANCE—FORFEITURE—COVENANT OF POSSESSION OF ENTIRE INTEREST.
   A policy of insurance, under which plaintiff brought an action to recover for the loss by fire of property incumbered by mortgages, stipulated that if the interest of the assured in the property "does not amount to the entire, sole, and absolute ownership, it must in every such case be so represented to the company, and clearly expressed in the body of the policy, otherwise there will be no liability" thereunder, as to such property or limited interest. *Held*, that the stipulation does not refer to the matter of incumbrance, but to the character and quality of the title, whether that of a fee simple or leasehold or otherwise.
2. SAME—FORFEITURE—COVENANT—ASSIGNMENT.
   A policy of insurance covering property incumbered by mortgages executed subsequent to its issuance was assigned to the purchaser of the property with the consent of the company, "subject to all the terms and conditions of insurance mentioned and referred to" in the policy, which provided that the acquiring by a third party of all insurable interest in the property by virtue of a mortgage executed by the assured subsequent to the date thereof should cause the immediate termination of the policy, unless otherwise provided by special agreement expressed in the body of the policy. Neither the company nor the purchaser and assignee had any actual knowledge of the existence of the mortgages at the time the company gave its consent, or when the purchase and assignment were made. *Held*, that the consent of the company to the transfer of the policy was the creation of a new contract, and the assignee took it free of all vitiating circumstances, and upon the same terms as those upon which it was originally issued to the assignor, and that the company was estopped from denying its validity, either on the grounds of ignorance or for want of consideration.[1]

Motion for New Trial.

William L. Ellis, as assignee of certain policies of insurance, brought suit against the Insurance Company of North America to recover for the loss by fire of a stock of goods and building under four policies issued by the said company, to E. R. Ellis & Co., a firm composed of E. R. Ellis alone. The first policy was issued June 10, 1881, insuring a stock of merchandise for $500. The second policy on said stock was for $500, and dated October 10, 1881. The third policy, dated August 20, 1881,

[1] It has been held in *Iowa*, in an action brought by the assignee of an insurance policy, which had been transferred with the consent of the company, that the latter was not precluded from setting up the defense that the policy had become void in the hands of the assignor by reason of a violation of the condition against "incumbrances," the existence of the incumbrance not having come to the knowledge of the company at the time of the assignment. Ellis v. Insurance Co., 27 N. W. Rep. 762. But see dissenting opinion, Id. 765.

insured the building containing the stock. The fourth policy was one for $1,000 on the stock, and was dated December 8, 1881.

Each of the policies contained the following terms and conditions of the insurance therein.

"(a) If insurance is desired * * * on property * * * on leased ground, or on property of any kind in which the interest of the applicant for insurance does not amount to the entire, sole, and absolute ownership, it must in every such case be so represented to the company, and clearly expressed in the body of the policy, otherwise there will be no liability hereunder as to such property or limited interest.

"(b) The procuring of insurance on said property for more than its cash value, or the having of other insurance thereon, or any part thereof, valid or invalid, prior or subsequent, not made known to this company, and consented to hereon, * * * will render this policy null and void.

"(c) The acquiring by a third party of an insurable interest in the property, or any part thereof, by virtue of a mortgage or deed of trust executed by the assured subsequent to the date hereof, * * * or any change whatever in title or right of possession, not herein specified, succession by reason of the death of the assured excepted, shall each and all cause the immediate termination of this policy, unless otherwise provided by special agreement, clearly expressed in the body of the policy.

"(d) Agents of the company have no authority to bind the company in violation of any of the printed terms or conditions of insurance as herein expressed; and no printed or written condition or restriction hereof, which by its terms may be subject to waiver, shall be deemed to have been waived, except by a distinct specific agreement, clearly expressed in the body of the policy.

"(e) If the assured shall, by voluntary transfer or conveyance, dispose of the property covered by this policy, or of an undivided interest therein, or a change shall take place in the membership of the firm or copartnership for whose benefit the insurance hereunder was effected, this policy may be assigned to the party or parties succeeding to the ownership of the property, providing the company shall first consent thereto by indorsement thereon, otherwise this insurance shall cease from the date of such change in ownership. * * * This policy shall be subject to cancellation at any time, at the request of the assured, the company to retain earned premium, reckoned at the usual short rates for the time expired. The policy may also be at any time canceled by the company on refunding or tendering to the assured his, her, or their agent, a ratable portion of the premium for the time expired."

The first three policies were issued by the duly-authorized agent of the company, at Albia, Iowa; the last by its agent at Des Moines, who had no actual knowledge of the existence of the prior policies, though they had been reported to the company. December 6, 1881, E. R. Ellis executed and filed for record a chattel mortgage covering all the goods described in the policies. December 5, 1881, E. R. Ellis made a mortgage upon the lot and building covered by the policy, dated August 20th, which mortgage was recorded the same day. December 15, 1881, E. R. Ellis sold and conveyed to William M. Ellis, the plaintiff, the lot and building aforesaid, and December 20, 1881, the entire stock of goods therein contained was also transferred to him. An assignment of the policies was duly made December 23d, and the consent of the company thereto was indorsed upon each, as follows:

"The property hereby insured having been purchased by William M. Ellis, the Insurance Company of North America hereby consents that the within policy may be assigned to said purchaser, subject to all the terms and conditions of insurance herein mentioned and referred to. Dated Albia, Iowa, this twenty-third day of December, 1881. M. CARRIER, Agent."

December 21st, William M. Ellis and wife executed and delivered a mortgage upon the lot whereon the building and goods were situated, which mortgage was filed for record December 24th thereafter; at the time of the assignment of the policies, and the consent of the company given, neither the plaintiff nor the company had actual knowledge of the mortgages given by E. R. Ellis. The property was destroyed by fire, December 27, 1881; and, the defendant failing to comply with plaintiff's demands for adjustment, suit was commenced in the state court, but afterwards transferred to the United States circuit court, where the case was tried before Judge LOVE without a jury. The court found and entered judgment for plaintiff, whereupon a motion was made for a new trial; the defendant claiming that the first three policies were avoided by the mortgages of December 5th and 6th, and that the policy of December 8th was void because Ellis, being a mortgagor, was not the entire, sole, and absolute owner of the property.

BREWER, J. Two questions have been presented and argued; one of them of great difficulty as well as of some importance.

The first question arises upon these facts: One E. K. Ellis was the owner of property upon which he had taken out insurance policies, one of them that in suit. He sold that property to the plaintiff, William Ellis, and assigned the policy. The consent of the company was given to the assignment. At the time of the assignment there was an incumbrance upon the property in the shape of three or four mortgages. The policy provides that it shall be void if the insured is not the sole, absolute, and unconditional owner; and it is insisted that ownership is not equivalent to the mere matter of title, but goes to the interest held in the property, and that if that interest is subject to any condition the policy is vitiated. Plaintiff's ownership is held subject to this condition, that he pays the mortgage. Therefore it is not an unconditional ownership.

We are all familiar with the fact that applications for insurance policies usually contain two series of inquiries, independent in their nature, —one as to the matter of title, and the other as to that of incumbrance. Of course, different policies have different forms of stating these two lines of inquiry, but they are entirely independent. In one there is provision as to any incumbrance, its nature and extent; in the other there is inquiry and provision as to the character of the title, fee-simple or otherwise. It is further known that the policies and the blanks for application are prepared by the insurance companies, and it is familiar law that the stipulations and provisions therein are to be construed strictly against the insurer; that if there is any fact respecting which information is desired, or any provision which it is deemed necessary to insert, it is the duty, because it is the interest, of the insurer to see that there is

a clear and expressed question or stipulation covering the matter. With those two well-known facts before us, it seems to us that this stipulation must be held to refer, not to the matter of incumbrance at all, but to the character and quality of the title, whether that of a fee-simple or leasehold, or otherwise. And, as it appears unquestionably that the absolute title was in the party, we have with little hesitation come to the conclusion that the policy is not vitiated by these facts and that stipulation.

The other question is more serious and difficult. The policy contains a provision to this effect: that if the insured incumbers the property the policy shall be vitiated. The original party insured did place incumbrances upon the property. They were in existence at the time he sold the property to the plaintiff, at the time the assignment of the policy was made to the plaintiff, and at the time the company gave its consent. The company was ignorant of that fact, as was also the assignee and purchaser. Now, the assignment was assented to by the company subject to all the terms and conditions of the policy. And it is insisted, on the one hand, that the universal rule in respect to transfers of all choses in action or other contracts, with the single exception of negotiable paper transferred before maturity, is that the assignee simply steps into the shoes of the assignor; that he is subjected to all his burdens and liabilities, and has no other or higher rights than such assignor. Hence, as it is conceded, and there can be no doubt about it, that this policy while it remained with the assignor, his property, and before the sale and assignment, was vitiated by this incumbrance, was voidable at the instance of the insurer, the assignee has no higher right than the assignor had, and the policy is vitiated in his hands. On the other hand, it is insisted that this, which is called an assignment, has not the legal effect of a mere transfer of an existing right, but is equivalent to the creation of a new contract,—a contract springing into being at the moment the assignment is assented to between the assignee and insurer for the insurance of the property during the unexpired term. The authorities very generally say that where an assignment goes with an absolute sale of the property there is the creation of a new contract. If it is a new contract for one purpose, it is a new contract for all purposes.

The assignment is expressed to be subject to the terms and conditions of the policy. What does that mean? It is equivalent to saying that the assignee takes the contract as of present writing, containing the same terms and stipulations, binding him to the same duties, and subjecting him to the same liabilities, that were imposed by the contract in the first instance upon the assignor. In no other way can it fairly be said that a new contract was made; tested by that rule the assignee agreed, as the assignor had agreed in the first instance, that he would place no incumbrance upon the property, and that if he did the policy should fail. There is no pretense that he has violated that stipulation thus construed. It may well be doubted whether the use of the technical terms, "assignment," "assignor," and "assignee," are apt to describe the actual transaction. When the insured sells the property, that moment the policy

falls. He has no insurable interest. The policy ceases to have legal force as a policy. Can it be said he is assigning that which is nothing, and that the insurance company contemplates and assents to the transfer of that which has no legal existence? Take this case. Suppose a contract is made by which one binds himself to work for another for a period of one year at stipulated wages per month, with certain provisions regulating his conduct, and forfeiting his right to compensation in case of non-compliance therewith. Pending that contract he assigns it to another, which assignment is accepted by the other party, and this new party goes on and does the work in the same manner during the balance of the year as was done by the party from whom he received this contract. In one sense of the term you may say there is an assignment, but really there is substitution of a new party for the old, the creation of a new contract upon the same terms as the old, containing the same conditions, but operative only *in futuro*, and not subjecting the party doing the work to the burdens and penalties which had fallen on the assignor previous thereto under his contract for personal service. This is a practical question, and we must look at these matters in a practical light. When the purchaser buys the property, naturally the thought in his mind is insurance. It being his, and the old policy being dead, he looks for insurance. He finds a policy which had been in force, dead because of his purchase and cessation of the insurable interest in the assignor, yet which the insurance company is willing to have transferred to him. Would it not be an injustice to him if, after the insurance company has consented to that transfer, it could turn back to acts done by the person from whom he obtained the policy, and claim that those acts vitiated the whole thing, and rendered it not liable to the assignee? Many policies contain the stipulation that if the house be left vacant for three months the policy shall fall. Suppose a party buys a house ignorant of its history during the time the policy has been running, and the company assents to the policy; would it not be injustice for the insurance company to thereafter say that the policy was voidable on account of the vacation of the house for three months, and although he, the purchaser, has rested in the faith that his property was insured, it will pay him nothing on the loss? If such were the rule the assignment of policies would cease, and parties would take out in every instance new policies.

But it is said there is really no consideration for this contract on the part of the company; that the breach of the policy by the assignor forfeited all right to the unearned premium; and therefore the company received no consideration for any promise to insure for the unexpired term. The assignment of this policy is an assertion practically by the assignor of a right to an unearned premium, and the claim of such unearned premium, presented to the assignee, is assented to by the company when it consents to the assignment. It matters not that there may have been no actual right to such unearned premium, for the recognition and compromise of a claim is consideration. Further than that, there would be the injury to the assignee as well as the benefit to the insurer to be con-

sidered. Again, it is said that there can be no waiver without knowledge; that the insurance company was ignorant, (and that is admitted) of the fact of this incumbrance; and that it assented to the assignment and the transfer of the policy in ignorance of these facts; and therefore it should not be held to have waived its rights. There may be estoppel without knowledge. Suppose the insurance company had given a contract to pay a certain sum of money, a non-negotiable contract, and the party holding that contract had transferred it, assigned it to this plaintiff, and prior to such assignment the plaintiff had gone to the insurance company, and asked if that contract was in force, and the full amount due thereon, and he was told that it was; he could recover the full amount of that contract, although unknown to the insurance company, and before the transfer and assignment, the assignor, having collections, which he was authorized thus to use, collected money belonging to the insurance company, and applied it upon that debt. There would be an estoppel by reason of its statement that the full amount was due on that contract, which had misled the purchaser, and yet a statement made in ignorance of the real facts. This consent to the assignment, though not in terms a like statement, yet, dealing with things in a practical way, must be construed to have a similar effect, and as a statement by the insurance company that it recognized that policy as a valid instrument. Surely it would be unjust to think that the insurance company put itself into the position of assenting to the transfer of a policy which had no validity, going through the form of consenting to that which had no legal existence and was worthless. These considerations, although we concede that the question is one of not perfect transparency, lead us to the conclusion that this assignment must be taken, in the language of the text-books and the authorities, to create a new contract between the assignee and the insurance company,—a new contract embracing, as of present writing, the same terms and stipulations as were embraced in the contract originally written between the assignor and insured. This being the case, these prior incumbrances did not vitiate this policy, and the motion for a new trial must be overruled.

LOVE and SHIRAS, JJ., concur.

LAIRD *v.* CITY OF DE SOTO and others.[1]

(*Circuit Court, E. D. Missouri, E. D.* October 8, 1887.)

JUDGMENT—RES ADJUDICATA—VALIDITY OF BONDS.

The petition in a suit upon a "railroad aid bond" issued by a city set out a copy of the bond, from which the purpose of the issue, viz., the building of machine-shops, appeared, and in which there was a reference to the statute under which the city took its action. The answer set up a special defense of change in municipal organization. There was a verdict for the plaintiff, and the defendant, a new trial having been refused, moved in arrest of judgment on the ground that "the averments of the petition and the recitals in the bond * * * showed that the bond was issued without authority of law." This motion was overruled, and a rehearing applied for, a brief being presented taking the same position, viz., that the use was not a public one. The rehearing was refused, but in his opinion the judge discussed the defense raised by the answer *only*, and concluded as follows: "This being the *only* matter set out in the plea," etc. *Held*, in a subsequent action between the same parties, on other bonds of the same issue, that the question as to the validity of the bonds, because of the purpose for which they were issued, was *res adjudicata*.

At Law. On motion for new trial.

Mills & Flitcraft, for plaintiff.

Joseph T. Tatum, for defendant.

BREWER, J., (*orally.*) In the case of Laird against the city of De Soto, an action on certain bonds and coupons issued by the town of De Soto, of which this defendant has been adjudged the legal successor, a question of *res judicata* is presented. The bonds were issued to the Iron Mountain Railroad Company, to aid it in purchasing ground and building machine-shops. The purpose of the issue was expressed on the face of the bonds. The present plaintiff has instituted and succeeded in two suits on bonds and coupons of the same issue, and he now claims that the judgments therein work an estoppel upon the defendant. The defendant, on the other hand, insists that it has a defense which has not been presented to the court heretofore, which is a valid defense, and upon which it demands judgment. It pleads that these bonds were issued without authority, because issued to a corporation for a private purpose—the building of machine-shops; and it says that that question has never been submitted to or decided by the court in the prior cases. This suit is not upon the same causes of action as the prior suits, and the rule of estoppel in respect thereto has been finally and definitely settled by the supreme court in at least three cases. *Cromwell* v. *Sac County*, 94 U. S. 351; *Russell* v. *Place*, Id. 606; *Enfield* v. *Jordon*, 119 U. S. 680, 7 Sup. Ct. Rep. 358. That rule is this: that where the second suit is not upon the same causes of action, though between the same parties, the former judgment is conclusive as to matters which were in fact and necessarily decided, and is not conclusive as to matters which might have been, but which were not, presented and decided. It is further held that we must look to the record of the former cause to see

[1] See 22 Fed. Rep. 421; 23 Fed. Rep. 780; and 25 Fed. Rep. 76.

if that shows what was certainly decided; and if it does not, we may resort to extrinsic testimony to determine.

In each of the three suits the petition sets out a copy of the bond, which upon its face shows the purpose for which they were issued, and it refers in terms to the act of the legislature under which the town took its action; so that the defense of a want of authority to issue the bonds, because issued by a municipality for a private purpose, is something which appears upon the face of each petition. Hence, when judgment was entered in favor of the plaintiff upon the first two petitions, it was a decision that those petitions stated a cause of action, and, of course, adverse to the claim that the bonds were void upon their face.

Perhaps that of itself might be enough, but we are not limited to that. To the petition in the first case, an answer was filed setting up as a special defense a change in the municipal organization. Upon that answer the cause was tried, and judgment rendered, and thereupon a motion for a new trial[1] and one in arrest of judgment were filed. The latter states these grounds:

"(1) Because the last-amended petition of the plaintiff wholly fails to state any cause of action against defendant.

"(2) Because the averments in said amended petition, and the recitals in the instruments of writing therein described, purporting to be bonds, show that the instruments of writing sued on in this cause were issued without authority of law, so that as a matter of law it appears from said amended petition that the plaintiff is not entitled to recover in this action."

There the very defense which counsel seek here to plead was pleaded, and the record shows that this motion in arrest of judgment was overruled. That was the only matter presented in this motion, and that was the matter which must have been and was alone decided when it was overruled.

But we need not stop here. After these motions in arrest and for new trial were overruled, a petition for a rehearing[2] was filed, and on that petition for rehearing a brief was presented by counsel for the defendant, and in that they distinctly state this very question. We quote from it:

"The petition fails to state a cause of action. If the bonds were valid, they were a loan of the town's credit to a private corporation for the erection of shops over which it had no control, and in which it had no interest. The use was not a public one, for which the taxing power could have been invoked." Citing *Loan Ass'n* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U. S. 487, 1 Sup. Ct. Rep. 442.

It then goes on and comments on a case which was supposed to furnish authority for the issue of such bonds. So that we have presented these three facts: (1) The petition upon its face presented this question, and a judgment for the plaintiff was a decision that the petition stated a good cause of action, and that the bonds were valid upon their face. Then we have (2) a motion in arrest of judgment in which the

[1] 22 Fed. Rep. 421. See, also, 23 Fed. Rep. 780.

[2] 23 Fed. Rep. 780.

party moving bases his motion singly upon the ground that these bonds are not valid instruments upon their face, but that they were issued for a private purpose; and then, as if to nail the matter, we have the brief of counsel in which this point is enlarged upon, and the attention of the court called to it specifically. So that it seems to us there can be no escape from the conclusion that the record of this prior case carries an absolute certainty that this very question was presented and necessarily decided; and, of course, under the authorities cited, that matter is *res judicata*. The only thing that counsel have to rely upon is this: The first case was heard before Justice MILLER and Judge TREAT. Justice MILLER read an opinion in which he discussed the question of the municipal organization simply, and closed by saying: "This being the only matter set out in the plea," etc.[1] That statement was correct. That was the only defense specifically set out in the answer. He did not refer to this question which we are now considering, but his selection in that respect does not militate against the record, or even show that he did not consider it. It is a common thing for a court, when a case is presented and many questions argued, to single out one or two which are deemed most important, and in an oral or written opinion discuss them, passing the others by; yet they are all considered and decided; and in this case we have it disclosed from the briefs of counsel that there was an authority in existence which was then supposed to determine the question. It was the most natural thing in the world for Justice MILLER to pass that by, because it had been, or was supposed to have been, already decided. But in any event, when the record of a case shows that a question must necessarily have been decided before the judgment which was rendered could have been rendered, it is conclusive in all subsequent litigation upon the fact that that question has been litigated and decided, and the party may invoke that decision upon the principle of *res judicata*.

For this reason, without stopping to consider the question of the validity of those bonds as a new question, we think the matter is at rest, and judgment must go for the plaintiff.

We have not stopped to consider specifically the second suit, although a motion for a new trial was filed in that, in which this same matter was presented, so that again and again the question has been presented and decided.

[1] 22 Fed. Rep. 422.

GRANDMANGE, Surviving Partner, etc., *v.* SCHELL, Collector, etc.

(*Circuit Court, S. D. New York.* November 17, 1887.)

1. CUSTOMS DUTIES—ACTION TO RECOVER EXCESS—SIGNATURE TO PROTEST.
In an action to recover an excess of duties, the evidence showed that the protest was signed with the firm name, but there was nothing to prove the handwriting or the authority of the individual who wrote the signature. *Held*, that a verdict should have been directed for the defendant.
2. SAME.
In an action to recover an excess of duties, there was no evidence to prove either the handwriting or the authority of the individual who wrote the firm name to the protest, and added his initial to the signature. *Held*, that the acceptance of the protest by the collector was no waiver, as he was under no obligation to inquire into the authority of the person protesting before he received the written protest.
3. SAME—ACTION TO RECOVER EXCESS—PROOF OF PROTEST.
Rev. St. U. S. § 3011, provides that, in suits to recover an excess of duties, it is necessary for the plaintiff to have protested at or before the time of payment of the duties. With regard to one entry, there was only the naval-office copy, and as to the other entry, there was a copy of the collector's entry with a mark at the upper left hand corner, which looked as if at one time there might have been something attached. *Held*, that there was nothing to leave to the jury to prove that such a protest as the law requires was served.
4. EVIDENCE—DOCUMENTARY—CUSTOM-HOUSE RECORDS.
Regulations of the secretary of the treasury for the administration of the custom-houses, section 625, requires the officer who has charge of the inspection and deliveries from vessels to make returns, in writing, of each delivery, within three days; and section 517 requires the assistant store-keeper or whoever was in charge of the warehouse to keep accurate account of all goods received, delivered, and transferred. *Held*, that the records kept under those regulations were competent evidence, without the testimony of the individuals who made the entries.

This was an action to recover excess of duties on importations of *mousselines de laine*. It was conceded that the amounts paid on all the 83 separate importations were excessive, but defendant claimed that plaintiff had failed to show that he paid the excessive duties, to get possession of his goods, or that he protested at the time, and in the form required by the act of February 26, 1845, (5 St. 727.)

LACOMBE, J., (*orally.*) The motion of the defendant to direct a verdict as to Exhibit No. 47, (or rather as to one case by No. 47,) where there is no proof of the authority to sign the claimant's name to the protest, is granted. The statute requires the protest to be signed by the claimant. It may, of course, be signed by a properly authorized agent of the claimant, but there is nothing here to prove either the handwriting or the authority of the individual who wrote the firm name to this protest, and added his initials to the signature. Nor is there anything in the contention that the protest was accepted at the custom-house, because the collector was under no obligation to inquire into the authority of the person protesting, before he received the written protest.

The defendant has also moved for a direction of verdict in his favor, as to Nos. 18 and 22—the entries by the Arabia and the Arago—on the

ground that the plaintiff has not proved service of protest as the statute requires. The only evidence which is offered, or all that is claimed as evidence, of that fact is the letter of the secretary of the treasury, the protests in some six or seven other cases, and certain marks on the face of one of the entries. The secretary of the treasury heard appeals under the act of 1857; and all that under the statute it was necessary to show in order to give him jurisdiction to hear the appeal was that, within 10 days *after* entry, a notice of dissatisfaction, in writing, was given to the collector, and that an appeal was taken within 30 days after entry. The protest which it is necessary for the plaintiff to show, to entitle him to recover in this suit, however, is a protest made at or before the time of payment. So that if payment was made the day after entry, the protest which he must show now, to entitle him to recover, is one which must have been made then; but the notice of dissatisfaction, in writing, which was sufficient to entitle the secretary of the treasury to hear the appeal, might have been served eight days after the actual payment, and still be within 10 days after the entry. The letter of the secretary of the treasury simply affirms the action of the collector, and states no ground. In the letter some eight or nine different importations, by different vessels, are referred to. As to six or seven of these the entries are in evidence, and attached to each of them there is a protest. As to one entry by the Arabia, there is the naval-office copy only; and as to the other, by the Arago, there is the collector's copy of entry, with a mark at the upper left hand corner which looks as if at one time there might have been, either by paste, or by a wafer, something attached there. From that I am asked to leave it to the jury to determine that the plaintiff served, at or before the time of the payment of the duties, upon the collector of the port, or on the person properly authorized to receive such service for the collector, a protest in writing, setting forth distinctly and specifically the grounds of objection, and signed by the claimant, or by his properly authorized agent. I think that to leave it to the jury to determine, from such evidence as this, that such a protest was served would be to invite them simply to guess at the facts; and therefore I shall grant the motion as to Nos. 18 and 22, giving the plaintiff an exception.

The defendant also asks that a verdict be directed as to Nos. 3, by the Geo. Hurlbert, and 5, by the Asia, upon the ground that the payment of excessive duty was not made to obtain possession of the goods. The secretary of the treasury is authorized by the statute to make such regulations for the administration of custom-houses, and for the government of the different collectors, as may seem to him proper; and the regulations which he makes under that act are, so far as the employes of the custom-house are concerned, the law as to them. Section 625 of the regulations (which are in evidence) requires the officer who has charge of the inspection and deliveries from the vessels, to make returns, in writing, of each delivery, within three days; and section 517 requires the assistant store-keeper, or whoever was in charge of the warehouse, to keep accurate accounts of all goods received, delivered, and transferred.

The records which are introduced here, kept under those regulations are, under a familiar doctrine of law, competent and admissible evidence and proof of their contents, without the testimony of the individuals who made the particular entries in them. They are the only evidence at all touching these two entries which there is in this case, as to the date of delivery. They show specifically, by the numbers of the cases themselves, and the particular dates given, the dates upon which they were delivered to the importers, some time in July or August; of course, if that stood alone, being the only evidence in the case, the verdict could only be one way. If it should be left to the jury to determine what the fact as to delivery is, upon all the evidence here, and they should find for the plaintiff, would the court be justified in sustaining their verdict upon a motion to set it aside as being against the evidence? I do not think that I would. There is nothing to contradict or impeach the authenticity or accuracy of these entries in any way, except, as plaintiff claims, the fact which is in proof, viz., that the duties were paid on the twentieth of November. From that the plaintiffs contend that, there being a presumption that a public officer discharges his duty, and that the collector does so himself, or through all his various subordinates, each discharging in his own sphere the particular functions which are given in the aggregate to the collector:—under that presumption, and in view of the fact that the law required the payment of duties in cash, it must be assumed that the goods were delivered on or after the payment made on the twentieth of November. The application of the doctrine of presumption cannot be carried so far, in the absence of anything at all to impeach the accuracy of the records produced here as to concede that it might control the direct proof as to the date of actual delivery. I should therefore feel constrained, if the verdict of the jury were for the plaintiffs on that issue, to set aside their verdict as being against the weight of evidence; and for that reason shall direct a verdict for the defendant, on those two items, and give the plaintiffs an exception. The plaintiff claims the right to go to the jury on Exhibits 65, 41, 45, and 46. I shall leave those to the jury, and as to all the others shall direct a verdict for the plaintiff.

SCHMIEDER and others *v.* BARNEY.

(*Circuit Court, S. D. New York.* November 4, 1887.)

CUSTOMS DUTIES—ACTION TO RECOVER—PRACTICE.

In an action against a collector of customs, to recover duties, the defendant, on his motion, obtained an order of the court requiring the plaintiffs, within a specified time, to serve a bill of the particulars therein enumerated of their claim, and that, in default of such service, the defendant should have judgment of *non pros.* against the plaintiffs, provided that, on the proof by them of certain circumstances, and on their compliance with the conditions then prescribed by the order, they should not be required to furnish such bill.

More than three years having elapsed after the expiration of the time for the service thereof, and no bill meanwhile having been served, the defendant noticed a second motion for such bill, and, in default of the service thereof within five days, for judgment of *non pros.* against the plaintiffs; and the plaintiffs noticed a counter-motion for the production of certain papers, under Rev. St. U. S. § 724 and, on the failure of their production, that this action be continued, and not placed on the day calendar of the court for the trial of causes. Upon the argument of these motions, which were heard together, the plaintiffs produced certain affidavits, which, they claimed, showed, besides other things, the existence of the circumstances mentioned and a substantial compliance by them with the conditions prescribed by the order for the non-service of the bill. The court held that the plaintiffs had not shown the existence of these circumstances, and therefore had not complied with these conditions; but, as they might have omitted through some excusable negligence to state in their affidavits the facts showing the existence of such circumstances, extended the plaintiffs' time to comply with the terms of the order for the bill five days from the date of the service of an order granting this extension, but ordered that in default of such service, and on proof thereof, the defendant should have judgment of *non pros.* against the plaintiffs.

(*Syllabus by the Court.*)

Action to Recover Excess of Duties Paid under Protest.

On cross-motion, the one for bill of particulars, and the other for production of custom-house papers under Rev. St. U. S. § 724.

Stephen G. Clarke, for plaintiffs.

Stephen A. Walker, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

LACOMBE, J. This is a consolidated action. The several original actions were begun at various times in 1863 and 1864, the defendant duly appearing in each, and demanding a copy of the bill of particulars of the plaintiffs' demand therein. No bill of particulars has ever been served. On June 9, 1883, defendant moved, upon affidavit, for a bill of particulars, or, failing the service of such bill, for a judgment of *non pros.* against the plaintiffs. After argument, the court, (Hon. ADDISON BROWN, sitting as circuit judge,) on June 26, 1883, ordered[1] that plaintiffs serve a bill of particulars giving certain enumerated items, within 90 days after service of the order and notice of entry on plaintiffs' attorney; and further ordered that, in default of such service, and on due notice thereof, defendant have judgment of *non pros.* against the plaintiffs. This last clause of the order, however, was coupled with a proviso that it should, under certain circumstances, be inoperative. These circumstances are thus described in the order:

(1) If the plaintiffs, through the loss or destruction of their books and papers, or other cause, shall be actually unable to furnish the particulars required, without an inspection of the invoices, entries, and protests on file in the custom-house; and (2) shall serve an affidavit in this action upon defendant's attorney, or upon the present collector, stating that fact, and the reason of such inability; and (3) shall serve upon the collector a request, in writing, for permission to inspect such invoices, etc., [the details of the request need not be considered,]—then plaintiff shall not be required to furnish the particulars hereinabove ordered.

[1] See 6 Fed. Rep, 150, and note.

The order of Judge BROWN, with notice of entry, was served on plaintiffs' attorney on July 31, 1883, and the 90 days limited therein have long since expired. On December 12, 1883, an affidavit of the plaintiffs' attorney was served on the district attorney, and apparently about the same time on the collector. It refers to this action, and to two others, and states "that he [plaintiff's attorney] has endeavored to procure the particulars required by the order of this court made in said actions on the twenty-sixth day of June, 1883, but without success, owing to the fact that the plaintiffs, at the times the importations referred to were made, composed firms which have long since passed out of existence, and all their books and papers referring to their importations at that period have been lost or destroyed."

On October 21, 1887, and on several occasions prior thereto, plaintiffs' attorney served on the collector a request for an inspection of the invoices, etc. The terms of these requests need not be considered, as they are practically conceded to be in substantial compliance with Judge BROWN'S order. On October 2, 1887, notice of a further motion for bill of particulars, or in default of service thereof within five days, then for judgment of *non pros.*, was given by the district attorney. On October 26, 1887, the plaintiffs made a counter-motion, under section 724 of the Revised Statutes of the United States, for the production of papers from the custom-house, or, failing such production, that the cause be continued, and not placed on the day calendar. These last two motions have now been heard, and will be disposed of together.

The order made on June 26, 1883, is apparently controlling of these applications, unless plaintiffs have put themselves in a position to avail of the relief accorded by the proviso. Upon the papers, they do not seem to have done so. They were required to serve an affidavit, stating their inability, and *the reasons of such inability*. The only attempt to comply with these requirements is the submission of the affidavit of plaintiffs' attorney above quoted from. Evidently the deponent has no personal knowledge of the loss or destruction of plaintiffs' books, and it may well be doubted whether an affidavit which does not set forth the efforts made to obtain it is in sufficient compliance with the second clause of Judge BROWN'S order. Manifestly, the learned judge did not mean to provide that plaintiffs who might be able to obtain the necessary information from their own books and papers, but declined to do so, because they were unwilling to take the trouble of searching for them, might be excused for a failure to comply with the order. What he did mean, undoubtedly, was that the plaintiffs might, by making out such a case as would upon a trial entitle a party to introduce secondary evidence of the contents of a book or paper, excuse themselves from furnishing a bill of particulars without assistance from the files of the custom-house. This affidavit, however, is very far from making out such a case. *Simpson* v. *Dall*, 3 Wall. 460; and see the authorities cited in *Kearney* v. *Mayor, etc.*, 92 N. Y. 617.

It is to be further noted that the learned judge has not only required that an affidavit of loss or destruction be served. The proviso is condi-

tioned on the fact that "the plaintiffs, through the loss or destruction of their books and papers, or other cause, shall be *actually* unable to furnish the particulars required," etc. When the right to avail of the proviso is claimed, conformity with the condition on which it was granted must be shown to the satisfaction of the court. Besides the affidavit of the plaintiffs' attorney, there has been presented on these motions an affidavit of Louis E. Schmieder, one of the plaintiffs. In this he states that, at the time of the transactions which are the subject of this suit, he was the resident partner here; the other plaintiffs, Charles E. Schmieder and Frederick Schmieder, remaining abroad. That in 1868 the firm was discontinued, "and all their books and papers, being necessary for winding up and settling the accounts of said firm, were then sent to the main house, in Germany." Deponent then adds that "he verily believes that none of the records or books of said house showing their importations during the years 1863 and 1864 are now in existence." He wholly fails to state the grounds for such belief, or to show that at any time during the past 20 years *he* has made any effort to find them. Moreover, the very affidavit of Louis E. Schmieder shows that the books and records of the firm were last in the possession of the other two plaintiffs, and no statement of *theirs*, sworn or unsworn, is offered to account for them. Such proof as this wholly fails to comply with the letter or the spirit of Judge BROWN'S order, and is insufficient to entitle the plaintiffs to claim the benefits of the proviso.

It may be that they have in fact made proper and diligent search for books and records which have been lost or destroyed to their misfortune, and without their fault; and that they have omitted, through some excusable neglect, to state the facts in their affidavits. The time within which plaintiffs may comply with the terms of Judge BROWN'S order of June 26, 1883, is therefore extended five days from the date of service of this order on their attorney. Failing to comply within that time, the former order will take effect, and, upon the filing of an affidavit of non-service of the bill of particulars, defendant may have judgment of *non pros.*

This disposition of the case will, of course, dispose of the other motion, which was argued at the same time, and no decision thereon need be made.

POTTS, Assignee, *v.* HAHN and others.

(*District Court, D. New Jersey.* October 29, 1887.)

PLEADING—MULTIFARIOUSNESS—FRAUDULENT CONVEYANCES.

In a suit brought by an assignee of a bankrupt against several parties, the complaint alleged facts showing that they were all connected with fraudulent undertakings for the purpose of preventing the bankrupt's property from reaching the assignee's control, but showing also that the defendants were not all connected with each fraudulent act, but that some of them performed one act, and some another, all tending to the same result. *Held*, upon demurrer on the ground of multifariousness that the complaint was good as the defendants joined in the common fraudulent purpose.

In Equity. Demurrer to bill.
G. A. Seixas, for complainants.
Samuel Kalisch, for defendants.

WALES, J. Proceedings in bankruptcy were begun against John Hahn, one of the defendants, on the thirty-first of January, 1876, and on the ninth of April, 1887, he was declared a bankrupt, and the complainant appointed assignee. The bill sets forth that John Hahn, in contemplation of insolvency, and within three months before the filing of the petition for adjudication against him, executed a mortgage of his real estate to Louis Kirchner for a considerable sum, and afterwards conveyed the same real estate to Philip Kirchner, who, subsequently, conveyed it to Barbara Hahn, the wife of the bankrupt; that the said mortgage and conveyance were made and delivered without any consideration, and that the said Louis and Philip Kirchner had reasonable cause to believe that John Hahn was insolvent, and that they accepted the said mortgage and conveyance for the purpose of aiding and abetting the bankrupt in his fraudulent scheme to prevent the said real estate from coming to his assignee, and from being distributed under the bankrupt act; that the said Barbara Hahn has not and never had any estate, separate and apart from her husband, and was also a party to the same fraudulent scheme; that at about the time of the pretended conveyance to Philip Kirchner, the bankrupt transferred and in other ways divested himself of all his property, and in particular, on the eighth of January, 1875, being then insolvent, did chattel mortgage and transfer to his son, John Hahn, Jr., for the expressed consideration of $2,500, his stock in trade and all other property connected with and relating to the business of a tobacco and cigar store, and all the household goods belonging to the bankrupt which were then on the premises covered by the mortgage and conveyance to L. and P. Kirchner, with intent to delay and defraud this plaintiff and the bankrupt's creditors, and that John Hahn, Jr., knowingly aided and abetted his father in carrying out his fraudulent plan. The bill concludes with a prayer that the mortgage and deed may be declared void, that the defendants may be enjoined from disposing of the said property, and for an account of the rents and profits, also for the appointment of a receiver. The bill is demurred to for multifariousness, on the ground that it exhibits several distinct matters and causes, in many of which some of the defendants are not in any manner interested or concerned.

The object of joining these defendants was to prevent a multiplicity of suits, an object always favored in equity. The bill alleges that the other defendants, separately or together, aided John Hahn in carrying out a deliberately contrived scheme to defraud his creditors. This makes a single issue on the central question of fraud, to the perpetration of which it is alleged the defendants knowingly contributed by their individual and distinct acts. In *Way* v. *Bragaw*, 16 N. J. Eq. 213, the court said:

"Where there is one entire case stated as against the debtor, it is no objection that one or more of the defendants to whom parts of the property have

been fraudulently conveyed, had nothing to do with the other fraudulent transactions. The case against the debtor is so entire that it cannot be prosecuted in several suits, and yet each of the defendants is a necessary party to some part of the case stated. In such case neither of the defendants can demur for multifariousness, or for a misjoinder of cause of action in some of which he has no interest."

The same doctrine is approved in *Randolph* v. *Daly*, 16 N. J. Eq. 313. Demurrers for the same cause and under an analogous state of facts were overruled in *Railroad Co.* v. *Schuyler*, 17 N. Y. 592, and in *Fellows* v. *Fellows*, 4 Cow. 682. The supreme court of the United States has held that it is impracticable to lay down any fixed, unbending rule as to what constitutes multifariousness. Each case must depend upon its special circumstances and the necessities which may arise out of the due administration of justice in that case. As a general rule, the court will not compel parties to incur the expense, vexation, and delay of several suits where the transactions constituting the subject of the litigation or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree.

A different rule would often prove to be both oppressive and mischievous, and could result in no possible benefit to any litigant whose object was not simply to harass his adversary, but to ascertain what were his just legal rights. *Sheldon* v. *Keokuk N. L. Co.*, 8 Fed. Rep. 769. The defendants can be placed under no disadvantage by being joined in the bill, and the complainant will be saved the expense, labor, and time of prosecuting several suits.

The demurrer is overruled, and it is ordered that the defendants plead to or answer the bill within 30 days.

HAYES *v.* UNITED STATES.

(*Circuit Court, D. Colorado.* November 14, 1887.)

1. CRIMINAL PRACTICE—INSTRUCTIONS—PROVINCE OF COURT.
   Defendant was indicted for contempt of court and corruptly obstructing the administration of justice as a juror. On the trial counsel for accused stated that this was "the first case of the kind." The court told the jury it was not the first of the kind, and that a similar case had arisen, and gave the general facts of it. *Held*, that it was not error for the court to thus disabuse the minds of the jury of an impression that they were trying an unprecedented case.

2. SAME.
   The court further said: "And he (defendant) went out and took counsel of * * * with respect to it (the verdict.) His choice of an adviser was rather unfortunate; that a man should go to a boon companion in a drinking-saloon, a bar-room loafer, to ask what the law is on a subject of that kind." *Held*, that this was not error, as the judge's reference to the witness as a "bar-room loafer" might have been justified by his appearance, and the other facts referred to appeared in the record.

3. WITNESS—CREDIBILITY—INSTRUCTIONS.
In a criminal action, where witnesses had testified as to defendant's good character, the trial judge charged: "And if you believe him guilty, let not the fact that bankers and business men have testified that he is a man of integrity, by which they mean, probably, that he pays his debts, influence your verdict, or discourage you in the discharge of your duty." *Held*, that this was a correct statement of law, and though it was a "covert fling" at the witnesses' criterions of character, it was not error.

H. W. Hobson, for the United States.
Patterson & Thomas, for defendant.

BREWER, J. At the November term, 1886, of the district court, the plaintiff in error was convicted under an indictment for corruptly obstructing the administration of justice, and for contempt of court, and the case is now before me on a writ of error from that conviction and sentence. The only errors alleged by counsel in their briefs are in the instructions given the jury, and those not as inaccurate statements of law, where questions of law were presented, but as improper comments upon the facts, and as improperly throwing the weight of the court's opinion in favor of the prosecution and against the defendant.

This case comes before me on a writ of error, and the same rules control me in its decision as have been announced by the supreme court in the decision of cases taken on error to it. And it is the settled rule of that court that comments made by the trial judge upon matters of fact in his charge to the jury furnish no grounds of error. In the early case of *Carver* v. *Jackson*, 4 Pet. 80, the supreme court, by STORY, J., laid down the rule in this language:

"That with the charge of the court to the jury upon mere matters of fact, and with its commentaries upon the weight of evidence, this court has nothing to do; observations of that nature are understood to be addressed to the jury merely for their consideration as the ultimate judges of matters of fact, and are entitled to no more weight or importance than the jury in the exercise of their own judgment choose to give them. They neither are, nor are they understood to be, binding upon them as the true and conclusive exposition of the evidence."

This doctrine is affirmed in the case of *Magniac* v. *Thompson*, 7 Pet. 348. See, also, the cases of *M'Lanahan* v. *Insurance Co.*, 1 Pet. 182; *Games* v. *Stiles*, 14 Pet. 322; *Mitchell* v. *Harmony*, 13 How. 115; *Reynolds* v. *U. S.*, 98 U. S. 145. This last case is very much in point. It was a trial in Utah for bigamy, and the court in charging the jury called upon them "to consider what are to be the consequences to the innocent victims of this delusion [the doctrine of polygamy.] As this contest goes on, they multiply, and there are pure-minded women, and there are innocent children—innocent in a sense beyond the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land,"—and this language of the court to the jury was held not improper.

In the case at bar, the defendant was charged with obstructing the ad-

ministration of justice, and the testimony tended to show that while acting as a juror, and before the close of the trial, he was in a bar-room, drinking with friends, and declaring that the verdict must be in favor of the plaintiff or there would be no verdict at all. It appeared also from the testimony that in that trial in which defendant was acting as a juror a large amount was involved, and that each side was employing detectives to watch the jurors. It is not to be wondered at under the circumstances that the learned judge who tried this case was indignant and felt called upon to impress upon the jury the seriousness of the offense charged, and their duty to give careful attention to the testimony. It is painfully true that there are some violations of law, such as tampering with the ballot-box, influencing of jurors, and matters of that kind, which to many seem trivial; they are often in common conversation laughed at when successful, and simply sneered at when a failure; but they are offenses which, although the punishment imposed by statute be not great, are of a most heinous character and affecting vitally the best interests of society. It is the duty of the trial judge, when cases of that kind are presented, to see to it that they are not laughed out of court, and that the jury are impressed with the seriousness of the accusation. It is a matter of congratulation, rather than of complaint, that there are judges whose personal weight of character, learning, and high ability are such that their earnest words compel the serious attention of jurors. More than once in his charge the learned judge told the jurors that they were triers of fact, and that they were not to be influenced by any of his comments on the testimony; so they knew just what was their province and duty; and if by his earnest words he compelled their serious attention, he did that which worked no legal wrong to the defendant, and which may prove of incalculable advantage to the public. I have felt compelled to say this, not because it was necessary for determining the questions which are properly open for my consideration, but because I believe most heartily that it is the duty of a trial judge to do everything that he can, without trespassing upon the rights of the defendant, to arrest the most serious and earnest attention of the jurors in cases of this nature.

Now, with these general remarks, let me notice specifically the parts of the charge obected to. Obviously, in the argument of counsel, either for the purpose of belittling this case, or as making an excuse for the conduct of defendant, it had been stated that this was the first case of this kind, and the trial judge commences his charge by a statement that this is not the first case, and that a case of a similar nature had arisen in Pueblo, and, without mentioning names, simply states the general facts of that case. Can it be said there was any error of law in this? It was fair to disabuse the mind of the jury of the idea that they were called upon to sustain a new proceeding, or to try a case the like of which was unknown. They need not fear to be laughed at in finding a man guilty of the offense charged, on the ground that no one had ever thought of prosecuting for such an act before.

Again, he made this reference to one of the witnesses:

"And he [Hayes] went and took counsel of * * * with respect to it. His choice of an adviser was rather unfortunate; that a man should go to a boon companion in a drinking-saloon, a bar-room loafer, to ask what the law is on a subject of that kind."

Counsel truly say that there is nothing in the record which perhaps justifies such an exaggerated characterization of this witness; and yet that defendant and witness met in a saloon where they were drinking together is disclosed by the record, and it may well be that the appearance of the witness on the stand fully disclosed his character as a mere bar-room loafer. There is certainly nothing in the record to contradict it.

Again, it appears in the testimony that some of the witnesses testified to defendant's previous good character, and upon this the court charged in these words:

"And if you believe him guilty, let not the fact that bankers and business men have testified that he is a man of integrity, by which they mean, probably, that he pays his debts, influence your verdict, or discourage you in the discharge of your duty."

That is unquestionably correct as a matter of law; if the jury believe the defendant guilty, no previous good character, however proved, would be any excuse for acquitting him. And if it be said that there is a covert fling at the witnesses' criterion of a man's integrity and character, that does not change the correctness of the rule of law laid down.

These are the only special matters of the charge presented. I have mentioned them in order that my silence might not carry an implication that, though not properly cognizable on a proceeding in error, they constituted an improper attempt to influence the verdict of the jury. I think, reading the charge as a whole, any one would feel that all that the court did in his comments upon matters of fact was to endeavor to impress upon the jury the seriousness of the offense charged, and to prevent them from being misled as to their duty by matters extrinsic to the question of guilt.

There being no error apparent in the record, the judgment of the district court will be affirmed. The statute gives to this court the power of modifying the sentence imposed. As the jury recommended to mercy, I see no reason to doubt the propriety of the sentence, and the same sentence will be imposed here as in the district court.

STEWART and another *v.* TENK and another.

(*Circuit Court, S. D. Illinois.* November 8, 1887.)

PATENTS FOR INVENTIONS—ISSUE OF LETTERS—JOINT INVENTION.

Where the evidence showed that patent No. 140,315, June 24, 1873, of an apple paring and coring machine was issued to two patentees jointly, but that the whole machine was made up of about 12 different claims for a patent, and that one of these was invented by one of the patentees alone, a joint patent on such claim and part of the machine is invalid.

George A. Anderson, for complainants.
John R. Bennett, for defendants.

GRESHAM, J. John Stewart and Will Campbell obtained letters patent No. 140,315, on June 24, 1873, for a joint invention for certain new and useful improvements in machines for paring, slicing, coring, and dividing apples, and other fruit. The invention consists—

"*First*, in providing the said device with a paring-knife, so operated as to remove the skin of the fruit from all parts thereof outside of the parts operated upon by the coring-knife; *second*, in conjunction with said paring-knife, providing a convex anti-friction roller, to prevent any friction upon the device by the fruit, when being operated upon; *third*, in providing the arm upon which said paring-knife is mounted, with the segment of a cogged guide or flattened sphere, so formed as to enable the said paring-knife to operate upon a line describing one-half of the periphery of the vertical central plane of an ordinary-shaped apple; *fourth*, in providing said segmental cog with a yielding ratchet to assist the rotation of the cog and the preservation of an even pressure of the paring-knife upon the fruit; *fifth*, in providing said device with a coring-knife, which is so arranged that its cutting edge comes in contact with the parts of the fruit about the core with a draw-cut; *sixth*, in providing said device with a double-spiral fork for securely holding the fruit."

The twelve claims in the patent are for the machine as a combination, and for separate and distinct portions of it as separate and distinct inventions. The bill charges infringement of the tenth claim only which reads as follows: "The combination of the arched coring-knife, I, and slicing-knife, H, substantially as shown and described."

It is insisted by the defendants' counsel that Stewart alone invented the arched coring and slicing-knife; and that, therefore, a joint patent for this distinct invention was unauthorized. Stewart testified that he conceived the idea of combining the slicing and arched coring-knife as it is described in the patent; and that he gave instructions to Campbell how to make the knife. He further testified that certain other parts of the combination, which are covered by separate claims in the patent, were invented by him; while other parts were invented by Campbell. Campbell was also examined as a witness, but his testimony on these points did not differ materially from Stewart's.

Stewart and Campbell were entitled to a joint patent for what they jointly invented. It may be that their minds co-operated in combining the different parts which resulted in the production of the complete machine, but a joint patent can be sustained only for a joint invention; and the evidence shows that Campbell did not contribute to the invention covered by the tenth claim. Stewart was the sole inventor of the slicing and coring-knife, and the patent for that, as a separate and distinct part of the machine, should have been issued to him alone. *Worden* v. *Fisher*, 11 Fed. Rep. 505; *Bunging App. Co.* v. *Woerle*, 29 Fed. Rep. 450.

The bill is dismissed for want of equity.

PFANSCHMIDT and others, Copartners, *v.* KELLY MERCANTILE CO.

(*Circuit Court, D. Minnesota.* November 15, 1887.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—WASH-BOARDS.
A patent of a wash-board known as the "George" patent, numbered 187,842, and issued February 27, 1877, consisted of a frame of the usual shape for wash-boards and made with a corrugated zinc rubbing surface constructed of a single heavy sheet of zinc with the lower edge wrapped tube-shape, about a supporting rod. *Held*, to possess no patentable novelty over the "Heath Wash-Board" patent No. 168,252, issued September 28, 1875, which was very nearly like the former, only made with two overlapping zinc plates instead of one; and as the evidence did not clearly show an invention by George prior to that by Heath, the former's patent is invalid.
2. PRACTICE IN CIVIL CASES—REHEARING—CUMULATIVE EVIDENCE.
A motion to reopen a hearing for the admission of testimony which is merely cumulative will not be granted.

Frackelton & Careins, for complainants.
W. H. Burridge and *Warner & Lawrence*, for defendant.

NELSON, J. This suit is brought against the defendant for an infringement of letters patent granted to David I. George, February 27, 1877, "for improvement in wash-boards." The complainants claim to be interested in the patent and all rights of action that may have accrued for any infringement of the same. The defendant denies infringement, but relies chiefly upon the defense of want of patentable novelty in the George wash-board. A vast amount of testimony is taken. After the hearing, a motion is made by defendant to open the case and allow the deposition of several witnesses to be taken for the purpose of giving additional evidence that a wash-board, invented by Heath, to whom letters patent had been issued, was prior in time to the invention of George, and furnished all the information necessary to a skillful mechanic to construct the George wash-board. The complainants have offered testimony tending to show that the actual invention by George was older than Heath's; which evidence has been met by the defendant, so that, if the motion is granted, the additional testimony would be merely cumulative. While it might be more positive in terms upon the fact sought to be established, the case, on that account, should not be opened. I deny the motion and shall decide the controversy upon the testimony already taken.

I shall only consider the defense of want of novelty. If the Heath patent, issued September 28, 1875, is older than the George invention, in my opinion the suit must fail.

The George patent contains a single claim, viz.:

"In a wash-board, the corrugated metallic plate, B, formed of a single piece of sheet-metal, and provided at its lower end with a tubular enlargement, substantially as specified."

The patentee claims a corrugated metal sheet with a tubular enlargement made by bending and soldering the free edge at one end to the body of the sheet. In his specifications he says:

"This invention has relation to wash-boards, and it consists in a single corrugated zinc plate, inserted in the grooved sides, bars, and top piece of the frame, and supported from below by being bent around an iron clamp rod extending across the frame, which is thus effectively braced; whereby a very effective and economical wash-board is produced, as will be hereinafter more fully explained."

He then goes on in detail to describe how the frame is made, which, in general appearance, is similar to the frames of wash-boards having wooden rubbing-surfaces, with some additional devices for conveniently holding the soap used in cleansing garments; and then says:

"Board, C, (which is a flat wooden board found at the upper end of the frame of all wash-boards,) is provided at its lower edge with a longitudinal groove, *e*, adapted to receive the upper edge of a corrugated sheet-metal plate, B, the vertical edges of which are received in longitudinal ways, *f*, found in the inner faces of the sides, *a*, of frame, A. Plate B, above alluded to, will be made of a single sheet of metal, preferably zinc, and will be corrugated, and the depressions on one of its sides will form the raised surfaces on the other. It will also be of sufficient thickness to give it the necessary rigidity for resisting strain when in use. This plate will be secured in position as follows: Its lower edge will be bent over a suitable mandrel so as to form a cylindrical tube, *g*, when its free edge is soldered to its body; and a metallic rod, C, having an enlarged head, *h*, is passed through registering perforations, *i*, in sides, *a*, and through the said tube, *g*. This being accomplished, a nut, *j*, is applied upon its screw-threaded projecting end and set up, thus drawing the sides forcibly together and clamping the corrugated plate between them, which, by this means, is held against all displacement."

In other words, if I understand the specifications, the distinctive features of this wash-board are that the rubbing-surface is made of one thick plate of corrugated zinc, fastened to the frame by fitting into serpentine-shaped grooves in the side pieces, and a groove in the top piece; and at the bottom a cylindrical tube is made by bending the plate and soldering the free edge to its body, and a rod, having a head at one end and threaded at the other, is passed through the frame and the tube. A nut is then applied and set up, and by this means the plate is firmly held in place. In the Heath patent, No. 168,252, the claim is—

"The screw-rod, C, and corrugated zinc plates connected therewith by a lap joint, as specified in combination, with the grooved flexible frame piece, A, and cross-bars, BB, as and for the purpose specified."

This patent was issued September 28, 1875, on application made May 8, 1875. The George patent, No. 187,842, was issued February 27, 1877. Heath, in his specification, says:

"My invention relates to the construction and arrangement of parts as hereinafter described, whereby the corrugated zinc plates, which form the rubbing-surfaces of the wash-board, are secured together, and to the flexible grooved frame."

He then in detail describes his wash-board, the rubbing-surface of which consists of two plates of corrugated zinc, substantially as follows: The frame is made of a flexible wooden or metal bar bent in the shape of a frame of an ordinary wash-board; and at the sides are two grooves to receive the side edges of the plates, and at the top is one groove to re

ceive the upper edge of one plate, which extends so as to form the upper part of the wash-board. The upper ends of the zincs are confined between two parallel cross-bars secured together by rivets. The lower edge of one of the zincs is bent around a cross-rod which connects the ends of the frame piece, and is made to overlap the edge of the other zinc. This rod has a thread on one end, which adapts it to be readily removed to allow repair or substitution of zincs, and by it the zincs may be clamped more or less tightly as required.

In my opinion the only substantial difference between the two wash-boards is the use of two zinc plates for a rubbing-surface in the Heath patent, and only one in the George patent. The lap-joint in the Heath patent, made by the lower edge of one zinc being bent around the rod and overlapping the edge of the other zinc, forms a tubular enlargement at the bottom of the rubbing-surfaces; perhaps not as solid and firm as in the George patent, but still a tubular enlargement performing substantially the same function. The structure of the boards is substantially the same, and I do not see that there is any difference in the two boards with the exception of the rubbing-surfaces. If Heath is the prior inventor in view of the state of the art, it cannot be said that there is patentable novelty in George's invention. It required only mechanical skill, and very little of that, to determine that, if thick zinc could be obtained, one plate would serve the purpose of a rubbing-surface as well as two. All that George did was to make a wash-board with one plate instead of two, and solder the free edge of the lower end, after being bent over a rod, to the body of the plate. After Heath's patent there was no invention in thus constructing a wash-board. The file wrapper and contents show that on the application of George his broad claims were rejected for the reason that Heath had already anticipated them, and it was only after repeated efforts that he was granted a patent; and his original claims presented were all rejected for the reason that they were met by patents of Minor & Merrick, No. 22,087, and Heath, No. 168,252. I think the single plate used by George is the equivalent of the two plates used in the Heath patent. The Heath patent antedates that of the complainant, George; but counsel urge that George made a wash-board with a single plate of thin zinc, in September, 1874, which he found not serviceable, and good for nothing. The proof to establish the fact that he constructed a wash-board with one zinc plate for a rubbing-surface is not satisfactory. It is not cogent and clear, but is uncertain and conflicting, and does not carry conviction to my mind of its truth.

Taking all the testimony submitted, I am of the opinion that the invention by Heath was prior in time to the construction of a wash-board by George as is claimed. Decree for defendant.

MEYERS and others *v.* BUSBY.

(*Circuit Court, N. D. California.* October 17, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—DEFENSES.

The fourth and fifth defenses to suits for infringements of patents, authorized to be made by section 4920, Rev. St., are separate and independent defenses; and each requires its appropriate notice or answer in order to let in testimony to establish the defense.

(*Syllabus by the Court.*)

Action in equity to enjoin the infringement of letters patent No. 141,580, to the complainant Louis Meyers, issued on the fifth day of August, A. D. 1873, for "a glove-fastener." The claim is as follows:

"I claim as my invention, and desire to secure by letters patent, the glove fastener, consisting of a cord, B, which is fastened with both ends to one flap of the glove, and drawn through holes in the other flap, to operate in combination with the button or holder, E, as set forth."

The respondent is a glove manufacturer at San Francisco, and practiced the invention under a license from complainant, and paid the royalties therein provided; but at its termination he declined to renew it. He continued, however, to practice the invention against the will of complainants, and thereupon this suit was commenced to enjoin him. A preliminary injunction was granted at the commencement of the suit.

The answer of defendant presents three matters of defense. It alleges:

"*First*, that the complainant Louis Meyers was not the first inventor or discoverer of any material or substantial part of the device for fastening gloves, covered by the letters patent mentioned in complainants' bill of complaint; *second*, that the said device for fastening gloves so covered by said letters patent had been in public use or on sale in this country for more than two years before the application of said Louis Meyers for a patent therefor; *third*, that the defendant has not infringed the patent of the complainants."

The provisions of section 4920 of the Revised Statutes, under which the first and second of the defenses are pleaded, are as follows:

"(4) That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented. (5) That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. If any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him, with costs."

J. H. Miller, for complainant.

Gray & Havens, for defendants.

Before SAWYER, Circuit Judge.

SAWYER, J., (*orally.*) In this case there is really only one defense that is available, and on which any testimony was taken, or could be taken under the answer, and that is, as to the prior public use for two years before the application for the patent. The fourth defense under the statute, that it is not new, and the invention has been made before, is a distinct defense from the fifth, and the defendants have given no sufficient

notice of any testimony—and no testimony other than that applicable to the defense of two years' prior use—on the question of prior invention; no notice of place of residence, or name of any party who invented it before, or knew of it before it was invented by the patentee in this case. As to the other defense, no two years' public prior use has been shown, unless it be, in the state of New York. I do not think the defendants have made out the defense, that it was in use in New York state two years, or at any time before the application for a patent. It is true, that one man at one shop, another one at another, testified that they had seen it; that the patented articles, a similar glove, had been made and sold at the manufactory where they worked in 1869, or about that time, but they are contradicted by other witnesses, by one of the owners himself, of one shop, who said he carried it on, and was perfectly cognizant of what was done there, during the time referred to, and, also, by his glove-cutter. They both testified, positively, that the invention was not made in that shop, or sold or used by them. They knew the facts, and were the very persons pointed out by the witnesses who testified for defendant in the case, that he had conversed with upon the subject, and, in conjuction with them, investigated the mode of making. The witness is, thoroughly, contradicted. It seems to be one of those cases, where somebody, years afterwards, in looking back to find an anticipation, imagines that he remembers some such case. I do not think the two-years prior use, or any use at all, is, satisfactorily, shown. On the contrary, I think it is clearly contradicted. It is not merely the negative testimony of some one, who had never seen the thing. It is the positive evidence of parties, one the owner and the other the cutter, who must have seen the invention, had it been manufactured by them in their shop, and then sold. The same is true in the other case in New York. The testimony of defendants' witness is contradicted by several witnesses who could not be mistaken. In both cases at Chicago of parties one of whom said he brought a pair of similar gloves from Norway, and wore them in Chicago in 1872, and another who also brought to this country a pair in 1874, the evidence is not satisfactory. If either is correct, the case was not in time, as the application for the patent was made July 16, 1873. I very much doubt the reliability of the testimony. There was but a single pair brought some 15 years ago from Norway. It is scarcely probable that a pair of gloves would be kept or remembered so long, there being nothing in particular to attract attention to the matter. It would be a very unsafe incident upon which to overthrow a patent, at this late date, on the ground relied upon. At all events, it was not two years, or one year before the making of the application for a patent in this case, which was made on the sixteenth of June, 1873. One of these pairs of gloves was brought to this country in 1874 or 1876, long after the application, and the other was alleged to have been brought in 1872, within the period of two years, even if the testimony be true; but, I greatly doubt if that glove was brought from Norway in 1872.

There must be a decree for the complainant, and a reference to the master to ascertain the net profits and the damages, and it is so ordered.

THE WALLACE.[1]

COMFORT *v.* THE WALLACE.

(*District Court, E. D. New York.* November 9, 1887.)

PILOTS — NEGLIGENCE — SWASH CHANNEL — SHIP TOUCHING BOTTOM — ICE IN MAIN CHANNEL.

Libelant, a pilot, took a ship to sea through the Swash Channel. On the passage she touched bottom, and damaged her keel, and in this action by the pilot for his pilotage fees the vessel set up the said damage, and alleged it to have been caused by the pilot's negligence. The evidence showed that the vessel was in the channel, the depth of water in which exceeded her draught, when she encountered a heavy and unusual wave, which lifted her, and caused her to strike; that the reason of her not taking the main channel was the presence in the latter of ice; and that libelant, before starting, had been warned by the owner not to take the ship through ice. *Held*, that no negligence on the part of the pilot was shown, and that he was entitled to his pilotage fees.

Carpenter & Mosher, for libelant.
Wing, Shoudy & Putnam, for claimant.

BENEDICT, J. This is an action by a pilot to recover his pilotage for taking to sea the ship Wallace, in February, 1885. The pilot took the ship through the Swash Channel, and, while passing through the channel, the ship touched the bottom, and damaged her false keel to the extent of about $200. The defense set up is that "the libelant, in whose sole charge the boat was, directed her course through the Swash Channel in so negligent and improper a manner as to cause her to touch bottom." The negligence here charged is not keeping the vessel in the channel while proceeding through the Swash. This charge is wholly unsupported by evidence. The negligence contended for in the brief of the claimant is in "attempting to take the ship through the Swash Channel." The answer does not permit such a contention, but, if it did, the contention must fail. It is proved that the Swash Channel, although narrower than the Main Channel, has the deeper water, and is constantly used by vessels coming to and departing from New York; that, when this ship went through, the depth of water exceeded her draught; that the cause of the ship's touching bottom was a heavy and unusual wave, which was encountered while in the channel, by which the ship was lifted so as to cause her to strike bottom; that when the pilot reached the Swash Channel there were large quantities of ice in the Main Channel, and before starting the pilot had been warned by the owner not to take the ship through the ice, because her bottom was of soft wood. These circumstances relieve the pilot of the charge of negligence. Attempting to take the Swash Channel under any circumstances is not to be held negligence, and I am not willing so to hold.

The libelant must have a decree for the amount of his pilotage, with interest and costs.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

FALES, Adm'x, v. CHICAGO, M. & ST. P. RY. CO.

(*Circuit Court, N. D. Iowa, E. D.* November Term, 1887.)

1. REMOVAL OF CAUSES—CITIZENSHIP—ACT OF MARCH 3, 1887.
   Act of congress of March 3, 1887, § 1, provides that the circuit courts of the United States shall have jurisdiction of civil causes between citizens of different states, and that, when the jurisdiction is founded only on diverse citizenship, the suit may be brought in the district where either the plaintiff or the defendant resides. Id. § 2, provides that civil suits of which the circuit court has jurisdiction, and which are brought in the state courts, may be removed to the circuit courts by the defendant if a non-resident of the state. An action was brought in the district court of Dubuque county, Iowa, the amount involved being over $2,000. The plaintiff was a citizen of Iowa, and the defendant of Wisconsin. On the application of the defendant the cause was removed to the circuit court of the United States. *Held*, that the removal was authorized by the statute, the defendant not being a resident of Iowa, and the cause could not now be remanded to the state courts.
2. SAME—CITIZENSHIP—CORPORATIONS.
   Corporations are citizens and residents of the state under the laws of which they were created, and they cannot, by engaging in business in another state, acquire a residence there.
3. SAME—PLACE OF BRINGING SUIT—ACT OF MARCH 3, 1887.
   The provisions of act of congress of March 3, 1887, § 1, regarding the place of bringing suit by original process in the circuit courts of the United States, do not apply in determining the question of jurisdiction on an application for removal of causes from the state courts.

At Law. Motion to remand cause to state court.

Henderson, Hurd, Daniels & Keisel, for petitioners.

W. J. Knight, for defendant.

SHIRAS, J. This action was originally brought in the district court of Dubuque county, and upon the application of defendant was removed to this court, whence it is sought to have the same remanded for want of jurisdiction.

The motion to remand requires for its determination a construction of the second section of the act of March 3, 1887. To ascertain the true reading of this section, it is necessary to collate with the several clauses thereof portions of the first section of the act, as that section is expressly referred to in the second section, and is thereby made part thereof. Reading the one, therefore, in connection with the other, it appears that removals from the state to the federal courts may be had in the following classes of cases:

(1) Suits of a civil nature, at law or in equity, arising under the constitution, laws, or treaties of the United States, involving over $2,000, exclusive of costs or interest, may be removed by the defendant, whether he be or not a resident of the state wherein suit is brought.

(2) Suits of a civil nature, at law or in equity, in which the United States are plaintiffs, without reference to the amount involved, may be removed by the defendant, if he is a non-resident of the state wherein suit is brought.

(3) Suits of a civil nature, at law or in equity, between citizens of different states, involving over $2,000, exclusive of interest and costs,

may be removed by the defendant, if he is a non-resident of the state wherein suit is brought.

(4) Suits of a civil nature, at law or in equity, between citizens of the same state, claiming lands under grants of different states, irrespective of the amount involved, may be removed by the defendant, if he is a non-resident of the state wherein suit is brought.

(5) Suits of a civil nature, at law or in equity, between citizens of a state and foreign states or subjects, involving over $2,000, exclusive of interest and costs, may be removed by the defendant, if he is a non-resident of the state wherein suit is brought.

(6) In suits of a civil nature, at law or in equity, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant being a citizen of a state other than the one wherein suit is brought, may, irrespective of the amount involved, remove said cause, by making it to appear to the United States circuit court that, owing to prejudice or local influence, he cannot obtain justice in the state court in which the cause is pending, or to which it may, under the state laws, be removed for trial.

(7) Suits of a civil nature, at law or in equity, between citizens of the same state, involving the title to land, the amount in dispute exceeding $2,000 exclusive of interest and costs, may be removed by either plaintiff or defendant, if it be made to appear, in the mode provided in the statute, that the adverse parties claim title under grants from different states.

From this classification of the cases removable under the provisions of the act in question, it appears that a plaintiff is not granted the right, except in the class of cases falling under the seventh head, which covers cases involving title to land claimed under grants from different states. In all other removable cases, under this act, the defendant alone can exercise the right of removal, and the defendant's right is limited in the majority of instances.

Thus in cases falling in the first class named, to-wit, those arising under the constitution, laws, and treaties of the United States, the defendant may remove the cause without reference to the citizenship or residence of the parties.

In cases included within the second, third, fourth, and fifth classes, the defendant cannot remove the cause, unless he is a non-resident of the state wherein suit is brought.

In cases arising under the sixth head, or local prejudice provision, the defendant may remove the cause if he is a citizen of another state.

In cases arising under the first, third, fifth, and seventh classes, the amount involved must exceed $2,000, exclusive of interest and costs. In cases arising under the second, fourth, and sixth classes, the removal may be had irrespective of the amount involved in the controversy.

In this case, of *Catherine Fales, Adm'x*, v. *Chicago, M. & St. P. Ry. Co.*, the plaintiff is and was, when the action was brought in the state court, a citizen of the state of Iowa, and the defendant company was and is a corporation created and organized under the laws of the state of Wisconsin,

and, therefore, for jurisdictional purposes, is deemed and held to be a citizen of that state. The amount involved in the controversy exceeds $2,000 exclusive of interest and costs, and the case, therefore, falls within the third class of removable cases; that is to say, it is a case which is removable by the defendant, if the latter is a non-resident of the state of Iowa.

In support of the motion to remand it is argued that the United States courts cannot take jurisdiction, by removal, of any case which could not have been originally brought in such court, and in support of this view is cited the case of the *County of Yuba* v. *Mining Co.*, decided by the circuit court for the Northern district of California, and reported in 32 Fed. Rep. 183.

It will certainly seem an act of presumption on my part to question the correctness of the views expressed by the learned court in that case; yet the conclusion therein reached, it seems to me, completely nullifies a large part of the provisions of the act of congress, and I cannot yield assent to it as a correct exposition of the statute in question. In principle, also, the conclusion reached is at variance with that announced by the circuit judge of this circuit in the case of *Telegraph Co.* v. *Brown*, 32 Fed. Rep. 337.

The doctrine of the California case is, that section 2 of the act of 1887 does not authorize the removal of a suit from a state to a federal court, which could not have been originally brought in the latter tribunal; that a corporation can be an inhabitant only of the state under whose laws it is created, and that under the act of 1887 the United States courts have not jurisdiction of actions between citizens of different states, except in the state whereof the defendant is an inhabitant.

In the first section of the act it is declared that—

"No person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process of proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant."

The latter sentence expressly declares that where the jurisdiction is founded on diverse citizenship, the suit may be brought only in the districts of the residence of either plaintiff or defendant.

Under the express language of the act of 1875, suit by original process might have been brought in any district whereof the defendant was an inhabitant, or in which he should be found at the time of serving process. Hence if, by reason of diverse citizenship, or by reason of the subject-matter, the cause was one cognizable by a federal tribunal, the case might, under the act of 1875, have been brought in any district wherein the defendant could be found for purpose of service.

Under the act of 1887, the place wherein the suit may be brought is limited to the district in which the defendant resides, save in cases wherein jurisdiction depends solely on the fact of diverse citizenship,

and in these the suit may be brought in the district of the residence of either plaintiff or defendant.

We must not confound the question of federal jurisdiction with that of the place of bringing suit. The first section of the act of 1887 was intended to define the classes of cases of which the United States circuit courts should have original cognizance, concurrent with the courts of the several states, and also to define the place or places where such suits might be brought by original process.

Two general grounds of federal jurisdiction are recognized in the statute, to-wit, subject-matter and diverse citizenship. Cases arising under the constitution, laws, or treaties of the United States, or in which the title of land is involved, claimed under grants from different states, are cognizable in the United States courts by reason of the subject-matter, whereas controversies between citizens of different states, or between citizens of a state and aliens, are cognizable in the federal courts by reason of diverse citizenship. In addition to these general grounds of federal jurisdiction the statute also includes cases wherein the United States are plaintiffs or petitioners.

Having thus defined the classes of cases of which the United States circuit courts have jurisdiction, the section then proceeds to define the place or district within which such suits may be brought by original process, it being declared that no civil suit shall be brought against any person by any original process in any district other than that of which he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district wherein plaintiff or defendant resides. The latter clause of the section cannot be ignored. It is the latest declaration of the legislative will, and, if irreconcilable with the preceding clause, it must be held to control, but it is not necessary to resort to purely technical rules in construing the statute. Force can be given to both clauses of the section by holding that the first one establishes the general rule that, in bringing suits by original process in the United States courts, the same must be brought in the district wherein the defendant resides; and the second clause provides an exception, to-wit, that where the jurisdiction is based solely on diverse citizenship, suit may be brought in the district of the residence of either plaintiff or defendant, but not elsewhere. Whatever may be the true construction of these clauses, they affect, not the question of federal cognizance, but solely the question of the place of bringing suit by original process, in cases of federal cognizance.

The second section of the act defines under what circumstances causes brought originally in the state courts may be removed for trial into the federal courts. If the case is one of federal cognizance, as defined in the first section of the act, because it arises under the constitution, laws, or treaties of the United States, then the defendant, without reference to place of residence, may remove the same. If the case does not arise under the constitution, laws, or treaties of the United States, but is otherwise of federal cognizance, as defined in the first section, it may be re-

moved by the defendant, if a non-resident of the state wherein suit is brought.

Suits of a civil nature, at law or in equity, in which there is a controversy between a citizen of the state wherein suit is brought, and a citizen of another state, may be removed on the ground of prejudice or local influence, by a defendant, if he is a citizen of a state other than that in which suit is brought.

Suits between citizens of the same state, involving the title to land claimed under grants from different states, may be removed by either plaintiff or defendant, irrespective of residence.

If the ruling made in the case of *Yuba County* v. *Mining Co.*, *supra*, is the correct interpretation of the statute, it follows that, in all cases wherein original jurisdiction is conferred on the United States courts by reason of diverse citizenship, no removal thereof can be had if suit is brought in the state court, because the statute declares that only non-resident defendants can remove such cases, and the court holds that the United States court has not jurisdiction of cases wherein a non-resident is a defendant. It seems to me that the question of federal cognizance is confounded with the question of the place of bringing suit by original process. The latter question has nothing to do with the right of removal. The question whether the action might have been brought by original process in any federal court was material, in order to determine whether it was a case of federal cognizance, but that question being decided in favor of the federal jurisdiction, the question of the proper place or district in which the suit might have been brought by original process is wholly immaterial on the question of removal.

In the *Yuba County Case* the complainant, as a California corporation, might have brought the suit in the federal court of the district of Nevada, the defendants being corporations, and therefore citizens of that state and district. The case, therefore, was one of federal cognizance, under the provisions of the first section of the act of 1887. If the complainant had brought suit in a state court of Nevada, the case could not have been removed; not because the case was not one of original federal cognizance, but because the defendants were residents and citizens of Nevada. When brought, however, in a state court of California, being a case of federal cognizance, the right of removal exists under the statute, because the defendants were non-residents of California.

Having defined the classes of cases in which federal cognizance, concurrent with that of the states, exists, the first section of the act restricts the place or district in which suit may be brought by original process, to the district wherein defendant resides, save in cases where diverse citizenship is the sole ground of federal cognizance, in which event suit may be brought in the district of the residence of either plaintiff or defendant.

The statute confers upon a party, having a cause of federal cognizance, the right to bring suit thereon in a federal court; but, for the protection of the defendant, requires suit to be brought in the district or districts named, and no other, thus essentially changing the law in this particular.

If, however, the plaintiff, having a cause of federal cognizance by rea-

son of diverse citizenship, chooses to bring suit thereon in the state court, then he has made his election, and he cannot afterwards remove the case unto the federal tribunal. If such a suit is brought in the courts of the state of which defendant is a resident, then it cannot be removed, because it is supposed the defendant can have no objection to a trial by the courts of the state of which he is a resident. If, however, a suit is brought in a case of federal cognizance in a court of a state of which defendant is not a resident, then the election is given to such non-resident defendant to carry the case by removal into the federal court.

It is also said that the statute recognizes a distinction between citizenship and residency, and that, in a given case, while the citizenship of the parties may be diverse, the defendant may be in fact a resident, though not a citizen, of the state wherein suit is brought, and that thereby the right of removal will be defeated, save in cases arising under the seventh head of the classification hereinbefore given.

In the particular case now under consideration, the argument is that the railway company, though deemed to be a citizen of the state of Wisconsin, is nevertheless in fact a resident of Iowa, by reason of the fact that it is engaged in the management and operation of part of its railway system in the state, and has by reason thereof become a resident of this state.

It is well established that citizenship and residence are not synonymous terms, when used in connection with the question of jurisdiction. *Parker* v. *Overman*, 18 How. 137. In other words, a person may be a citizen of one state, and yet acquire a residence in another. Can this, however, be truthfully said of a corporation? The earlier doubts on the question of the citizenship of corporations were finally settled by the decision in *Railroad Co.* v. *Harris*, 12 Wall. 65, in which it is held that—

"For the purposes of federal jurisdiction it is regarded as if it were a citizen of the state where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted. This is a presumption of law that is conclusive."

In a large number of cases, beginning with that of *Bank* v. *Earle*, 13 Pet. 588, the supreme court has held that a corporation cannot emigrate; that while it may enlarge the territory in which it does business, and carry on the same in other states, yet it remains a citizen of the state wherein it was created, without the legal power to change its citizenship, home, or residence, or as is said in *Ex parte Schollenberger*, 96 U. S. 369:

"A corportion cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter, or excluded by local laws."

In other words, the fact that a corporation is engaged in business in a state other than that under whose laws it was created, does not change its legal citizenship or residence.

In *Pennsylvania Co.* v. *Railroad Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 644, and *Goodlett* v. *Railroad*, 122 U. S. 391, 7 Sup. Ct. Rep. 779, it is held that a corporation, by owning property and doing business in

another state, under the provisions of state legislation to that end, does not thereby become a citizen of the latter state, so as to lose the right of removal under the act of 1875. The real reason underlying these decisions is clearly stated in the case of *Muller* v. *Dows*, 94 U. S. 444, in which it is said:

"A corporation itself can be a citizen of no state, in the sense in which the word 'citizen' is used in the constitution of the United States. A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and for the purpose of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the state which by its laws creates the corporation."

It being, then, a conclusive presumption of the law, irrespective of the actual facts, that the stockholders in a corporation are citizens of the state under whose laws the corporation is created, and that the corporation itself, as a legal entity, cannot become a citizen of any state, it follows that the corporation, by engaging in business in other states, cannot acquire citizenship or residence therein, nor can the acts of the corporation change the citizenship or residence of the stockholders.

When, therefore, the act of March 3, 1887, was enacted, it was the settled law of the land that corporations could not, by engaging in business in a state other than that wherein they had been created, change either their residence or citizenship. It was well known that nearly all the more important railroad corporations were engaged in the operation of lines of railway extending into states other than the one of their legal existence, and it was equally well known that by repeated decisions of the supreme court it has been held that by thus engaging in business in other states the corporation did not change its citizenship or residence. With this knowledge, had congress intended to change the law in this particular, and to declare that corporations should be deemed residents of the states wherein they engaged in business, certainly some indication of such a purpose would have been found in the express language of the act. The fact that no such declaration is made in the act clearly shows that in this particular congress intended to leave the law unchanged, and therefore the same construction must hold good under the act of 1887 as under previous acts, to-wit, that corporations are deemed to be citizens and residents only of the state under whose laws they are created.

From the record in this cause it clearly appears that the plaintiff, when the suit was brought, and ever since, was and has continued to be a citizen of the state of Iowa, and that the defendant was and is a corporation created under the laws of the state of Wisconsin, and therefore is and was a citizen and resident of that state, and of no other. It also appearing that the matter in controversy, exceeds in value the sum of $2,000, exclusive of interest and costs, it follows that the cause was properly removed to this court, and the motion to remand must be overruled.

SMITH *v.* MITCHELL and others.

SAME *v.* HIVELEY and others.

(*Circuit Court, S. D. California.* October 3, 1887.)

PUBLIC LANDS—ISSUANCE OF PATENT—CERTIFICATES OF PURCHASE.

Plaintiff, in ejectment, relied upon a certificate of purchase for the land in controversy, regularly issued by the state of California. Defendant relied upon a patent from the same source, also in due form. *Held*, that under Pol. Code Cal. § 3556, before due foreclosure, the land-office could not issue a patent for land for which a certificate had been regularly issued.

Edward R. Taylor, for plaintiff.
Wells, Van Dyke & Lee, for defendants.

ROSS, J. The cases above entitled are of the same nature, and were tried and submitted together. The land involved in one is a part of a sixteenth, and in the other, a part of a thirty-sixth, section. The plaintiff in each case relies for a recovery upon a certificate of purchase, regularly issued by the state of California to one whose interest in the premises vested by assignment in the plaintiff, prior to the commencement of the action. By the terms of the statute under which these certificates were issued, such certificates are made *prima facie* evidence of title, and they, together with all rights acquired thereunder, are also expressly made subject to sale by deed or assignment. Clearly, therefore, plaintiff is in each case entitled to recover, unless the *prima facie* case thus made out has been overcome. In each, the defendants pleaded the statute of limitations, but the proof adduced in support of the plea was insufficient to show adverse possession on the part of the defendants, or either of them. Defendants in each case also pleaded title in themselves, and in support thereof introduced in evidence a patent (in form) for the land, from the state to the grantors of the defendants, together with the proceedings upon which such patents were based. Those proceedings were initiated long subsequent to the issuance of the certificates of purchase under which the plaintiff claims, and were, in my judgment, without authority of law, and therefore void. While a patent is an instrument of great solemnity, and, in a court of law, is conclusive of all matters properly determinable by the land department, when its action is within the scope of its authority, nevertheless, if, under the law, the officers of that department have no jurisdiction to act, their pretended conveyance of the land is of no validity, even though it be issued in the form of a patent. *Smelting Co.* v. *Kemp*, 104 U. S. 636.

In the cases at bar, at the time of the initiation of the proceedings upon which the patents are based, there were outstanding certificates of purchase for the same land, which had been duly and regularly issued, and which were then in full force and effect. Under such circumstances there was no authority in the officers of the land department to entertain any application for the purchase, or to take any step looking to the sale, of

the same land, to other and different parties. The statute makes ample provision for the contest of applications for the purchase of such lands as those in suit, and provision is also made for the foreclosure of all interest of delinquent purchasers. But when an application to purchase is duly approved, after or without contest, and a certificate of purchase regularly issued upon it, the land is not again subject to entry and sale, until after judgment foreclosing the interest of the purchaser or the holder of the certificate. "*After* judgment foreclosing the interest of the purchaser or the holder of the certificate has been entered, and the certified copies filed, the land," says the statute, "is again subject to entry and sale." Pol. Code, § 3556. Manifestly, *before* such foreclosure, the land for which a certificate has been regularly issued is not so subject. It results that plaintiff in each case is entitled to judgment.

Counsel for plaintiff will prepare findings and judgment in accordance with this opinion.

Ex parte BURDELL.

Ex parte SIMONS.

(*District Court, E. D. South Carolina.* October, 1887.)

1. WITNESS—FEES—DEPUTY-CLERK.
   A deputy-clerk is an officer of court, and is not entitled to *per diem* and mileage when used as a witness for the government in a case tried in the court in which he is officiating.
2. SAME—MARSHAL'S CLERKS.
   The clerks employed by the marshal in his office, keeping his accounts, are not officers of court, and are entitled to fees and mileage, if used as witnesses for the government.
3. SAME—DEPUTY-MARSHAL.
   A deputy-marshal is an officer of the court, but, unless he be actually engaged in waiting upon the court, he is entitled to *per diem* and mileage if he be summoned as a witness for the government.

(*Syllabus by the Court.*)

Application for Allowance of Fees as Witnesses.

John Wingate, for petitioner.

H. A. De Sausseurs, Asst. Dist. Atty., *contra*.

SIMONTON, J. T. S. Burdell is the deputy-clerk of this court. I. S. Simons is chief clerk of the marshal. Each of them was a witness for the government in the case of *U. S.* v. *Hayne*, tried at this term. An order has been submitted giving to them, with others, fees of witnesses.

Mr. Burdell was appointed deputy-clerk of the court. He holds his office at its pleasure. Rev. St. U. S. § 558. He can sign, as clerk, all process issuing from the court. *Confiscation Cases*, 20 Wall. 92. He takes the same oath of office as the clerk of the court. Section 794.

He keeps the journal, swears witnesses, and otherwise conducts himself as clerk. He is included in the list of officers of court who cannot practice as attorney therein. Sections 748, 749. Clearly, he is not entitled to fees as a witness. He is excluded by section 849, being an officer of the court, officiating therein.

Mr. Simons is chief clerk of the marshal, and is also deputy-marshal. He is employed with the other clerks of the marshal in keeping his accounts with the government, and the records of the office. His title, "chief clerk," is simply the designation given him by the marshal, fixing his relative position in that office. As with all the other clerks in that office, he holds his place at the will of the marshal, was appointed by the marshal, and is paid by him under a private arrangement with him. These clerks have no claim on the government at all for pay, and look entirely to the marshal. *U. S.* v. *Meigs*, 95 U. S. 748. When he selects or dismisses his clerks the marshal neither consults the court, reports his action to the court, nor seeks any confirmation of his action. In no sense, then, are Mr. Simons and his fellow-clerks officers of the court. He is not within section 849, because of the fact that he is chief clerk. He is also deputy-marshal; but he has no reward or emolument differing from those of any other deputy-marshal. He has no duties in and about the court when it is in session. He never comes into or waits on the court. He does not officiate therein. Let him have his fees as a witness.

WILLIAMS and others *v.* MORRISON and others.

(*Circuit Court, E. D. Missouri, E. D.* October 29, 1887.)

1. COSTS—DOCKET FEE.
   In a law case, where there is a final trial before a jury, the attorney's docket fee of $20 allowed by Rev St. U S. §§ 823, 824, is always to be taxed; and it is for the court to determine who is the prevailing party.
2. SAME.
   The plaintiff in replevin recovered four-fifths of the property claimed. The verdict was set aside, and a new trial ordered, which resulted in a judgment that the plaintiff retain seven-eighths of the property replevied, and that he return to the defendant the remaining eighth. *Held*, that the plaintiff was the prevailing party, and that his counsel was entitled for each trial to the docket fee of $20 allowed by Rev. St. U. S. §§ 823, 824.

At Law. On taxation of costs.

George A. Castleman, for plaintiffs.

Frank M. Estes, for defendants.

THAYER, J., (*orally.*) In the case of *John H. Williams* against *Jasper N. Morrison*, a question was presented to me yesterday relative to the taxation of costs in that case. The question is whether the plaintiffs' counsel is entitled to one docket fee of $20, or to two docket fees of $20 each.

The suit is an action in replevin. It was tried at the October term, 1886, before a jury, and the plaintiff recovered about four-fifths of the property claimed. 28 Fed. Rep. 872. The verdict was afterwards set aside, and a new trial granted. 29 Fed. Rep. 282. It was tried again at the present term, and the plaintiff recovered a verdict for about seven-eighths of the property claimed. Cross-judgments were entered in the case. There was a judgment in favor of the plaintiff that he retain possession of that part of the property which the jury awarded to him, and a judgment in favor of the defendant that plaintiff restore to the defendant the other one-eighth of the property.

Under sections 823, 824, Rev. St. U. S., plaintiff's counsel claims that two docket fees should be taxed. I find that in the case of *Dedekam* v. *Vose*, reported in 3 Blatchf. 77, and decided by Judges NELSON and BETTS, it was ruled that when a case had been on the docket at one term, and was continued and tried at a second term, only one docket fee of $20 should be allowed. In the same case, before Judge BETTS, reported in 3 Blatchf. 153, after there had been a final hearing and decree in the case, and a docket fee of $20 taxed, there was a supplementary proceeding, (it being an admiralty suit,) in which the libelant asked an order against the sureties in the stipulation to compel them to pay into court the amount of the stipulation, and a docket fee of $20 was taxed by the clerk on account of the hearing of the motion, which the court struck out, saying that the law allows but a single docket fee, and that on final hearing. Then, in the case of *Iron & Nail Co.* v. *Corning*, 7 Blatchf. 16, decided by Judge NELSON, it was remarked that a docket fee of $20 was "the highest compensation allowed to a solicitor, and that it can be allowed but once;" citing the case of *Dedekam* v. *Vose*, 3 Blatchf. 77 and 153. This last case, however, (the *Iron & Nail Co.* v. *Corning*,) was an equity case, and the report does not show whether there had been more than one final hearing. The inference is that a second docket fee of $20 had been claimed in the case on account of a trial of some motion or proceeding incidental to the case, and not on account of a final hearing. Of course, in that event, the docket fee of $20 claimed was not within the language of the statute, which only allows the charge on final hearings in equity and admiralty causes, and it was properly stricken out for that reason. The same remark may be made respecting the claims for a docket fee in the case of *Dedekam* v. *Vose*, 3 Blatchf. 77 and 153. In neither of those instances was a claim made for a docket fee on account of a final hearing in the case. The remark, volunteered in each instance above cited, that a docket fee could be allowed but once in a cause, seems to have been unnecessary.

In the case of *Schmieder* v. *Barney*, decided by Judge BLATCHFORD when circuit judge, and reported in 7 Fed. Rep. 451, it appears that there were three trials. The first one resulted in a verdict for the plaintiff, and the other two resulted in a verdict for the defendant, and it was held in that case that a docket fee should be taxed for a trial whether the verdict stands or is set aside, and that defendant's attorney in that case was entitled to a docket fee of $20 for each trial, the defendant be-

ing the prevailing party. Of course, the last decision cited fits the present case, as there were two trials in the present case before a jury. It seems to me, also, that the statute does not make the docket fee to depend upon whether the verdict rendered stands or is set aside. It allows compensation to the attorney for services rendered on each final hearing of a case, and, as there have been two trials in this case, two docket fees should be allowed.

I was at first disposed to take the view that this case was distinguished from the case of *Schmieder* v. *Barney*, in that there were cross-judgments in this case, the plaintiff not having succeeded in maintaining his claim to all the property for which he sued. I think, however, that that view is inadmissible. The logical result of that view of the case would be that in this instance there was no prevailing party, and that no docket fee could be taxed. I think in a law case, where there is a final trial before a jury, a docket fee is always to be taxed, and that the court must determine who is the prevailing party. In this case, as the plaintiff recovered seven-eights of the property claimed, and as the defendant contested his right to any of the property, the plaintiff should be esteemed the prevailing party to the same extent as if he had sued for $800, and had only recovered $700. A docket fee should be taxed for each trial, and it will be so ordered.

CENTRAL TRUST CO. OF NEW YORK and others *v.* WABASH, ST. L. & P. RY. CO. and others. (Intervening petition of GILLILAND.)

(*Circuit Court, E. D. Missouri.* October 29, 1887.)

1. COSTS—SOLICITOR'S COMPENSATION—DOCKET FEE.
   A solicitor for an intervenor in an equity case, who prevails in such intervention, is not entitled to a docket fee of $20, under the provisions of section 824 of the Revised Statutes of the United States. Such a termination of the intervening cause is not "a final hearing in equity," within the meaning of said statute.
2. SAME.
   A special master in chancery is not a "referee," within the meaning of said statute.
3. SAME.
   Such fees are not recoverable in such cases at common law, or under the statutes of the state of Missouri.
4. SAME—DEPOSITION FEES.
   In such a case the intervenor is not entitled to recover a fee of $2.50 for each deposition taken and admitted in evidence, under said section 824 of the Revised Statutes of the United States.

(*Syllabus by the Court.*)

On the twenty-seventh of September, 1886, the intervenor filed his petition in the above-entitled cause, claiming damages against the receivers for the burning of hay, fencing, and injury to meadow land, alleged to have been caused on the thirteenth day of August, 1886, by

the negligent operation on the part of the receivers of the locomotive attached to freight train No. 22. The petition was afterwards heard before Hon. E. T. ALLEN, who had theretofore been constituted special master in chancery in a suit to foreclose a mortgage on the Wabash, St. Louis & Pacific Railway, for the purpose of examining and reporting upon such claims, and other preferential demands against the mortgaged property, that might arise in the course of the proceeding. The special master, on the twenty-second day of June, 1887, found the issues in favor of intervenors, and recommended an order of court, directing the payment of the claim. No exceptions to this report were ever filed by the intervenor or the receivers, and upon the twelfth day of September, 1887, such report was filed and confirmed by the court. On the fifteenth day of October, 1887, the intervenor filed a motion praying for the retaxation of costs in said cause, and for the allowance of the following fees: (1) A docket fee of $20 in favor of the solicitor for intervenor; (2) a fee of $2.50 for certain depositions taken and admitted in evidence. Such allowances were claimed under section 824 of the Revised Statutes of the United States.

H. A. Loevy, (*James Carr*, of counsel,) for intervenor.

George S. Grover and *Eleneious Smith*, for receivers.

THAYER, J., (*orally.*) In the matter of the intervening petition of R. J. Gilliland in the *Wabash Case*, a motion to retax the costs in that proceeding has been filed, and the point presented is whether the attorney for the intervenor in that case is entitled to a docket fee of $20, and whether he is entitled to $2.50 for each deposition taken and used in the case on the hearing. *Vide* section 824, Rev. St. U. S. The trial on account of which the docket fee is claimed was before a special master in chancery appointed in the course of a chancery suit, to audit and allow certain preferential claims against the property in the hands of the court through its receivers. There was a report in favor of the intervening petitioner. The character of the claim was this: It was a claim for damages sustained by the intervenor by the burning of certain hay and fences, which were set on fire by sparks from a locomotive attached to a freight train which was being operated by the receivers. The statute, § 824, allows a docket fee of $20 to be taxed "on a trial before a jury in civil or criminal causes, or before referees or on a final hearing in equity or in admiralty." It is clear that there was no trial in this instance before a jury in a civil or criminal cause. It is also clear that the trial was not a final hearing of an equity or admiralty case. The hearing was had upon an incidental or collateral issue that arose in the progress of a foreclosure suit. The claim can only be sustained, therefore, upon the ground that it was a trial before a referee within the meaning of the statute, and that, I take it, is the sole question to be determined.

In my judgment the word "referee," as used in this statute, has reference to a class of officers who are appointed in pursuance of the statutes of the various states, to hear and determine all or a portion of the issues that arise on the final hearing of a cause,—it does not have reference to

or include masters in chancery, whether they hold their place by a general appointment or by a special appointment. I think that is the view that has generally been taken of that section.

In the case of *Doughty* v. *Manufacturing Co.*, decided by Judge WOODRUFF, (reported in 4 Fish. 318,) the court seems to have been of the opinion that the term "referee," as used in the statute, did not include masters in chancery. It was further of the opinion that even if the word "referee" should be given that enlarged construction, a docket fee would not be taxable for a trial or hearing had before a master on a matter arising incidentally or collaterally in the progress of a case.

In the case of *Dedekam* v. *Vose*, 3 Blatchf. 154, it was said that the statute (referring to section 824, Rev. St. U. S.) does not have reference to hearings that are interlocutory or collateral.

In the case of *Beckwith* v. *Easton*, 4 Ben. 358, it was held that no docket fee could be allowed on the trial of exceptions taken to a commissioner's report.

In the case of *Stimpson* v. *Brooks*, 3 Blatchf. 456, it was held that a fee of $2.50 for depositions, taken and admitted in evidence, could not be allowed unless they were taken and used on the final hearing of the case. It was further said in that case that the statute has direct relation to proceedings which are "*final*," and not to such proceedings connected with the case as are incidental or collateral only.

In the case of *Spill* v. *Manufacturing Co.*, 28 Fed. Rep. 870, it was held that depositions taken, not for use on final hearing, but in a contempt proceeding, are not within the statute, and that the statutory fees therefor are not taxable.

I take it, therefore, that the fees claimed in the present case are not within the statute. Neither clause of the statute covers the case, or warrants the court in taxing either a docket fee of $20 for the attorney or a fee for depositions, as claimed. As this is an equity proceeding, however, in which the intervenor had occasion to come into court, and ask that his rights be protected, I think it is within the power of the court to allow him all of his reasonable and necessary costs in obtaining testimony for the support of his claim, and therefore he should be allowed all the costs incurred in taking depositions which were used to maintain his claim, other than an attorney's fee therefor. He should also be allowed his witness fees. I find, upon looking at the master's report, that all such allowances were made. The expense of taking depositions was taxed and allowed, and also the usual fees for all of his witnesses. Of course, at common law, an attorney was not entitled to have a fee taxed, and in this state it is not the practice to allow an attorney's fee to be taxed in a case. I think the master has allowed the intervenor all the costs that he is entitled to. He has allowed all that could have been recovered in the state court if the suit had been there tried. The motion to retax is overruled.

YANCY, Assignee, *v.* COTHRAN and others.[1]

(Circuit Court, N. D. Georgia. May 9, 1887.)

BANKRUPTCY—ACTION BY ASSIGNEE—LIMITATION.

The complainant, an assignee in bankruptcy, filed a bill, the object of which was to recover against the *feme* defendant certain shares of stock alleged to have been transferred to her in fraud of the rights of her husband's creditors. It appeared that the right of action existed when the assignee was appointed, and that the complainant as counsel had represented one against whom the *feme* defendant had brought suit concerning this stock, and that in that proceeding such information of the transfer had been disclosed which, if diligently pursued, would have led to the discovery of all the facts constituting the fraud, at a period more than two years before the bill in this proceeding had been filed. *Held*, that the suit was barred by Rev. St. U. S. § 5057, which provides that "no suit * * * shall be maintainable * * * between an assignee in bankruptcy and a person claiming an adverse interest touching any rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued."

In Equity. On plea of statute of limitations.

Featherstone, Alexander & Wright, W. W. Brooks, and *Hopkins & Glenn*, for complainants.

D. S. Printup, W. H. Underwood, and *King & Spalding*, for respondents.

NEWMAN, J. This is a bill filed by Yancy, as assignee in bankruptcy of the firm of Cothran & Jackson, composed of H. D. Cothran and J. N. Jackson, against Mrs. Laura E. Cothran, her husband, H. D. Cothran, and others. The object of the bill is to recover from Mrs. Cothran 232 shares of the capital stock of the East Rome Town Company. The facts upon which this right to recover is based are substantially as follows, as shown by the pleadings and evidence: In April, 1874, H. D. Cothran was the owner in his own right of the stock in question. He had previously, in 1873, failed in business as a member of the firm of Cothran & Jackson. At the time named, in April, 1874, Cothran transferred the stock to Cothran & Jackson, which firm it would seem was then endeavoring to wind up its old business. The stock was pledged by Cothran & Jackson to the Bank of Rome as security for the loan of $3,500. In August, 1874, the note for $3,500 was due, and the firm had not met it. H. D. Cothran was the president and manager of the Bank of Rome, the stock of the bank being all owned, or practically so, by the firm of Ogden & Brower, of New York. About this time H. D. Cothran went to R. F. Fouche, and stated to him the facts about the hypothecation of the stock; that the debt was due; and that Cothran & Jackson were unable to pay it. He told Fouche that he and the cashier of the bank, C. O. Stillwell, had tried to sell the stock, but could not get an offer for it. Stillwell told Fouche the same thing. Cothran then asked Fouche if he would give his note at 90 days, take a transfer of the stock, and agree that Mrs.

[1] Reported by W. A. Wimbish, Esq., of the Atlanta bar.

L. E. Cothran should have the stock. Fouche agreed to do so, and gave his note in lieu of the Cothran & Jackson note, took a transfer of the stock to himself, and hypothecated the stock as collateral for his note, and signed an agreement in writing that if Mrs. Cothran would pay his note, to transfer the stock to her. The old certificates were taken up by the East Rome Town Company, and new ones issued to Fouche. The stock stood at the time transferred on the books of the company in the name of H. D. Cothran. Fouche had no communication with Mrs. Cothran in the transaction, and communicated only with H. D. Cothran, Stillwell, the cashier, and, perhaps, one Adams. Fouche's wife was a cousin of Mrs. Cothran. About November or December, 1874, Fouche being in the Bank of Rome on other business, Stillwell, the cashier, handed him his note stamped "paid," and said the matter had been arranged. Fouche went into the back room of the bank, and transferred the stock on the books of the company to Ogden, Brower & Co., and it appears from the certificates that about the same time it was transferred by Ogden, Brower & Co. to the Bank of Rome. Fouche testifies that he did not desire or expect to purchase the stock for himself; that he was solvent and able to pay for the stock, and has been solvent ever since; that his principal object in going into the matter was to help Mrs. Cothran. He says his note was a legal note; that he was liable upon it; that nothing existed that would have relieved him from its payment. He also says that when the note was handed him by Stillwell there was on it this entry: "Paid by Mrs. L. E. Cothran." He did not observe this entry at the time, and not until long afterwards, when he attached the note to interrogatories in the case of Mrs. Cothran against Brower. The discount registry of the Bank of Rome shows that after the Fouche note was taken up these 232 shares of the East Rome Town Company stock became collateral in the bank for certain notes of W. S. Cothran, Jr., who was a brother of H. D. Cothran. It continued to run thus on the books of the bank as collateral, with other stock and property, for notes of W. S. Cothran, Jr., down to September 1, 1875, at which time it stood with other stocks as collateral for $10,948.43. The notes seem to have been then extinguished. On May 8, 1876, the stock in question seems to have been transferred by the bank to Brower. In 1878, under an execution in favor of *Forsyth, Administrator*, v. *Cothran & Elliott*, this stock was levied on as the property of H. D. Cothran. A claim was interposed by Brower, and on the trial there was a verdict and judgment for Brower. In August, 1880, Mrs. Cothran filed a bill in equity in Floyd superior court to recover this stock, alleging that about September 1, 1875, she owned this stock, and that it was pledged by her husband to the Bank of Rome for moneys previously advanced to him. She claimed also a large amount of dividends that had been paid on the stock. The case was not tried until January, 1883, when Mrs. Cothran obtained a verdict and decree in her favor for the stock, and for a large amount of dividends, subject to certain credits of amounts for which it had been pledged in bank. It appears of record that Mr. Yancy, the complainant (as assignee) in the case, was attorney for Brower

in the case of Mrs. Cothran against him. His name, with other counsel, is signed to Brower's answer, which was filed December, 1880.

The defendants in this case filed several pleas, and an answer. They set up, in substance, as defenses—*First*, the statute of limitations; *second*, that the facts do not make a case of fraudulent transfer of this stock as against the creditors of Cothran.

It is unnecessary to consider or to determine whether or not the facts established in this case as to the various transfers of the stock, and the circumstances in connection therewith, are fraudulent as against the creditors of Cothran, so as to have authorized a recovery of the same by the assignee in bankruptcy, if it appears that the assignee knew the facts, or had such information that by the exercise of proper diligence he could have known them more than two years before this suit was brought.

Section 5057, Rev. St. U. S., provides:

"No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any 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 courts have, however, ingrafted on this act the recognized rule as to statutes of limitation, that if the facts on which any right of action is based have been fraudulently concealed by the parties in interest, or if the fraud is of such character as conceals itself, the statute will only commence to run from the date of the discovery of the fraud, or of such information as, if diligently followed up, would discover it. *Carr* v. *Hilton*, 1 Curt. 390; *Bailey* v. *Glover*, 21 Wall. 342; *Upton* v. *McLaughlin*, 105 U. S. 640; *Rosenthal* v. *Walker*, 111 U. S. 185, 4 Sup. Ct. Rep. 382.

This bill was filed January 22, 1885. The right of action now claimed, existed in 1875, when the assignee was appointed; so that about 10 years have elapsed since the right of action accrued. Complainant says, however, that the defendants Cothran and wife fraudulently concealed from him the real facts connected with the transfer of this stock, and that the same was only discovered by him within two years before filing this bill in this court.

What are the facts as to Yancy's knowledge? It appears that in 1878 this stock was levied on by an execution in favor of one Forsyth, administrator, against Cothran & Elliott, and that the same was claimed by Brower. Yancy says in his testimony in this case that he attended the trial of that claim case "for the purpose of gaining information as to the stock." This trial resulted in favor of the claimant Brower. The testimony in that case did not disclose Mrs. Cothran's connection with the stock in any way whatever; on the contrary, the testimony of Cothran and others showed regular transfers by hypothecation and sale, as shown on the certificates of stock. It is questionable whether the assignee in bankruptcy can be charged with any notice at that time, in view of the testimony in the case and the result. In *Carr* v. *Hilton*, 1 Curt. 390, CURTIS, J., cites with approval the following language from *Kennedy* v. *Green*, 3 Mylne & K. 719, 721, 722:

"It is the well-established principle that whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might lead. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it."

The same language is quoted with apparent approval in *Wood* v. *Carpenter*, 101 U. S. 141. If this rule be strictly enforced, it may be that proof of the fact that Yancy had become suspicious as to the *bona fides* of the transaction about the stock would of itself be sufficient; but I am hardly prepared to so hold. The next Yancy knew of this stock was information that on a division of the assets of the Bank of Rome it was awarded by arbitration between H. D. Cothran and Brower to Brower. But in August, 1880, Mrs. Cothran brought suit to recover this stock of Brower. Yancy, with other counsel, was employed to represent Brower. They investigated the case, and in December following filed Brower's answer. While that bill and answer do not show all the facts in this transaction as fully as they now appear, it did show enough to give any one a pretty fair knowledge of the matter. The bill alleged that Fouche held the stock for the benefit of Mrs. Cothran, and that the same had been held for her benefit since Fouche's transfer. It seems to me that the facts thus disclosed were amply sufficient to put Yancy on inquiry, and that after a reasonable time for inquiry the statute would begin to run.

But it further appears that October 15, 1881, the testimony of Mrs. Cothran was taken in her case against Brower. Her answers, which were interrogatories in writing, are in evidence here. She testified that she became the owner of 232 shares of stock in East Rome Town Company, in August, 1874. "She bought it from R. T. Fouche. Her brother-in-law, W. S. Cothran, bought it for her. That her title was in writing. It was executed by R. T. Fouche at the time mentioned. It was delivered to her, and had been in her custody ever since." It was not shown when these interrogatories were filed in office, but the presumption is that it was done at the next term of court. It would certainly be fair to Yancy to say that he must have seen them by the spring of 1882. On the twenty-seventh of October, 1881, R. A. Denny was appointed auditor in that case to take account of, and report the amount of, dividends received on the stock, amount due on notes for which it was pledged, etc. In January, 1882, Denny took testimony, and February 22, 1882, made his report. This report contained a transcript from the books of the Bank of Rome, showing W. S. Cothran's notes, and that the stock stood on the books of the bank of Rome as collateral for their payment. So it will be seen that by the spring of 1882, at least, Mr. Yancy must have known every fact in connection with this matter that he knew in January, 1885, when he commenced his suit. Under all the authorities on the subject I think Mr. Yancy's knowledge early in 1882 was sufficient for the period of limitation to commence to run. But it is argued by complainant's counsel that the statute did not begin to run until the verdict in *Cothran* v. *Brower*, 71 Ga. 357. They say that Yancy

had a right to wait until the termination of that suit,—to wait until he could know whether or not her claim would prevail over Brower's. I cannot assent to this view of the matter. There is nothing in the authorities on the subject, so far as I have seen, that would indicate that the assignee had a right to wait until it was determined in another case whether the facts shown were fraudulent or not, and that the statutes would only commence to run after such determination. It appears, moreover, that an amendment was filed by Brower while that case was being argued, denying Mrs. Cothran's right to recover the stock, because her title or interest, if she had any, was obtained through a scheme to defraud H. D. Cothran's creditors. And one of the special issues made thereafter in the case, and which was put to the jury as a question to be answered by them, was whether it was the design of H. D. Cothran, in the transaction with Fouche and Mrs. Cothran, to hinder, delay, or defraud his creditors; and the jury answered that question "that it was not." So that the result of that trial on this point was certainly not such as to charge Mr. Yancy with notice of fraud any further than he had already been. To take the strongest view of this matter in favor of the complainant, I think it must be held that when he had knowledge of the facts on which he now bases his claim to recover, the statute commenced to run against him. And I think that the latest period at which he can be said to have obtained such knowledge would be in the early part of 1882, and nearly three years before he brought this suit. I must therefore sustain the plea which sets up the statute of limitations as a bar to this suit.

UNITED STATES *v.* SLENKER.

(*District Court, W. D. Virginia.* October 31, 1887.)

1. POST-OFFICE—MAILING OBSCENE MATTER—TEST OF OBSCENITY.
   The test of obscenity, within the meaning of Rev. St. U. S. § 3893, prohibiting the use of the mails for the circulation of obscene matter, is whether the tendency of the matter sent through the mail is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands such writings, prints, and publications may fall; and "lewd," as used in that section, means having a tendency to excite lustful thoughts.[1]
2. SAME.
   Where the writings, papers, and publications sent through the mail by the accused are of an obscene, lewd, or lascivious character, the fact that they were so sent in the real or supposed interest of science, philosophy, or morality, is immaterial.
3. SAME—MAILING OBSCENE MATTER—INDICTMENT—SCIENTER.
   Scienter as to the obscene, lewd, and lascivious character of the matter mailed is an essential ingredient of the offense denounced by Rev. St. U. S. § 3893, prohibiting the use of the mails for the circulation of obscene matter,

[1] As to what are "obscene, lewd, or lascivious" publications, within the meaning of section 3893, Rev. St. U. S., prohibiting such publications from being carried in the mail, see U. S. v. Wightman, 29 Fed. Rep. 636, and note.

and an indictment which fails to allege such *scienter* is bad on motion in arrest; the defect not being cured by Rev. St. U. S. § 1025, providing that no indictment shall be deemed insufficient, nor shall the judgment thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.[1]

4. SAME.

An allegation in an indictment under Rev. St. U. S. § 3893, prohibiting the use of the mails for the circulation of obscene matter, that the accused "knowingly deposited or caused to be deposited," the objectionable matter, cannot be extended to embrace an averment of *scienter*, as to the obscene, lewd, and lascivious character of the matter so deposited.

5. WITNESS—CREDIBILITY—DECOY LETTERS.

The fact that post-office inspectors resorted to test or decoy letters in order to bring to justice a person suspected of using the mails for the circulation of obscene literature, does not operate to discredit their testimony upon the trial of that person for that offense.

Indictment under Rev. St. U. S. § 3893.

At the July special term, 1887, the defendant, Elmina D. Slenker, was indicted under Rev. St. U. S. § 3893, (2d Ed. 1878) in the district court of the United States for the Western district of Virginia. The indictment contained two counts, which were in these words (omitting formal parts,) viz.:

First Count. That the defendant, on the fifteenth day of March, 1887, at, etc., "did unlawfully and knowingly deposit and cause to be deposited in the mail of the United States, for mailing and delivery, in the post-office of Snowville, Virginia, certain obscene, lewd, and lascivious writings, papers, prints, and publications, one of which said writings, papers, prints, and publications is called 'The Girl and the Dog,' and the other of said writings, papers, prints, and publications are without any title whatsoever; and all of which said writings, papers, prints, and publications are so lewd, obscene, and lascivious, the same would be offensive to the court here, and are improper to be placed on the records thereof; wherefore the jurors aforesaid do not set forth the same in this indictment. Which said writings, papers, prints, and publications were then and there inclosed in a paper envelope, which said envelope was indorsed in red ink 'Private papers of Elmina D. Slenker, Snowville, Va.,' which said envelope containing said writings, papers, prints, and publications, as aforesaid, were then and there inclosed in another paper envelope, which said last-named paper envelope was then and there addressed and directed as follows: 'W. H. Barclay, Richmond, Virginia,'" etc.

Second Count. Said defendant, on the fifth day of October, 1886, at, etc., "did unlawfully and knowingly deposit and cause to be deposited in the mail of the United States, for mailing and delivery, in the post-office of Snowville, Virginia, certain obscene, lewd, and lascivious writings, papers, prints, and publications, which said writings, papers, prints, and publications are without any title or heading whatsoever, and said writings, papers, prints, and publications are so lewd, obscene, and lascivious that the same would be offensive to the court here, and improper to be placed on the records thereof; wherefore the jurors aforesaid do not set forth the same in this indictment. Which said writings, papers, prints, and publications were then and there

[1] In U. S. v. Chase, 27 Fed. Rep. 807, the court held that an indictment which charged that the defendant knowingly deposited in the mail an obscene letter, but did not aver that he had knowledge of its character, was defective in matter of form only, and after a plea of guilty such defect was no ground for a motion in arrest of judgment under section 1025, Rev. St. U. S., providing that no indictment * * * shall be deemed insufficient, for imperfections in matter of form only, which do not tend to the prejudice of the defendant.

inclosed in a paper envelope, which said envelope was indorsed in red ink, 'Private and to be returned to Elmina X,' which said envelope containing said writings, papers, prints, and publications, as aforesaid, were then and there inclosed in another paper envelope, which last-named paper envelope was then and there addressed and directed as follows: 'R. M. Williams, Drawer D 6, St. Louis, Mo.,' and was stamped in red ink, 'Please order them from Elmina D. Slenker, Snowville, Pulaski Co., Va.,' " etc.

The case having been adjourned to the October term, the defendant, on October 31, 1887, was put upon trial upon this indictment.

The court (PAUL, J.) charged the jury as follows:

"*Gentlemen of the Jury:* The court instructs you that the questions you are to determine are: (1) Are the writings, papers, prints, and publications alleged in the indictment to have been knowingly deposited in the mail, for mailing and delivery, by the defendant, of an obscene, lewd, or lascivious character? (2) Did the defendant deposit, or cause to be deposited, in the mail, for mailing and delivery, such obscene, lewd, and lascivious writings, papers, prints, and publications?

"The test of obscenity, within the meaning of the statute under which this prosecution is had, is whether the tendency of the matter sent through the mail is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands such writings, papers, prints, and publications of this kind may fall; and "lewd" means having a tendency to excite lustful thoughts.

"You are further instructed that, if you believe from the evidence that the said writings, papers, and publications were sent through the mail by the defendant, as charged in the indictment, and were of an obscene, lewd, or lascivious character, the object or purpose for which they were sent is not a matter for your consideration. No matter what the motive or purpose for which they were sent, whether in the real or supposed interest of science, philosophy, or morality, if they are of an obscene character, you should find the defendant guilty. The defendant is presumed to know the character of the matter proved by the government to have been mailed by her to Barclay and McAfee, the government witnesses.

"You are instructed that the detection of crime by means of test or decoy letters is allowable under the law; that the witnesses Barclay and McAfee were justifiable in resorting to this means to discover violations of the postal laws, and their testimony is not to be discredited because they have resorted to this frequent, and frequently indispensable, mode of detecting crime. Their testimony is entitled to the same weight as that of other witnesses, subject, of course, to the same tests as to its truthfulness.

"If on the whole of the evidence you believe that the writings, papers, and publications charged in the indictment to have been deposited in the mail, for mailing and delivery, by the defendant, were of an obscene, lewd, and lascivious character, it will be your duty to find her guilty. If, however, on consideration of the whole evidence in the case, you have a reasonable doubt as to the guilt of the defendant, you must find her not guilty."

There was a verdict of guilty; whereupon, a motion for a new trial having been overruled, the defense moved in arrest of judgment.

H. C. Allen, Dist. Atty., and *F. B. Hutton*, Asst. Dist. Atty., for the United States, cited:

1 Bish. Crim. Proc. §§ 504, 611; *Helfrick* v. *Com.*, 29 Grat. 846; Code Va. 1873, p. 1240, § 12; Rev. St. U. S. § 1025; *U. S.* v. *Bennett*, 12 Myer, Fed. Dec. p. 700, § 2485; *Com.* v. *Williams*, 2 Cush. 583; *U. S.* v. *Gooding*,

12 Wheat. 460; *U. S.* v. *Gaylord*, 17 Fed. Rep. 438, (Judge DRUMMOND'S opinion;) Bouv. Law Dict. *vide* "Knowingly;" *U. S.* v. *Bennett*, 12 Myer, Fed. Dec. p. 697, § 2482.

Ronald, Hermans & Chamberlain, for defendant, cited:

Rex v. *Tucker*, Car. Crim. Law, 290; *Com.* v. *Boynton*, 12 Cush. 499; *Com.* v. *Young*, 15 Grat. 664; *Glass* v. *Com.*, 33 Grat. 827; *U. S.* v. *Cruikshank*, 92 U. S. 544; *U. S.* v. *Carll*, 105 U. S. 611; *Com.* v. *McGarrigal*, 1 Benn. & H. Lead. Crim. Cas. 551; Whart. Crim. Law, §§ 297–304, 2159.

The court sustained this motion in the following opinion, filed November 4, 1887.

PAUL, J. The jury in this case having found a verdict of guilty, the defendant moves the court in arrest of judgment, on the ground that it is not alleged in either count of the indictment that the defendant knew the writings, papers, publications, etc., charged to have been by her deposited in the mail, were of an obscene, lewd, and lascivious character. She is charged in the indictment with unlawfully and knowingly depositing, and causing to be deposited, in the mail, for mailing and delivery, certain obscene, lewd, and lascivious writings, papers, etc., but there is no allegation that she knew the papers, writings, etc., to be lewd, etc.

The *scienter*, when necessary to be alleged in an indictment, is matter of substance, and not of form, and its omission is not cured by section 1025 of the Revised Statutes. The district attorney insists that as the indictment is in the language of the statute, it is sufficient. This is the general rule as to sufficiency in describing the offense; but where something more is necessary, such as the allegation of guilty knowledge, then the language of the statute is not always sufficient. This was the case in *U. S.* v. *Carll*, 105 U. S. 611, where the indictment alleged, in the words of the statute, that the defendant feloniously, and with intent to defraud, did pass, utter, and publish a falsely made, forged, counterfeited, and altered obligation of the United States, but did not allege that the defendant knew it to be false, forged, counterfeited, and altered, it was held insufficient even after verdict. The supreme court saying:

"In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless the words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all elements necessary to constitute the offense to be punished."

To the same effect is the decision of *U. S.* v. *Cruikshank*, 92 U. S. 542. The same objection made to this indictment was made and sustained in the case of *Com.* v. *Boynton*, 12 Cush. 499. These authorities are as high as any that can be invoked in the decision of this question. A very clear rule as to the sufficiency of an indictment is laid down in *Com.* v. *Young*, 15 Grat. 664. It is this:

"If the indictment may be true, and still the accused may not be guilty of the offense described in the statute, the indictment is insufficient."

Let us apply this rule to the case before us. The defendant is charged with knowingly depositing, and causing to be deposited, in the mail, for mailing and delivery, certain obscene papers, etc. She may knowingly

have done this; she may knowingly have caused it to be done, and yet be entirely ignorant of the obscene character of the writings, etc., so deposited, and consequently not guilty of the offense described in the statute. "Knowingly," in the indictment, must be limited to the *act* of depositing, for mailing and delivery, the obscene matter in the mail, and cannot be extended to include a guilty knowledge of the writings, papers, etc. Suppose the indictment charged that the defendant knowingly deposited, and caused to be deposited, in the mail, for mailing and delivery, a certain dangerous and explosive substance known as dynamite or gunpowder; would this be a sufficient allegation that she knew the material to be of a dangerous and explosive character? The court thinks not. The knowledge alleged in the indictment would be confined to the act of mailing. The adjectives "dangerous and explosive" would intervene between the fact of which she is alleged to have knowledge, and separate it from the subject of which she must be charged with having guilty knowledge, and are descriptive of that subject. As stated in the case cited from 12 Cush. *supra*, the guilty knowledge charged was confined to the act of selling, and did not extend to the character of the meat sold.

The case chiefly relied upon by counsel for the government, to sustain this indictment, is *U. S.* v. *Bennett*, 12 Myer, Fed. Dec. 700. An examination of that case will show that the point there raised against the indictment was somewhat different from the one raised here. But granting them to be the same, I cannot think the *Case of Bennett* of more binding authority than the cases which I have cited.

The court is of the opinion that the indictment does not set forth the offense with clearness and all necessary certainty, so as to apprise the accused of the crime with which she stands charged, and every ingredient of which the offense is composed is not accurately and clearly alleged. It is defective because it does not allege that the defendant knew that the writings, papers, etc., which she is charged with having deposited in the mail, for mailing and delivery, were of an obscene, lewd, and lascivious character. This conclusion is clearly sustained by principle and precedent; and the motion in arrest of judgment must be sustained.

Judgment stayed, and defendant discharged.

CHICOPEE FOLDING BOX CO. *v.* ROGERS.

(*Circuit Court, S. D. New York.* April 15, 1887.)

PATENTS FOR INVENTIONS—CLAIM FOR PROCESS.

The language of one of the claims of a patent was as follows: "In the art of scoring or creasing paper or other kindred substances, preparatory to bending the same for use in the manufacture of paper boxes and similar articles, the step herein set forth, which consists in making the crease or score by means of successive blows or pressures, the first of which is lighter than the following one." *Held*, that this was a claim for a general process, and was not ground for an action for infringement.

This was an action for infringement of letters patent, No. 298,425, to John E. Stannard, for a machine for creasing paper. The first claim in the patent was:

"In the art of scoring or creasing paper or other kindred substances, preparatory to bending the same for use in the manufacture of paper boxes and similar articles, the step herein set forth, which consists in making the crease or score by means of successive blows *or pressures*, the first of which is lighter than the following one."

Walter D. Edmonds, for complainant.
R. B. McMaster, for defendant.

WALLACE, J. The first claim of the patent in suit (No. 298,425, granted May 13, 1884, to John E. Stannard for machine for creasing paper) is a bald attempt to patent the function of the machine described in the specification, or the result of a mechanical operation which the operator must learn how to perform for himself without aid from the specification. No mechanism for creasing paper "by means of successive blows or pressures" is suggested in the specification, except the combination of devices covered by the third claim of the patent, and no instruction is given how to take "the step" which is the subject of the first claim, unless by the use of those devices.

The third claim fully and accurately embodies the real invention of the patentee. The complainant's case must stand or fall upon the infringement of that claim by the defendant. Novelty is imparted to that claim by the peculiar grooves or channels in the cam disks, all the other elements being old, separately, and in the combination claimed. The new result is produced by making the groove of the cam "with two inward trends towards the shaft 9—one at 21, and the other at 23, the latter extending inward nearer the shaft than the other—and with an outward swell or trend between them, as clearly shown in Fig. 2." The peculiar shape of the groove is the gist of Stannard's invention. The proofs show that the defendant has never infringed this claim. He had altered the cam grooves in the Elmer machines to plain eccentrics, in February, 1884, before the complainant's patent was granted. He did this for the express purpose of avoiding litigation, after the interference had been declared in the patent-office between the Elmer patent and the application of Stannard. His conduct towards the complainant throughout shows good faith. The complainant assumed that the defendant was using the original Elmer machines constructed according to Elmer's patent; he acquired Stannard's patent as soon as it was granted, and brought this suit the day after against the defendant. After the suit was brought, being met with proofs that the Elmer machines had been altered before the issue of the Stannard patent, so that they did not employ the real invention of Stannard, the complainant has fallen back upon the worthless first claim of the patent. The bill as to infringement is dismissed with costs.

The bill prays for the cancellation of the Elmer patent owned by the defendant, as an interfering patent. The adjudication of the patent-

office that Stannard was the prior inventor in the interference proceeding to which the defendant was a party is sufficient *prima facie* to entitle complainant to this relief. But it does not appear that the defendant has ever asserted any rights under the Elmer patent, and, when the interference was declared, he permitted the proceeding to go by default. Under these circumstances, and as no issue has been made by the defendant by pleading or proof upon this branch of the case, costs should not be decreed against him.

ASPINWALL MANUF'G CO. *v.* GILL and another.

(*Circuit Court, D. New Jersey.* July 18, 1887.)

1. PATENTS FOR INVENTIONS—LICENSE—EXTENT OF.
   A defendant in an action for the infringement of a patent pleaded a license to make 100 of the patented machines. The evidence showed that he had made 125. *Held*, that he was not protected by the license as to the excess over 100, although the patentee had delayed the defendant, and prevented his making the 100 according to his contract, and caused him damage thereby.
2. SAME—ASSIGNMENT—FUTURE IMPROVEMENTS.
   Where a patentee assigned his patent for $12,000, "together with all the improvements I may hereafter make, without further cost," the assignee is entitled to make and sell the original inventions as improved after his assignment.
3. SAME—ASSIGNMENT—RIGHTS OF ASSIGNEE.
   An assignee of a patent, whose assignment is properly recorded, is protected as to all of his rights thereunder, as against a subsequent assignee of the patentee.
4. SAME—INFRINGEMENT—ACTION BY PART OWNER.
   A part owner of a patent cannot maintain an action for infringement against another part owner.
5. SAME—IMPROVEMENT—WHAT CONSTITUTES.
   The patent No. 276,994, issued to Lewis A. Aspinwall, May 8, 1883, of a potato planter, was merely an improvement of patent No. 235,401, issued to the same inventor, December 14, 1880, and was not for a separate and different machine, as the difference in the two machines consisted simply in making the barbs which speared the potatoes, and carried them to the dropping place, straight, instead of hooked, and thus facilitating the action of the device.

In Equity. On planter patents.

Francis Forbes, for complainant.

F. C. Lowthorp, Jr., for defendants.

BRADLEY, Justice. The bill in this case was filed to restrain the infringement of two certain patents, and to recover profits and damages for the infringement thereof. The patents sued on were granted to Lewis Augustus Aspinwall for improvements in potato planters,—one dated December 14, 1880, and numbered 235,401, but subject to the limitation prescribed by section 4887, Rev. St. U. S., by reason of a British patent for the same invention, dated October 27, 1874, and July 30, 1878; the other patent sued on was dated May 8, 1883, and numbered 276,994. By separate deeds of assignment bearing date September 19,

1885, the said Aspinwall assigned said patents, and all claims and demands against any party for infringing the same, to the complainant. The bill alleges infringement by the defendants, and prays the usual relief. The defendants set up two grounds of defense: a license from Aspinwall, and an assignment of a part interest in the patents themselves.

1. The license relied on was pleaded in this wise: They allege that about the first of January, 1882, Aspinwall, after having obtained the first of the patents sued on, and made application for the other, and having, as he asserted, obtained letters patent from the governments of Great Britain and of Germany for improvements in potato planters, agreed with the defendants for the construction and sale by them of 100 machines containing the said improvements, and also 100 machines known as potato diggers. The answer states that the object of this agreement was to bring the machines into notice, and to introduce them into common use; and that, in pursuance of the agreement, the defendants expended a large amount of money under the direction of said Aspinwall, who, in violation of his agreement, left the works of defendants in August, 1882, and forbade them to make any more machines. They deny that they have ever constructed or used or sold any machines except those constructed upon the express order of Aspinwall prior to said agreement, or in pursuance thereof afterwards.

The evidence in the case shows that such an agreement was made as stated in the answer; and that Aspinwall superintended the making of machines in the defendants' works at Trenton, during the year 1882, until some time in August of that year, when the parties had a difficulty, which resulted in Aspinwall's leaving, and forbidding the defendants to manufacture any more machines. I am not satisfied, from the evidence, that Aspinwall was justified in his conduct. I think the right to complete the manufacture of 100 machines remained in the defendants, and that they cannot be called to account in this suit for completing and disposing of the same. It is also very clear that Aspinwall, during the years 1883, 1884, and 1885, endeavored to embarrass the defendants in disposing of the machines made by them, by announcing that they had no right to manufacture them, threatening suits against purchasers, etc. All this was sufficient to excuse the defendants in some delay in completing the 100 machines. But the evidence is very clear that they had manufactured and disposed of the full number before this suit was commenced, and that they had undertaken the manufacture of several more. Bennington Gill himself testifies that they had made and sold 85 machines before the commencement of the suit; that they had made in all 125, all of which, except about a dozen, were entirely completed. Of course, the defendants cannot pretend that their license to build 100 machines gave them any right to build any more than that; and it is clear, therefore, that in making the remaining 25 machines they were acting without authority. The defense of license is good, and has been maintained as to the 100 machines, but no more. As to the others, this defense fails. If Aspinwall was guilty of misconduct in trying to embarrass the defendants in the disposal of their 100 machines, he may have

made himself liable to an action for damages; but he did not thereby extend the license beyond 100 machines.

2. The other defense set up in the answer is part ownership of the patents sued on, alleged to have been acquired by the defendants by virtue of certain assignments. It seems that in 1869 Aspinwall obtained certain letters patent for a potato planter, dated November 30 of that year, and numbered 97,339, which contained at least some of the elements embraced in the two patents now sued on. On the fifteenth of January, 1870, he assigned this patent to 11 persons (including himself as one) by an instrument of which the following is a copy, to-wit:

"IMPROVEMENT IN POTATO PLANTERS, NO. 97,339.

"What I claim as my invention, and desire to secure by letters patent, is: (1) A spear, or spears, provided with trips; (2) operating the trips, substantially as described; (3) the V-shaped concave, C, constructed and used in the manner described; (4) swinging the plow and covers from the main frame, substantially as described, and for the purposes set forth.

"L. AUGS. ASPINWALL.

"Whereas, L. Augustus Aspinwall, of Albany, N. Y., did on the thirtieth day of November, 1869, obtain letters patent for the United States of America, securing him, his heirs, administrators, or assigns, for the term of seventeen years, the sole right to make, vend, and sell to others, to be used, the said improvements; and whereas, D. H. Wyckoff, Stacy P. Conover, Joseph H. Holmes, Joseph J. Thompson, John I. Thompson, Jonathan Longstreet, George Schanck, Garret R. Schanck, Daniel Smock, David Schenck, Jr., L. A. Aspinwall, are desirous of obtaining an interest in said invention, this is therefore to certify that I, L. Augustus Aspinwall, do hereby set, sell, and convey over to said parties my entire right and title in said patent for the following territory, viz., the United States of America, without reserve, for the sum of twelve thousand dollars, the receipt of which is hereby acknowledged, together with all improvements I may hereafter make, without further cost.

"Witness my hand and seal the fifteenth day of January, 1870.

[Signed] "L. AUGUSTUS ASPINWALL. [L. S.]

"Witnesses: JONATHAN LONGSTREET.
"GEORGE SCHANCK."

This instrument was duly recorded in the patent-office, November 3, 1882.

On the eighth day of November, 1882, four of the parties named in the previous assignment, to-wit, David H. Wyckoff, Stacy P. Conover, Joseph H. Holmes, and Jonathan Longstreet, assigned and transferred unto George Schanck, (another of said parties,) his heirs and assigns, all their right, title, and interest in the said patent, No. 97,339, conveyed by the previous assignment, and to the assignment of the patent added the following words, to-wit:

"And we, the parties of the first part, do relinquish and quitclaim all interest or claim of whatsoever nature or description which we now have or hold in the said patent 97,339, unto the said George Schanck, his heirs and assigns, forever."

This instrument of assignment was recorded in the patent-office, February 28, 1883.

On the thirteenth day of December, 1882, a deed of assignment was made by the said George Schanck, both for himself and as heir at law of Garret R. Schanck, and by Joseph I. Thompson and John I. Thompson, to the defendant Bennington Gill, whereby they assigned to him all right and title in said patent No. 97,339, dated November 30, 1869, and in and to all improvements on said invention made after said date by said Aspinwall, or that might be made, as fully and completely as it was vested in them. This assignment was also recorded in the patent-office, February 28, 1883.

It thus appears that in December, 1882, the defendant Bennington Gill became the assignee of eight of the 11 persons to whom Aspinwall assigned the said patent in January, 1870.

Now, the contention of the defendants is that the patents sued on—granted, as before stated, one on December 14, 1880, and the other on May 8, 1883—are for mere improvements upon the potato planter, which was patented by the previous patent of November 30, 1869; and that by the assignment executed by Aspinwall on the fifteenth of January, 1870, whereby he assigned the last-named patent, with the addition of the words, "*together with all improvements I may hereafter make*," the inventions set forth and secured by the patents of 1880 and 1883 are covered and conveyed; and therefore that the defendant Bennington Gill is in fact the owner of eight-elevenths of the patents sued on; and that the complainant corporation, as assignee of Aspinwall, is the owner of only one-eleventh part of the same. If this position of the defendants be correct, it is evident that the present suit cannot be maintained. For, even if the assignment of improvements to be made *in futuro* does not convey a legal interest in a patent taken out for such future improvement, yet, if valid at all, it certainly conveys an equitable interest, entitling the assignee to call upon the holder of the legal interest for an assignment thereof to the extent of the equity.

That such assignments of future improvements upon a machine, in connection with the assignment of a patent for such machine, are valid, is settled, I think, by the case of *Littlefield* v *Perry*, 21 Wall. 226. A naked assignment or agreement to assign, in gross, a man's future labors as an author or inventor,—in other words, a mortgage on a man's brain, to bind all its future products,—does not address itself favorably to our consideration. It is something like engagements of an expectant heir, binding the property which he may afterwards inherit, which are always looked upon with disfavor by the law. But where a man purchases a particular machine secured by a patent, and open to an indefinite line of improvements, it is often of great consequence to him that he should have the benefit of any future improvements that may be made to it. Without that, the whole value of the thing may be taken away from him the next day. A better machine might be made by the inventor, and sold to another party, which would make the machine acquired by the first purchaser entirely useless. These things happen every day. And hence it has become the practice, in many cases, to stipulate for all future improvements that may be made by the same inventor upon any particu-

lar machine which he induces a party to purchase from him, sometimes by way of license to use such improvements, and sometimes by way of purchase and ownership thereof. Where the inventor is connected in business with the party making such stipulation, or is interested in the profits arising from the business in which the invention is used, the arrangement seems to be altogether unobjectionable. But such a connection or interest does not seem to be necessary to the validity of such bargains. If based upon a valuable consideration, they are sustained as collateral or incidental stipulations connected with the conveyances of a principal subject.

Here was a sale of a patent for the solid sum of $12,000, upon a stipulation to have the benefit of all future improvements; which means, of course, all future improvements upon the machine which was the subject of the patent conveyed. The consideration was a valuable one, probably of great consequence to Aspinwall at the time. He may not have anticipated then how much better the machine could be made, how great improvements it was capable of, how valuable it would come to be. It was as perfect then as he knew how to make it. He may have estimated at low value any possible future improvements. But, whatever were his views, he was willing to make the bargain, and did make it. I do not see how he can avoid being bound by it; and, if he is bound, his assignee, the complainant, is in no better plight, for the assignment was put on record long before the complainant became owner of the present patents.

But the complainant meets this defense by denying that the machine covered by the present patents is an improvement upon the old machine covered by the patent of 1869; on the contrary, the complainant contends that it is altogether a new machine, working on a different principle. It cannot be denied, however, that both are potato planters; that both are erected on a two-wheeled vehicle, which is drawn along by a tongue, like a cart; that both have a hopper into which the potatoes are deposited preparatory to planting; that both have a passage-way, called a "concave," for the potatoes to pass into, where they are taken up by the machinery, one at a time; that the device for taking them up is a series of spears attached to a disk which is caused to revolve by the movement of the wheels of the cart; and that these spears are carried, as the disk revolves, successively, to the potatoes lying in the passage-way or concave, and each spear impales a potato, and carries it up and around to a tripping device, which throws the potato off of the spear, and into a conductor that carries it to the ground. The new machine is better than the old one, no doubt; the spears are differently arranged, so as to secure a potato more certainly every time; and other improvements are adopted; but to say that it is not an improvement on the old machines is to abandon the dictates of common sense for the transcendental distinctions of ingenious theory. The principal ground for denying the new machine to be an improvement of the old, is the difference in the arrangement of the spears; the old spear being bent like a hook, so as to strike the potato tangentially, and the new one being straight, nearly in

line with the radius of the disk to which it is fastened. This is a difference in form, but not in principle. The object in both cases is to spear the potato. By the old method, you strike it with the hooked spear; by the new, you hold the potato while the spear enters it. The last is much the better device, no doubt, but in both you spear the potato. The last plan of doing it is an improvement on the old plan; that is all. The patent-office and patent experts may make two classes, if they please, and call one a hooked-spear class, and the other a radial-spear class; but that cannot settle the matter. These classifications are entirely arbitrary, and may descend to infinitesimal differences. The broad common sense of the thing is the only true criterion of the rights of the parties, and of the legal rules by which they are to be decided.

In my opinion, the machine as described in the patents of 1880 and 1883 is but an improvement upon the machines as described in the patent of 1869, within the true sense and meaning of the word "improvements," as used in the assignment of January 15, 1870.

Under this view of the effect of the assignment, the bill, of course, must be dismissed. The owner of one-eleventh of a patent cannot sue the owner of eight-elevenths of it for an infringement, even though the ownership of the latter be only an equitable interest. It is the duty of the legal owner to transfer to the equitable owner his rightful share of the property. The exact mutual rights of part owners of a patent have never yet been authoritatively settled. If one part owner derives a profit from the patent, either by using the invention, or getting royalties for its use, or purchase money for sale of rights, it would seem that he should be accountable to the other part owners for their portion of such profit. And probably a bill for an account would be sustained therefor. But this is matter of mere speculation, so far as this case is concerned. It is clear, I think, that one part owner cannot maintain suit against another for infringement.

The bill is dismissed, with costs.

ASPINWALL MANUF'G CO. *v.* GILL and another.

(*Circuit Court, D. New Jersey.* July 18, 1887.)

PATENTS FOR INVENTIONS—LICENSE—INJUNCTION.

Where it appears that a defendant has a license from the inventor and patentee to make, use, and vend 100 patent potato diggers, no injunction will be decreed to restrain the exercise of the license until he has fully enjoyed it, and where it appeared that defendant, under such license, had only made 50 machines, the injunction should be denied.

On Bill in Equity. On digger patents.

Francis Forbes, for complainant.

F. C. Lowthorp, Jr., for defendant.

BRADLEY, Justice. The bill in this case was filed to restrain the infringement of two certain patents granted to L. Augustus Aspinwall,—one dated February 3, 1880, and numbered 224,123, and the other dated September 19, 1882, and numbered 264,603,—both for improvements in potato diggers, and both assigned to the complainant by a deed bearing date February 24, 1883. The bill charges the defendants with infringement of the said patents, and prays for a decree for profits and damages. The defenses set up in the answer are—*First*, a license; and, *secondly*, an assignment.

The license claimed is the same as that which was set up in the suit on the planter patent, *ante*, 697, (just decided;) it being claimed under the same agreement, which provided for the manufacture of 100 planter machines and 100 digger machines. I held in that case that the defendants had exhausted the license for the manufacture of planters before the commencement of the suit, and had infringed the patents sued on by manufacturing in excess of the license. In the present case this has not been done. The defendants have not manufactured, all told, but 50 potato diggers of the 100 which they were authorized to manufacture. According to the views expressed in the other case, therefore, the defendants are not amenable to a suit for infringement of the digger patents. They went to large expense in getting out such machines as they did manufacture, and are entitled to a reimbursement of those expenditures from the proceeds of machines to be sold; and, as the said Aspinwall has interposed every possible obstacle in the way of their disposing of machines, it cannot be justly contended that their license will expire until they have made their full complement of 100 machines.

This disposes of the present case, and it is unnecessary to enter upon the consideration of the other defense, which is much the same as the second defense in the planter case, with the exception that the instruments called assignments of the digger only grant the right to make, use, and vend, (which is a mere license,) and only grant use of future improvements for the state of New Jersey. What this limited right may amount to, should the new digger machines be held to be mere improvements on the old machines, it is unnecessary, as before said, to consider at this time. The license is a sufficient defense to the present bill.

The bill is therefore dismissed, with costs.

In re GLENMONT.

(*District Court, D. Minnesota.* November 1, 1887.)

MARITIME LIEN — CONSTRUCTION OF VESSEL — ORIGINAL CONTRACT — MATTERS INCLUDED.

A month after the hull of the steam-boat was built, and the propelling power put in, the libelant furnished her with stores, fuel, tiller-line, check-line, copper wire, packing for machinery, pails for roof, beds, and bedding, etc. On the day this outfit was received the boat made her first trip. It did not

appear that the original contract included these materials. *Held*, that the original construction of the boat contemplated all the materials furnished to make the vessel serviceable from the beginning, and that no maritime lien existed.

In Admiralty.

The libelants, Hanson & Linehan, of Dubuque, Iowa, claim a maritime lien against the Glenmont for stores, fuel, tiller-line, check-line, copper wire, packing for machinery, pails for roof, beds, and bedding, etc., furnished to enable the vessel to perform her intended voyage. The boat was built at Dubuque, and was finished on April 23, 1885, by the outfitting above stated, and on that day started on her first trip to Stillwater, in the state of Minnesota. The owners of the boat were Roman, of Camanche, Iowa, and Gillespie & Harper, of Stillwater, Minnesota, and on August 17, 1885, they sold her to the claimants, Laird & Norton, of Winona, Minnesota. The libelants urge that a maritime lien exists for the articles furnished. The claimants insist that the materials designated were furnished in the original construction and equipment of the Glenmont, for which there is no maritime lien. Several other defenses were interposed. The suit was decided upon the first defense.

Dan W. Lawler, for libelants.

Clark, Eller & How, for claimants.

NELSON, J. The libel is filed to enforce a lien claimed for equipment of the steam-boat Glenmont, after the hull was launched, and before any trip. The hull of the steam-boat was built, and the propelling power put in, under a contract, as I understand the evidence, a month or more before the materials, for which a maritime lien is claimed, were furnished. The terms of the construction contract are not disclosed, but the original contract did not include the materials and outfit, a lien for which is now asserted.

The question presented for determination, and the only one, in my opinion, is whether the materials furnished are a part of the original construction to complete the structure, and make it a vessel serviceable for the navigation contemplated, or was the steam-boat entirely complete and adapted for the intended use at the time the materials were furnished by the libelants.

I cannot doubt that the materials furnished were necessary, according to the original design, and the steam-boat would not be suitable for the navigation intended without the tiller-rope, check-line, bedding, etc., included in the libelants' bill of items. The original construction of the boat contemplated all the materials furnished to make the vessel serviceable from the beginning, and no maritime lien exists. The question presented was settled in *Ferry Co.* v. *Beers*, 20 How. 393; *Edwards* v. *Elliott*, 21 Wall. 532; *Roach* v. *Chapman*, 22 How. 129; *Morehead* v. *Enequist*, 23 How. 494. See *The Pacific*, 9 Fed. Rep. 120; *The Norway*, 3 Ben. 163; *The Count de Lesseps*, 17 Fed. Rep. 460. *The Eliza Ladd*, 3 Sawy. 519, is not in harmony with the above cases.

The libel is dismissed, with costs, and a decree so ordered.

WRIGHT v. SCHNEIDER.

(Circuit Court, E. D. Missouri, E. D. November 26, 1887.)

COURTS—FEDERAL JURISDICTION—CITIZENSHIP.

Plaintiff was born in New York, but removed to New Jersey, in 1868, where he married, in 1877, and continued to reside until the death of his wife in 1880. He then took his children to Scotland. On his return he located in New Jersey, and lived there, boarding, until 1884, when he went to St. Louis. His business was contracting for street work, and he secured many important contracts there for granite paving. He also formed a partnership with defendant for quarrying granite. He then closed out his business in New Jersey, and moved such of his machinery as he could not sell to St. Louis. After living there for two years, part of the time in a hotel and part with relatives, he sued defendant in the federal court for dissolution of partnership, alleging that he was a citizen of New Jersey. *Held*, that the facts set out established a residence in Missouri, and that they were not overcome by a secret purpose of plaintiff to return to New Jersey when his business in Missouri was concluded at some indefinite future period.

In Equity. On plea to jurisdiction.

John M. Dickson, for complainant.

Hitchcock, Madill & Finkelnburg, for defendant.

THAYER, J., (*orally.*) The case of John G. Wright against Philip W. Schneider is submitted on a plea to the jurisdiction.

Wright, the complainant, representing himself to be a citizen of the state of New Jersey, files a bill against Philip W. Schneider for the purpose of winding up a copartnership alleged to exist between the parties, and to secure an accounting as to copartnership transactions. The defendant, Schneider, files a plea to the effect that Wright is not a citizen of the state of New Jersey, but is a citizen of the state of Missouri; and that is the sole question to be determined. I have looked through the testimony bearing upon that issue, and the following facts may be said to be practically undisputed, that is to say: It appears that the defendant was born in the state of New York, and went to reside, as a single man, at Orange, in the state of New Jersey, in 1868, and continued to reside there until the year 1877. In the year 1877 he was married, and after his marriage he removed to Newark, New Jersey, and resided and kept house there for about three years, and until his wife died. Subsequently, in the year 1880, he took his two children to Scotland, and left them with relatives to be reared and educated. On his return to this country he located again at Orange, New Jersey, but from that time forward boarded at a hotel, and continued to board until he came to St. Louis, in the winter of 1884, or 1885—January, 1885, I think the testimony shows. During the entire period of his residence in New Jersey, the complainant's business appears to have been that of a contractor for street work, such as street paving, etc. Shortly after his arrival in St. Louis he took at least eight contracts for reconstructing streets with granite. The execution of the contracts would require a very considerable period of time, and, according to his own statements as contained in

tne bill of complaint, he also formed a copartnership with the defendant Schneider, for the purpose of working an extensive granite quarry in this state, and getting out granite blocks for building purposes and street reconstruction. The terms of the copartnership, as stated by the complainant himself, would imply that complainant intended to engage in business in this state permanently. A letter, which the complainant wrote shortly after the copartnership was formed, also fully warrants the inference that he had abandoned his residence in New Jersey, and intended to take up his abode in this state. Furthermore, after the partnership was formed, complainant closed up his business in New Jersey, sold what he could of his tools and machinery, and removed the residue to this state. He has since resided in this state, living a portion of the time with a relative, and a portion of the time at a hotel. For the two years preceding the filing of the bill of complaint, complainant does not appear to have maintained a residence elsewhere than in the state of Missouri.

In opposition to the facts above recited, we have the statement of the complainant that in point of fact it was not his purpose to give up his residence in New Jersey, that his residence in this state was merely temporary, and that he has always intended to return to New Jersey when his business enterprises in this state were concluded.

From the foregoing statement it is obvious that all of the complainant's visible acts for two years or more were indicative of an intention on his part to take up his abode in this state for a period of years. It also appears that his actual residence is in this state. These facts must prevail over any secret purpose which he may have entertained to return at some indefinite future time to New Jersey and make that state his home. The result is that the plea to jurisdiction will be sustained, and a decree will be entered dismissing the bill.

HEIDECKER *v.* RED STAR LINE STEAM-SHIP CO.

(*Circuit Court S. D. New York.* November 16, 1887.)

REMOVAL OF CAUSES—PRACTICE AFTER REMOVAL.

An action was begun in New York by complaint, and removed, 14 days after service of the complaint, into the United States circuit court, by the defendant, where it was filed. Nineteen days after the filing, a demurrer was served, which was refused on the ground that it came too late, whereupon a motion was made to compel plaintiff to accept it. *Held*, under the removal statutes, providing "that after the removal the cause shall then proceed in the same manner as if originally commenced in the said circuit court," the time for answering or demurring had expired; but the motion would be considered as an application to open a default, and would be granted.

Jacob P. Berg, for plaintiff.
Biddle & Ward, for defendant.

LACOMBE, J. This action was begun in the state court by service of a summons on March 5th. Defendant, on March 24th, served notice of appearance. On April 2d, the complaint was served, and on April 16th, defendant removed the cause to this court, but did not file the record until October 3d. On October 22d, defendant served a demurrer, which plaintiff returned, as served too late. Upon this state of facts two motions are made, one by the defendant, to compel plaintiff to receive the demurrer, and the other by plaintiff, for an assessment of damages as upon default.

The removal statutes provide that, after the petition and bond are filed in the state court, it shall be the duty of that court to accept said petition and bond, and to proceed no further in the matter; and that, when the record is entered in the United States circuit court, "the cause shall then proceed in the same manner as if originally commenced in the said circuit court."

The plaintiff contends that the time to answer or demur expired on April 22d, while the defendant insists that he has 20 days from the filing of the record in which to plead, and contends that such is the constant practice. In this he is in error. Such is, no doubt, the rule in the eighth circuit, (*Webster* v. *Crothers*, 1 Dill. 301;) but in this circuit the usual practice upon entering the record is to obtain an extension of the time to plead, and it has never been held here that where no extension is obtained, the defendant has 20 days from the entering of the record in which to serve his answer or demurrer. The state practice allows the defendant 20 days in which to determine whether he will answer or demur, and to prepare and serve his pleading. The removal act of 1887, requires the defendant to determine whether or not he will remove, and to make and file his petition and bond in the state court, within the same period. Both the time to remove and the time to plead are thus, up to the date of removal, running against the defendant.

When the record is entered in this court, "the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court." If it had been originally commenced in this court, the time to answer would begin to run against the defendant when the complaint was served, and would expire in 20 days. In view, however, of the fact that intermediate the filing of the petition and bond, and the entering of the record, there was no court in which the pleading might be rightly filed, that interval should not be counted as part of the 20 days. The application of these rules to the present case would leave the defendant six days after entering the record, in which to serve his answer; 14 days of his 20 having passed before removal. The demurrer was, therefore, served too late.

The application to compel the plaintiff to receive the pleading may, however, be treated as a motion to open the default, and as such will be granted upon defendant's stipulating to accept notice of trial for this term; the case to be set on the October calendar of common-law demurrers.

The motion to assess damages is denied.

MANLEY *v.* OLNEY.

(*Circuit Court, W. D. Michigan, S. D.* November 23, 1887.)

1. REMOVAL OF CAUSES — ACT OF MARCH 3, 1887—REPEAL OF FORMER RIGHTS.
   Defendant pleaded to a declaration in February, 1887, and in May filed his petition for removal into a federal court. The act of congress of March 3, 1887, in reference to the jurisdiction of the circuit courts of the United States, repealed the act of 1875, under which this case was, at that time, removable, and provided that petitions for removal must be filed at the time of pleading. *Held*, that the case must be remanded.
2. SAME—JURISDICTION—POWER OF CONGRESS.
   The jurisdiction of the federal courts in cases between citizens of different states arises primarily under the constitution of the United States, but this jurisdiction is conferred by grant from congress, which may grant or withhold jurisdiction over removal cases.
3. SAME.
   The right of a citizen to remove a case into a federal court is not a vested right of property. The rules of statutory construction when vested rights are concerned do not apply when the jurisdiction of a federal court to entertain a removal case has been cut off by act of congress.

On Motion to Remand to state court.

George M. Buck, (*Charles S. May*, of counsel,) for plaintiff.

Spafford Tryon, (*George S. Clapp*, of counsel,) for defendant.

SEVERENS, J. This is a motion to remand a case which has been brought here by removal from the circuit court for Van Buren county. The suit was commenced by summons, which was served on the defendant on the twenty-eighth day of December, 1886. He appeared in that court January 7, 1887. Declaration was filed January 22, 1887, and the defendant pleaded thereto on the nineteenth day of February, 1887. The petition for removal was filed May 2, 1887.

The motion involves the construction of the act of March 3, 1887, in reference to the jurisdiction of the circuit courts of the United States, and the application of that act to cases then pending and in which plea had been already filed, but which were at that time removable under the previous act of 1875. The substantial ground taken by the plaintiff in support of the present motion is that the law of 1887 repealed the law of 1875 in regard to the right of removal, and altogether supplanted it, and inasmuch as the law of 1887 did not give the right of removal, because the plea was already in, such right was gone; and that the result was to cut off the right of removal as to all cases in that situation, when that right rested on the sole ground of diverse citizenship. And anomalous as such a consequence is, I cannot see any escape from it. Section 6 of the act of 1887, in plain terms, repeals the act of 1875, and then goes on by proviso to make a saving of all cases then pending in the United States courts, whether brought there by removal or originally instituted in those courts. This express repeal, taken in connection with the saving clause, seems to me to exclude the right to remove into this court any case upon the footing of the act of 1875, after the passage of the act of 1887, and that thereafter removals could only be had upon

the conditions of the later act, the third section of which provides that the petition must be filed at the time of pleading. It is the settled rule that if a law conferring jurisdiction is repealed without any saving of pending cases, jurisdiction over such cases is gone. *Insurance Co.* v. *Ritchie*, 5 Wall. 541; *Ex parte McCardle*, 7 Wall. 514; *U. S.* v. *Tynen*, 11 Wall. 88; *Railroad Co.* v. *Grant*, 98 U. S. 398. And this rule applies with increased force where there is an express saving of some cases which would otherwise be swept away by the repeal.

It is contended that the act of 1887 should not be construed retrospectively so as to cut off rights which had already accrued; and the familiar rule of statutory construction in that regard is cited and relied upon. *Murray* v. *Gibson*, 15 How. 421; *Dash* v. *Van Kleeck*, 7 Johns. 499. The rule is a good one when there is opportunity for its application. Under the act of 1875 it was held that pending cases were saved where the first term at which the trial could be had meant the first term after the passage of the act at which trial could be had, and it could apply to pending cases without departing from the language of the act, or importing anything into it. There the fulfillment of the condition for removal would happen after the passage of the act. *Removal Cases*, 100 U. S. 457; and especially the *Circuit Cases*, cited at p. 473.

Here the case is different. The condition, namely, the filing petition for removal at the time of pleading, does not and could not happen while the law of 1887 is in effect. This law can only be applied to cases coming within its provisions.

It is argued for the defendant that the jurisdiction of the federal courts in cases between citizens of different states arises under the constitution of the United States, and the inference is drawn that the right of a non-resident to have his case tried by a federal court is a constitutional one, and that congress, while it might regulate, could not altogether take it away. If the premises were sound, the conclusion would very likely follow; but they are involved in a mistake. It is true that the primary source of jurisdiction in these courts is found in the constitution, but it is directly conferred through the medium of congress by grant thereof, and is conferred with such limitations and exceptions as the congress shall prescribe, when creating the courts and defining their authority. Many cases in the supreme court reports have explained this, and the doctrine was restated at the circuit in *Harrison* v. *Hadley*, 2 Dill. 229. Congress may, therefore, grant or withhold altogether jurisdiction over removal cases. The jurisdiction which it has power to grant it has power to withdraw. If the right of removal was a vested right of property, quite different considerations would apply. But it is not so. It is simply a privilege of having the case tried in some other than the state tribunals. There is no property in it. It is certainly true that this conclusion leaves a chasm in the law into which such cases as the present must fall; but that is a matter which was for the consideration of congress, and I do not see how the courts can remedy the difficulty without judicial legislation.

An order must be entered, remanding the case to the state court.

BOURKE, Treasurer, etc., *v.* AMISON, President, etc., and others.

(*Circuit Court, S. D. New York.* December 1, 1887.)

COURTS—FEDERAL JURISDICTION—ACT OF MARCH 3, 1887.

The act of congress of March 3, 1887, concerning United States circuit courts, provides that no civil suit shall be brought by original process or proceeding in any district except that whereof defendant is an inhabitant, but that, where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either plaintiff or defendant. *Held* that, under these provisions, the process of such courts will not run throughout the United States, except in the particular cases, and to the extent provided by Rev. St. U. S. § 738.

Hess & Townsend, for Bourke.
Roger Foster, for Amison.

LACOMBE, J. This is an action brought against three defendants, residing, respectively, in Illinois, Tennessee, and Washington, D. C. Service has been made upon each of them at his place of residence, and motion is now made to set aside service of process on the ground that it is made without the circuit in which the action was commenced.

In the act of March, 1875, it was provided that no civil suit shall be brought before the circuit court against any person by original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as thereinafter provided. In the act of March, 1887, the words "in which he shall be found at the time of serving such process or commencing such proceeding" are omitted. In the same section, however, there is inserted the following clause:

"But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant."

The plaintiff contends that the language of this clause not only confers jurisdiction upon the circuit court of either district over a suit wherein the plaintiff and defendant reside in different districts, but that it also allows process of such court to be served outside of the district. Whether the first of these propositions is or is not sound need not be now determined; whatever may have been the intention of congress as to the conferring of jurisdiction, there is not sufficient warrant in the inserted words for the claim that the process of the circuit courts should henceforth run throughout the United States, except in the particular cases, and to the extent already provided for in section 738. So extensive and extraordinary a grant of power is not to be spelled out from words which are susceptible of reasonable interpretation without being held to effect so radical a change in existing law.

LOOKOUT MOUNTAIN R. CO. *v.* HOUSTON & CO. and others.

(*Circuit Court, E. D. Tennessee.* November 14, 1887.)

REMOVAL OF CAUSES—TIME OF APPLICATION—ACT OF MARCH 3, 1887.

Defendant, his demurrer to the bill having been overruled on appeal by the supreme court of the state, filed his petition for removal, April 12, 1887, on the grounds of (1) citizenship, and (2) local influence and prejudice. *Held*, that the application came too late, the act of March 3, 1887, requiring petitions for removal on the first ground to be filed at the term to which the case is *returnable*, and those on the second ground "before trial," and the hearing and determination of a demurrer being a "trial," within the meaning of that act.

On Motion to Remand.

Goree & Landrum, for complainants.

Cooke, Clift & Cooke, for respondents.

KEY, J. This cause comes here by removal from the chancery court of the state, and a motion has been made to remand it. The petition for removal is on behalf of two of the defendants, who set up two reasons for removal:

First. "That petitioners were both, at the time of bringing the suit, and still are, citizens of the state of Ohio; and that they are the only material defendants; and that all the complainants are, and were at the time of filing said bill, residents of different states from petitioners;" and, *second*, "that they have reason to, and do believe, that, from prejudice and local influence, they will not be able to obtain justice in the state court."

It is not necessary for both causes of removal to exist in order to authorize it. One is sufficient, if it be valid. It appears from the record sent here from the state court, that a demurrer was filed in that court by the petitioners for removal, upon various grounds going to the entire bill of complaint; that the demurrer was sustained by the chancery court, and the bill dismissed, from which decree an appeal was taken to the supreme court of the state, which reversed the decree of the chancellor, and sent the cause back to the chancery court to be proceeded with.

It is most palpable that the cause is not removable under the act of March 3, 1875, the supreme court having decided time and again that the hearing of a demurrer is a "trial," within the meaning of said act. *Alley* v. *Nott*, 111 U. S. 472, 4 Sup. Ct. Rep. 495; *Scharff* v. *Levy*, 112 U. S. 711, 5 Sup. Ct. Rep. 360; *Gregory* v. *Hartley*, 113 U. S. 742, 5 Sup. Ct. Rep. 743; *Laidly* v *Huntington*, 121 U. S. 179, 7 Sup. Ct. Rep. 855. Moreover, the application for removal in this cause was filed April 12, 1887, and falls under the provisions of the act of March 3, 1887, which says in cases like the one under consideration—

"He, the petitioner, may make and file a petition in said suit in such state court at the time, or any time before the defendant is required by the laws of the state, or the rule of the state court in which suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court."

The act of 1875, which has passed into the decisions of the supreme court of the United States, requires that the petition for removal be filed "before or at the term at which said cause could be first tried, and before the trial thereof." The act of 1887 demands an earlier application for removal; one made at the term at which the case is returnable, instead of at the term at which it is first triable. It is very evident that in this aspect of the cause the application for removal comes too late.

It remains to determine whether the allegation as to local influence and prejudice brings the cause here. The act of March 2, 1867, provides that for such cause removal may be had on petition filed "at any time before the trial or final hearing of the suit." The act of 1887 says that the application for removal may be filed "at any time before the trial thereof." The words "or final hearing" are omitted. The act of 1875, so often construed, says the petition for removal may be filed "before or at the term at which said cause could be first tried, and before the trial thereof." Each act has the words "before the trial thereof." The evident intent of congress in the act of 1887 was to diminish and discourage litigation in, and curtail the jurisdiction of, the federal courts, and when it omitted from that act the words "or final hearing," it meant to place removals which had been provided for on account of prejudice and local influence in the same category as removals under the act of 1875. If the hearing and determination of a demurrer be a trial in one case, it must be a trial in the other; such a conclusion seems inevitable.

In the view of the matter taken, it becomes unnecessary to construe what is to be understood by this language of the act of 1887:

"When it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in the state court."

It is not stated how it is to be made to appear; whether the circuit court is to institute and conduct an inquiry to ascertain the fact, or whether it is sufficient that it appear by petition and affidavit, as under the act of 1867. Indeed it does not appear from the language of the act of 1887 that the state court is permitted or authorized to take any part in the removal, or is even to be advised in regard to it; but the whole matter is to be left to the judgment of the circuit court, to which the application of removal should be made. The third section of the act, while it stipulates "that whenever any party entitled to remove any suit mentioned in the next preceding section * * * may make and file a petition in such suit in the state court" at or before the return term, excepts "such cases as are provided for in the last clause of said second section." It is not very clear what is embraced in the term "last clause" of the section, but a sensible interpretation of the term would be, it seems to me, that it included that part of the section which provides for the removal of suits upon the grounds of prejudice and local influence. Perspicuity is not a characteristic of the act of March 3, 1887.

Let the cause be remanded.

SPIES v. CHICAGO & E. I. R. CO.

(*Circuit Court, S. D. New York.* November 24, 1887.)

REMOVAL OF CAUSES—PLEA—JURISDICTION OF COURT.

An Illinois corporation was sued in the supreme court of New York, and the cause was removed to the federal circuit court for the Southern district, whereupon defendant filed a plea alleging that the court had no jurisdiction, or, if it had, that it ought not to exercise it, for the reason that the cause could be tried with greater convenience in the courts of Illinois. *Held* that, as no controlling authority appeared to warrant such a proceeding, the plea should be overruled.

Plea in Equity.

John W. Weed, for complainant.

Austen G. Fox, for defendant.

COXE, J. The complainant is a citizen of New York. The defendant is an Illinois corporation. The action was commenced in the autumn of 1886 in the supreme court of this state. The complainant, who is the owner of income bonds issued by the defendant, the par value of which is $62,500, seeks to compel an accounting from the defendant of its net earnings, and the application thereof to the payment of the interest upon his bonds; he also asks for an injunction restraining the disposition of the earnings until the interest is paid. The defendant, having entered a general appearance, and removed the cause to this court, demurred, upon the theory that the trustee under the mortgage given to secure the complainant's bonds was a necessary party. The demurrer was overruled. 30 Fed. Rep. 397. Subsequently the defendant filed an answer on the merits, and also a plea disputing the jurisdiction of the court, upon the ground that the defendant is a foreign corporation, having no property, and transacting no business, in this district.

Upon the argument of the plea the counsel for the defendant admitted that this court has jurisdiction of the subject-matter of the suit, and of the person of the defendant. See *Robinson* v. *Stock-Yard Co.*, 12 Fed. Rep. 361; *Jones* v. *Andrews*, 10 Wall. 327; *Block* v. *Railroad Co.*, 21 Fed. Rep. 529; *Kelsey* v. *Railroad Co.*, 14 Blatchf. 89; *Gracie* v. *Palmer*, 8 Wheat. 699; *Flanders* v. *Insurance Co.*, 3 Mason, 158. But it is contended by the defendant that, although the court has the power to dispose of the cause, it may, in its discretion, send the parties to the courts of Illinois, where the questions at issue can be more conveniently and properly determined, and that this discretion should be exercised. The assertion that the cause can be tried with greater convenience in Illinois is vigorously disputed by the complainant.

As this court has in several similar instances retained jurisdiction, and as no controlling authority has been cited sustaining the view of the defendant, it is thought that the plea must be overruled. The answer already filed may stand.

It is of course unnecessary to pass upon the complainant's objection that the defendant, by answering upon the merits, waived its plea.

UNITED STATES *ex rel.* HILL *v.* JUDGES OF SCOTLAND COUNTY.

(*Circuit Court, E. D. Missouri, E. D.* October 31, 1887.)

COURTS—CONFLICT OF STATE AND FEDERAL—LEVY OF TAX—COUNTY BONDS.

Judgment went against a Missouri county on certain railroad aid bonds issued by it, and the holder applied for *mandamus* to compel a tax levy to pay the judgment. The county judges returned that they had already levied the usual tax; that there was no law, either when the bonds were executed or when the writ was served, authorizing a special levy; that the judgment could only be paid by warrants drawn on the treasury, payable out of the usual county taxes; that there were no funds, and that if they obeyed the writ they would be guilty of a misdemeanor under the laws of the state. As a matter of fact, when the bonds were issued there was a law (Wag. St. Ed. 1872, p. 306, § 21) authorizing counties to "levy a special tax to pay the interest on such bonds, or to provide a sinking fund to pay the principal." In addition, the county courts then had a general power "to audit and settle all demands against the county," and "to levy such sums as were annually necessary to defray the expenses of the county." Wag. St. 441, § 9; page 1193, § 165. *Held*, that the return was insufficient, the judgment having determined the validity of the bonds, and the rights of the holder being fixed by the laws in force at the date of issue, and any order made in the case by the federal court being ample protection to the county judges.

Mandamus to Compel the Levy of a Special Tax by the county judges of Scotland county. On demurrer to respondent's return.

F. T. Hughes and *John A. Overall*, for relator.

H. A. Cunningham, for respondents.

THAYER, J., (*orally.*) In cases 1153 and 1287, consolidated, (*United States ex rel. William Hill* v. *Scotland County*,) the demurrer to the respondent's return to the alternative writ of *mandamus* will be sustained. In this case, omitting the introductory parts of the return, the respondents say:

"That at the date of the execution of the bonds on which the judgment in the case was rendered, there was no law of the state of Missouri, and is no law at the present date, authorizing them to levy any special tax for the purpose of paying the judgment, or for the purpose of paying the bonds."

They say further:

"That in May, 1887, they levied a tax, for county purposes, of five mills upon each one hundred dollars of an assessed valuation of less than two million dollars, and that their predecessors had levied a similar tax in previous years; that, under the state laws now and heretofore in force, the relator's judgment can only be paid by warrants drawn on the county treasury, payable out of taxes levied for county purposes, and that the treasurer has no funds, and that the result would be, if they obeyed the writ, that they would be guilty of grave crimes and misdemeanors, under the laws of the state of Missouri."

This part of the return is obviously an insufficient plea to an alternative writ issued to enforce the payment of a judgment against the county. For the most part, it is a mere recital of the construction placed by the respondents upon certain general laws of the state, which the court is bound to take notice of, as well as to construe. It would have been

more appropriate to have moved to quash the alternative writ, if the reasons stated in this part of the return are valid reasons why the peremptory writ should not issue. The judgment already rendered determines the validity of the bonds[1] merged therein for all the purposes of a proceeding by *mandamus* to enforce its payment, and that judgment is not open to an attack in this supplementary proceeding, although the respondents were not county judges when it was rendered. That proposition is settled beyond cavil in the cases of *Supervisors* v. *U. S.*, 4 Wall. 435, and *Mayor* v. *Lord*, 9 Wall. 409.

The bonds being valid, and it having been necessarily so determined before the entry of the judgment, there is no doubt whatever that under the laws of the state, as they existed when the bonds were negotiated, the county court had ample authority to levy a tax to any amount to pay the same. The supreme court of Missouri, in the case of *State* v. *Shortridge*, 56 Mo. 130, (as I understand the decision,) so held; citing section 34, p. 429, Rev. St. 1855, which remained the law, as the court say, until after 1874, and until after the date of the issue of these bonds, and appears as section 21, p. 306, Wag. St. (Ed. 1872.) In *Ralls Co.* v. *U. S.*, 105 U. S. 736, it was also held that the railroad charter, under which these bonds were issued, conferred ample power to levy a tax for their payment. Furthermore, at the time these bonds were issued, the county courts had a general power "to audit and settle all demands against the county," and "to levy such sums as were annually necessary to defray the expenses of the county." Wag. St. § 9, p. 441, and section 165, p. 1193. If the county court had power to levy a tax to pay the bonds when they were issued, that power has not been, and could not be, subsequently withdrawn, so long as the bonds are outstanding and unpaid, as has been many times held. *Van Hoffman* v. *City of Quincy*, 4 Wall. 535; *City of Galena* v. *Amy*, 5 Wall. 705; *Supervisors* v. *U. S.*, 4 Wall. 435; *Butz* v. *City of Muscatine*, 8 Wall. 575; *Riggs* v. *Johnson*, 6 Wall. 184; and numerous other cases.

In the face of these decisions, it is idle for the plaintiffs to say that they have no power to levy a special tax to pay the judgment, or to say that they made a levy of five mills on the dollar in May last, for county purposes, and can make no further levy. It is not shown whether the rate of taxation for county expenses for 1887 had been fixed before the alternative writ was served, but if it had been, no reason is perceived why an additional levy to pay the judgment might not have been ordered and extended on the tax-book. The laws of this state (sections 6805 and 6806, Rev. St. 1879) simply direct the county judges to fix the rate of county taxation "as soon as may be after the assessor's book is corrected and adjusted." Sections 6710 and 6731 of the Revised Statutes of Missouri, 1879, provide, in substance, that a failure to deliver the assessor's book in time to the county court does not invalidate the assessment, and that the levy is not invalidated by any informality in making the assessment or the tax-list, or on account of the assessment not being

[1] See 25 Fed. Rep. 395.

completed within the time required by law. The provisions in the state revenue law as to the time when the various acts shall be done, seem to have been made by the statute merely directory. But, however this may be, an order of this court, made in a case that is clearly within its jurisdiction, is, I apprehend, ample protection to the defendants. *Riggs* v. *Johnson*, 6 Wall. 193.

The balance of respondent's return merely repeats two of the pleas contained in the second amended answer on which the case was originally tried, and contains matter tending to show the invalidity of the bonds. Those pleas were either held bad in point of law, or the proof failed to support them, and it matters not which was the case, as the validity of the bonds cannot be retried in this proceeding. *Supervisors* v. *U. S.*, *supra; Mayor* v. *Lord*, *supra.*

The demurrer will therefore be sustained.

HILL *v.* SCOTLAND COUNTY COURT.

(*Circuit Court, E. D. Missouri, E. D.* November 11, 1887.)

1. COURTS—MANDATE FROM FEDERAL COURT—INJUNCTION BY STATE COURT.
The United States circuit court had, by a peremptory writ of *mandamus*, compelled the judges of the county court to levy a tax to pay a judgment against the county. Afterwards an action was brought in a state court, and the collection of the tax was enjoined. *Held*, that the action of the state court was an unwarranted interference with the United States court, and furnished no defense to a peremptory writ of *mandamus* by the United States circuit court to compel the collection of the tax.

2. SAME—MANDATE FROM FEDERAL COURT—TAX LEVY—VALIDITY OF BONDS.
In his answer to an alternative writ of *mandamus* to compel the county clerk to show cause why he should not make a supplemental tax-list, and extend thereon for collection certain taxes levied to pay a judgment on certain bonds of the county, he pleaded that the bonds had been adjudged invalid. *Held*, that this was no defense to the issuance of a writ of *mandamus* after a judgment on the bonds had been obtained.

Demurrer to Returns.

John H. Overall and *F. T. Hughes*, for relator.

H. A. Cunningham, for respondent.

THAYER, J., (*orally.*) I have examined the return filed by James R. Nesbitt, county clerk of Scotland county, and also the return filed by Joel Ewing, collector of Scotland county, to an alternative writ of *mandamus* issued in case No. 2,610, of *Hill* v. *Scotland Co.*, which commanded the county clerk to make out a supplemental tax book, and extend therein certain taxes that were levied by the county court of Scotland county on August 30, 1887, and which commanded the county collector, when the taxes should have been so extended, to proceed with the collection of the same.

Now the only reason assigned by the county clerk why he should not make out the supplemental tax book and extend the taxes therein is that he was enjoined by an order of the circuit court of Scotland county from so doing on the sixteenth day of September last. The only reason assigned by the county collector for failing to obey the writ is that he was enjoined at the same time from collecting those taxes, and furthermore, that he cannot proceed to collect the taxes until he is furnished with the tax book, and that the county clerk has been enjoined from furnishing such tax book. The force of the reasons assigned by these officers why they should not obey the command of the alternative writ, and also the order of the county court, or rather the want of force in the reasons assigned, is demonstrated by the following statement of facts:

Judgment was rendered in this case on the thirty-first of March, 1886, against Scotland county, and a peremptory writ of *mandamus* was awarded against the county judges of Scotland county, to compel them to levy a tax to pay that judgment, on the twenty-seventh day of April, 1887. In accordance with that writ, the county court ordered a levy of 14 mills on the dollar upon all the taxable property in the county, on the thirtieth of August, 1887, and by the same order directed the county clerk to make out a supplemental tax book, and extend the tax levied therein, and also directed the county collector to proceed and collect the taxes, and account for them as other taxes are accounted for. On the fifteenth of September, 1887, a suit by the state of Missouri at the relation of John B. Mudd, prosecuting attorney of Scotland county, against the county clerk, county collector, and county judges of Scotland county, was filed in the circuit court of Scotland county; and in that proceeding, on the sixteenth of September, an injunction was awarded against all the defendants, against extending the taxes on the supplemental tax book, and against collecting the tax of 14 mills on the dollar, which had been levied on the thirtieth day of August preceding.

Now, obviously the proceeding in the state court on September 15, 1887, was a direct and unwarrantable interference with the process of this court, as was held more than 20 years ago in the case of *Riggs* v. *Johnson*, 6 Wall. 194, and also in the case of *U. S.* v. *Silverman*, 4 Dill. 224, nearly 10 years ago. If the reasons alleged in the bill filed in the state court were sufficient reasons why a levy should not have been made, or a tax extended on the tax book, they should have been urged in this court when the writ was granted against the county judges; and if overruled, an appeal should have been taken to the United States supreme court. That was not done. The writ became final, and thereafter it could no more be interfered with by a state court than a writ of execution issuing from this court; and it makes no difference in this proceeding that the county clerk and county collector were not named in the peremptory writ issued against the county judges. They were county officials on whom the writ necessarily operated, because the tax ordered to be levied and collected could only be collected through their agency, acting under the orders of the county court. An injunction obtained against the county clerk or county collector *alone* would have been an un-

authorized interference with the process of this court, in so far as it sought to prevent the collection of the tax which this court had ordered. But in point of fact, the county judges were also embraced in the restraining order. The case has been argued for the respondents as if they had in this proceeding pleaded, in their return to the writ, the identical matters relied upon in the bill filed in the state court to obtain an injunction. But it will be observed on an inspection of the return that they have pleaded no such matters. They have planted themselves squarely on the ground that the injunction in the state court, no matter upon what ground it was granted, is a sufficient reason why a peremptory writ ought not to issue in this case. That plea, as it has been settled for years, is untenable.

The county clerk files an additional plea, to the effect that the bonds upon which the judgment in this case was obtained have been adjudged to be invalid in a proceeding or in a suit brought in the state court, which judgment, it is claimed, is binding upon the plaintiff in this case, because he was not an innocent purchaser of the bonds. That would be a good defense to a suit upon the bonds, but, as has been repeatedly held, especially in the case of *Ralls Co.* v. *U. S.*, 105 U. S. 734, it is not a defense which can be urged against the issuance of a writ of *mandamus*, after a judgment on the bonds has been obtained. The same point arose in a case decided in this court but the other day, against county judges of the same county. *Hill* v. *Judges of County Court of Scotland Co.*, *ante*, 714, (1153 and 1287 consolidated.)

The result is that the return in this case, No. 2,610, does not assign any sufficient reason why a peremptory writ should not issue; and the same is true of the returns filed in each of the following cases, which were submitted at the same time, viz.: Nos. 2,611, 2,612, 2,613, and 2,614. In all those cases, therefore, the demurrer to the respondents returns will be sustained.

LEAVENWORTH and others *v.* PEPPER and others.

(*Circuit Court, E. D. Missouri, E. D.* November 2, 1887.)

EQUITY—PLEADING—INFORMATION AND BELIEF.

A bill in equity by the grandchildren of the grantor in an absolute deed, praying to have a constructive trust imposed upon the grantee in the conveyance, on the ground that the grantor was wanting in mental capacity when she executed it, and was induced to sign it by the fraudulent representations of the grantee's husband, is not demurrable because the allegations in the charging part, as to such representations, are made upon information and belief only.

In Equity. On demurrer to the bill.

Dyer, Lee & Ellis, for complainants.

Hough, Overall & Judson, for respondents.

THAYER, J., (*orally.*) In the case of *Leavenworth* against *Pepper and others*, a proceeding in equity, there is a general demurrer to the bill of complaint by certain of the defendants. The bill is filed by certain grandchildren, heirs at law of one Esther Leavenworth. It alleges, in substance, that Esther Leavenworth, in 1879, was the owner of four parcels of real estate in the city of St. Louis; that she was at that time feeble in body and mind, and unable to make a valid conveyance; that she was living with her son-in-law, who was acquainted with her condition, and took advantage of it, and induced her to make a conveyance of these four parcels of real estate to his wife, representing at the time that, in case of the grantor's death, the property could be more readily divided, and that his wife, the grantee, would hold the property in trust for the heirs at law of the grantor; that thereafter Esther Leavenworth died, when the son-in-law, contriving to cheat and defraud the heirs at law, induced his wife to sell one of the parcels of property for the sum of $2,500, which sum he appropriated; and further induced his wife to place a mortgage in the sum of $7,500 upon the remainder of the property, the proceeds of which mortgage he also appropriated. There is a prayer for special relief of various kinds, and also a prayer for general relief.

Now, unquestionably, upon the state of facts presented by the bill, the court would be authorized to enter a decree declaring that the conveyance made in 1879 was a conveyance upon trust for the heirs at law of the grantor, Esther Leavenworth, and awarding them such further incidental relief as would follow from that adjudication. There is no defect, therefore, in the substance of the bill. The particular point of objection made is that in the charging part of the bill, where it is alleged that Mrs. Leavenworth was in a feeble condition of mind and body, and incapable of making a valid conveyance, and in that part of the bill where it is charged that she was induced to make the conveyance by representations that the grantee would hold the property in trust for the heirs at law, the allegations are only made upon information and belief. This is supposed to be good reason why the defendants should not be called upon to answer the bill.

I think that position is untenable. If the court was asked to grant any interlocutory orders, such as to issue an injunction against making sales of any of the property pending suit, or if it was asked to appoint a receiver of the property pending the litigation, the court would look at the character of the averments, and finding that they were only made upon information and belief, it would probably refuse any such interlocutory orders; but the fact that these averments are made upon informa- and belief is no reason, in my judgment, why the defendants should not answer the bill.

The demurrer will therefore be overruled, and the defendants will be required to answer by the December rules.

WYMAN *v.* LANCASTER and others.

(*Circuit Court, E. D. Missouri.* November 20, 1887.)

1. CARRIERS—LIEN FOR FREIGHT—RETENTION OF GOODS IN CUSTOM-HOUSE—ACTION TO RECOVER.

In order to recover property held by a collector or other customs' officer under Rev. St. U. S. § 2981, which provides that whenever the collector shall be notified of a lien for freight on any goods imported he shall hold the same until it is shown that the freight has been paid or secured, the consignee should first tender the amount of freight he admits to be due, and if declined he should tender a sufficient bond conditioned to pay all freight that may be found to be due or that may be adjudged due by any court of competent jurisdiction. Should this be declined, proof of these tenders should be made to the collector; who, if he finds the bond adequate to secure the carrier, should release the goods on the deposit with him, for the use of the carrier, of the bond originally tendered.

2. SAME.

In an action to recover property held by a collector of customs or other customs officer under Rev. St. U. S. § 2981, providing for the detention of goods upon which the carrier has a lien for freight, and arbitrarily detained by him after tender of a sufficient bond for the security of the carrier, the petition should show all the steps taken to secure a release of the property, including the tender of freight, the tender of the bond, and the proof of these facts before the collector.

John M. Holmes, for plaintiff.
Thos. P. Bashaw, U. S. Atty., for defendants.

THAYER, J., (*orally.*) In this case a question arises as to the duty of a collector of customs when he is in possession of property imported from abroad on which all of the duties due the United States have been paid, and a controversy arises between the consignee of the goods and the carrier who has transported them from the sea-coast in bond, as to the amount of the freight that is due for such transportation. The statute relating to the subject is as follows:

"Section 2981. Whenever the collector or other chief officer of the customs of any port shall be notified in writing by the owner or consignee of any vessel or vehicle arriving from any foreign port, of a lien for freight on any merchandise imported in such vessel or vehicle and remaining in his custody, such officer may refuse the delivery of such merchandise from any public or bonded warehouse, or other place in which the same shall be deposited, until proof to his satisfaction shall be produced that the freight due thereon has been paid or secured; but the rights of the United States shall not be prejudiced thereby, nor shall the United States, or its officers, be in any manner liable for losses consequent upon such refusal to deliver."

It is perfectly clear, in view of that section, that if the consignee does not pay the freight, or offer to secure it, that it is the duty of the collector to retain the goods in his possession to secure the carrier's lien. It is equally clear, in my opinion, that it is the duty of the collector to deliver the goods when the freight has been tendered, or in the event of a controversy as to the amount, when the amount claimed by the carrier has been duly secured. A practical difficulty arises in cases of this kind

where the consignee and carrier disagree as to the amount of the freight. The law makes no provision as to the kind of security to be given,—whether it shall be a bond, or a money deposit; nor does it authorize the collector to take a bond in any sum or form. My judgment is that in a case of this character the consignee should, in the first instance, tender to the carrier the amount of freight he admits to be due. If the same is declined, a sufficient bond should be tendered the carrier by the consignee, conditioned to pay all freight that may ultimately be found to be due, or adjudged to be due in any court of competent jurisdiction. If the carrier, on the tender of such bond, will not consent to the delivery of the goods, but insists upon their being held by the collector, then proof of such facts—that is to say, proof of the tender of the freight admitted to be due, and proof of the subsequent tender of a bond to the carrier—should be made to the collector; and if he is satisfied that the bond tendered is adequate to secure the carrier, he should deliver the goods on the deposit with him, for the use of the carrier, of the bond originally tendered to the carrier.

If, after all these steps have been taken, the collector arbitrarily refuses to deliver the goods, although the bond is adequate in form, and in amount of security, an action in my opinion will lie against the collector to recover the goods. The petition in such case, however, should set out all the steps that have been taken by the consignee to secure the release of his property. The petition in this case is an ordinary petition in replevin. It does not set out any of the steps that have been taken by the consignee to enforce the delivery of the property. I am not advised by the petition whether there was any tender of freight to the carrier, or whether the petitioner tendered any bond to the carrier, or whether he made proof of such facts before the collector; and in the absence of such proof I cannot enter an order directing the collector to deliver up the goods.

However, the petition in this case can be amended so as to show what steps have been taken; and if the court is satisfied, by affidavits, that a good and sufficient bond has been tendered to the transportation company to secure the freight claimed, and if the court is further satisfied by affidavit that proof of the fact of the tender of such a bond has been made before the collector, and that he arbitrarily refuses to give up the property, then the court will enter an order upon the collector directing the delivery of the goods to the consignee. The statute does not intend that the collector's office shall be so administered as to compel a consignee to pay an unjust demand for freight, or be deprived for an indefinite period of the possession of his goods.

The petition can be amended within such time as the plaintiff in the case desires, and the application for an order of delivery renewed.

STATE *ex rel.* BARTON CO. *v.* KANSAS CITY, FT. S. & G. R. CO.

(Circuit Court, W. D. Missouri, W. D. October, 1887.)

1. CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF RAILROAD CROSSINGS.
In 1881 the legislature of the state of Missouri passed an act affecting railroads, which provided that, at railroad crossings, the railroads crossing there should erect and maintain suitable depots and waiting-rooms to accommodate passengers. *Held*, that it was a legitimate exercise of the police power and not unconstitutional.

2. RAILROAD COMPANIES—REGULATION OF CROSSINGS—ACTION FOR VIOLATION—PARTIES.
An act of the legislature of Missouri made it the duty of railroads to erect and maintain at railroad crossings waiting-rooms for passengers, and fixed the penalty for a violation of the act. The defendant was prosecuted for not complying with the provisions of the act. It insisted that there was a defect of parties, in that both railroad companies were not joined. *Held*, that neither was released from liability by the failure of the other.

3. STATUTES—REPEAL—EFFECT ON PENALTIES INCURRED.
In 1885 the legislature of Missouri amended an act passed in 1881. The defendant company claimed that the amendment worked a repeal of the law of 1881, and released it from penalties incurred before the amendment. Rev. St. Mo. § 3151, provides: "No offense committed, and no fine, penalty, or forfeiture incurred, previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all such offenses, and the recovery of such fines, penalty, and forfeiture shall be had, in all respects, as if the provisions had remained in force." *Held*, that though the penalty was incurred prior to the amendment of 1885, still under this section it was recoverable.

4. SAME—CONSTRUCTION—MANDATORY PROVISIONS—CONDITIONS.
A statute contained simply mandatory provisions, and it imposed a penalty for a failure to comply with the conditions of the section. *Held*, that whatever criticism might be placed on the use of the word "conditions," the intent was plain, and the statute was to be construed so as not to defeat the manifest intent of the law-making power.

5. QUI TAM AND PENAL ACTIONS—LIMITATION OF—FAILURE TO MAINTAIN RAILROAD FACILITIES.
Rev. St. Mo. § 3231, places a limit of three years upon an action upon a statute for a penalty or forfeiture where the action is given to the party aggrieved, or to such party and the state. *Held*, that this did not apply to a case where a railroad had incurred penalties for not erecting a passenger depot at a crossing, and the penalties went to the school fund.

6. SAME—JOINDER OF OFFENSES—VIOLATION.
A statute imposed penalties for a failure to comply with the conditions of the section. *Held*, that a disobedience of any one of the provisions subjected the delinquent to the penalty.

7. SAME—VIOLATION—CONTINUED OFFENSE.
An act provided that for each day from and after a certain specified day the delinquent should forfeit and pay the sum of $25. *Held*, that the legislature intended an accumulation of penalties, and the defendant could not atone for its delinquencies by the payment of a single penalty.

Botsford & Williams, for plaintiff.
Pratt, McCrary & Ferry and *C. W. Blair*, for defendant.

BREWER, J. In 1881 the legislature of the state of Missouri passed an act affecting railroads, which, so far as is material to this case, reads:

"Every railroad corporation in this state which now is, or may hereafter be, engaged in the transportation of passengers or property * * * shall,

at all crossings and intersections of other railroads, where such other railroad and the railroad crossing the same are now, or hereafter may be, made upon the same grade, and the character of the land at such crossing or intersection will admit of the same, erect, build, and maintain, either jointly with the railroad company whose road is crossed, or separately by each railroad company, a depot or passenger house, and waiting room or rooms sufficient to comfortably accommodate all passengers waiting the arrival and departure of trains at such junction or railroad crossing, and shall keep such depot or passenger house warmed, lighted, and open to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all trains carrying passengers of said railroad or railroads. * * * Every railroad corporation or company who shall fail, neglect, or refuse to comply with the conditions of this section from and after the first day of July, 1881, shall, for each day said corporation or railroad company refuses, neglects, or fails to comply therewith, after said day, forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the state of Missouri to the use of the school fund of the county wherein said crossing is situated; and it shall be the duty of the prosecuting attorney to prosecute for and recover the same." Laws 1881, p. 77.

In Barton county the defendant's road crosses the Missouri Pacific Railroad, and, it having failed at such crossing to build the depot as required by this section, this action was commenced in February, 1885, by the prosecuting attorney of that county, to recover the penalties therefor. The amended petition is in 1,338 counts, each count seeking to recover the penalty for one day's failure to build a depot, commencing with July 2, 1881, and ending at the commencement of the suit. A demurrer has been filed to each and every count of this petition, and various questions have been argued with great ability and learning by counsel.

The first question is as to the constitutionality of the act. Statutes of this nature, when sustainable, are sustainable under the police power of the state, and in discussing questions of this nature we are confronted at the outset with the fact that no one knows the limits of the police power. Many attempts have been made to define it, and prescribe its boundaries, but none as yet have been so successful as to meet general approval. Even so learned a tribunal as the supreme court of the United States declined to attempt a definition, and held that the limits of the power could be more safely determined by the process of inclusion and exclusion, as the various cases involving its assertion should arise. It is a power affecting the public health, the public safety, and the public welfare. By reason of its undetermined extent it is the *bete noire* of courts. *Omne ignotum pro magnifico.* Hence in many cases the assertion of its extent is yielded to without question. But the power has limits; some are recognized and established, others, doubtless, will be from time to time. One is that the police power of the states is limited by the express prohibitions in the federal constitution upon a state's action. For instance, the state may regulate fares and freights, but inasmuch as the regulation of interstate commerce is vested in the general government, the state's police power to regulate freights and tariffs does not extend to interstate commerce. *Railway Co.* v. *Illinois*, 118 U. S.

557, 7 Sup. Ct. Rep. 4. Again, while the states may, in the exercise of their police power, prohibit the manufacture and sale of intoxicating liquors, they cannot, in view of the fourteenth amendment, extend such power to the destruction of private property invested before the passage of any prohibitory enactment in breweries or distilleries. *State* v. *Walruff*, 26 Fed. Rep. 178. So, I think, though without attempting to formulate a rule therein, a distinction will be drawn between cases in which the police power is invoked simply to regulate the use of property, and those in which a demand is made for the expenditure of money. It is one thing to require a railroad company to stop its trains at a given point; it is another to require it to go to the expense of building a depot at that point. One means nothing but the manner of use, the other calls for an outlay of money. Much larger liberty will be accorded to the legislature in the one direction than in the other. I do not mean to assert that the police power does not extend to any cases of the latter nature; I simply affirm that the courts will put narrower boundaries upon an attempted exercise in this direction. My first thought on the examination of this statute was that this distinction was operative here, and would compel an adjudication against the validity of the statute. I still have doubts of its validity, but as the rule is that questions of doubt must be resolved in favor of the constitutionality of a statute, I am constrained to hold that this act is a valid exercise of the police power of the state. That it is so valid has been affirmed by one of the judges of the supreme court of this state in the case of *State* v. *Railway Co.*, 83 Mo. 144. It is true that no decision was made by the court on this question, the case going off on another matter, but the opinion of so distinguished a jurist as Judge NORTON is entitled to great weight. If the supreme court of the state had affirmed its validity, doubtless such decision would be conclusive on the federal courts, unless in their judgment some provision of the federal constitution was infringed upon by the statute.

It is no longer doubted that the legislature may require that trains shall stop at every railroad crossing. Public safety justifies, if it does not compel, this. If the legislature may require a stop, why may it not require a stop of sufficient length to permit passengers to get on and off, and with that require suitable depot privileges? It will be noticed that the statute does not attempt to prescribe the size or expense of these depots; it leaves that to the discretion of the railroad companies, simply requiring that they shall be sufficient to comfortably accommodate passengers at that point. It would seem to be a reasonable exercise of the police power to compel railroad companies to furnish suitable accommodations for passengers at all places where they receive and discharge them from their trains. Public welfare, if not public safety, justifies this. It was suggested on the argument that in some instances the tracks of two railroads cross and recross several times within the limits of a city in making their way to a union depot; and it was asked, why should a depot be required at each of those crossings? It may be that, under the statute, none is there required; for it has been often said that that

which is not within the spirit, though within the letter, of the statute, is not within the statute, and it may well be that, construing this statute according to its spirit, it does not apply to cases of that kind. It may also be true that other circumstances may exist which in any given case will prevent the operation of the statute. This very case may, when the facts are fully disclosed, show a condition of affairs which will justify the court in holding the statute inapplicable. But considering the statute by itself, I am constrained to hold it a legitimate exercise of the police power, and not unconstitutional.

Another question is this: In 1885 the legislature amended this statute, and it is contended that such amendment worked a repeal of the act, and released the defendant from all liability incurred before such amendment. This might be true, and doubtless would be, but for section 3151 of the Revised Statutes of Missouri, vol. 1, p. 528. That section reads:

"No offense committed, and no fine, penalty, or forfeiture incurred, previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all such offenses, and the recovery of such fines, penalties, and forfeiture shall be had, in all respects, as if the provisions had remained in force."

I had occasion, when on the supreme bench of Kansas, to consider a section of this nature, and shall not restate the reasons which controlled the decision of that court. It is enough to say that this section must be taken as establishing a general rule controlling all cases in which the repealing act does not clearly express a contrary intent. The amendment in this case certainly suggests nothing of an intention to dispense with the operation of this general rule, and though the penalty was incurred prior to the amendment of 1885, still under this section it is recoverable.

Again: It is insisted that there is a defect of parties defendant, in that both railroad companies are not joined. This is a mistake; the penalty is incurred by each; the obligation rests upon each; they must build a depot jointly, or, on the failure of either, the other must act separately. Neither is released from liability by the failure of the other.

Again: It is insisted that the statute of limitation bars many of these counts, and section 3231, Rev. St. Mo. p. 547, is referred to, which places a limit of three years upon "an action upon a statute for a penalty or forfeiture where the action is given to the party aggrieved, or to such party and the state." I do not think the section applicable; that applies where somebody is wronged by the action of the defendant, and to him alone, or to him in conjunction with the state, an action for a penalty is given. An illustration of that is where a party is overcharged for freight or transportation by a railroad company. He is personally injured,—in the language of the statute, the party aggrieved; but in this case the penalty goes to the school fund, and the schools of the state are in no manner injured by this failure of the defendant to comply with the statute; the school fund can in no proper sense be considered a party aggrieved. Looking at the statutes of limitation applicable solely to civil cases, there is to be found no provision placing other than a 10-year limitation upon

cases of this kind. Turning to the criminal procedure of the state, article 11, Rev. St. p. 291, prescribes certain limitations. Section 1709 reads:

"If the penalty is given, the whole or in part, to the state, or to any county or city, or to the treasury thereof, a suit therefor may be commenced by or in behalf of the state, county, or city, at any time within two years after the commission of the offense, and not after."

Now, this action is what is known as a *qui tam* action; it is civil in form, but is to recover a penalty imposed by a penal statute, and is therefore, partially at least, criminal in its nature. Counsel did not discuss the applicability of this criminal statute of limitation, and therefore I express no opinion on the question; I simply suggest it for consideration, leaving a decision to the after-proceedings in this case.

Again: It is insisted that the statute imposes the penalty for a failure to comply with the conditions of the section; that, in fact, there are no conditions, but simply mandatory provisions; that this, being a penal statute, is to be construed strictly, and hence, there being no conditions, no penalty is recoverable. Whatever criticism may be placed upon the use of the word "conditions," the intent of the legislature is plain; and, although this be a penal statute, it is not to be so construed as to defeat the manifest intent of the law-making power. *In re Coy*, 31 Fed. Rep. 794. Giving full force to the intent of the legislature, it is obvious that it meant to enact that a failure to comply with these mandatory provisions cast upon the delinquent the prescribed penalty.

Again: It is insisted that all the provisions of the section must be disregarded before the penalty is cast. The statute says a refusal to comply with the conditions subjects to the penalty. That this means all of the conditions, is claimed, not only from the language used, but also from the fact that in 1885 the legislature amended this section so as to impose the penalty for a failure to perform any of the provisions. This is urged as a legislative interpretation of the meaning of the act of 1881. It may be that, or it may be the effort of the legislature to make plain what was doubtful before. I think it the latter, for the meaning of the act of 1881, while not certain, yet tested by the apparent intent, was the imposition of a penalty for delinquency in respect to any one of these provisions. A penal bond is broken by a failure to comply with any of the conditions of the bond, and in an action thereon it is unnecessary to charge a breach of all. This is similar; it is a penal statute with mandatory provisions, and obviously the legislature meant, and its language fairly construed implies, that a disobedience of any one of these provisions subjects the delinquent to the penalty.

Finally: It is insisted that but one penalty can be recovered for all delinquencies prior to the commencement of this action. The cases of *Fisher* v. *Railway Co.*, 46 N. Y. 644; *Parks* v. *Railroad Co.*, 13 Lea, 1; *Murray* v. *Railroad Co.*, 63 Tex. 407; *Gulledge* v. *Railroad Co.*, (not reported,) (Tex. Ct. App.,) are cited in support thereof. This question is also one that has embarrassed me no little. It seems shocking that a book account of penalties can be run up against a delinquent. In this case

the penalties sued for amount to over $30,000, and it is hard to believe that the legislature intended that such a burden of penalties should be cast upon a delinquent before its conduct is challenged and condemned in the courts. The authorities cited show that one penalty is alone recoverable, unless the language of the statute clearly expresses a contrary intent. I regret to say, and I do it with great hesitation, that such seems to be the intent of this section. It does not impose a penalty simply for a failure to construct a depot, but it says that for each day, from and after a specified day, the delinquent shall forfeit and pay the sum of $25. Now, that language fails of meaning if after a lapse of years of delinquency but one penalty was recoverable. The delinquent would not be forfeiting and paying $25 for each day of delinquency. Giving to this language that force which each word requires, it must be held that the legislature intended an accumulation of penalties, and the delinquent cannot atone for its delinquencies by the payment of a single penalty. In conclusion let me say that, while upon these several questions I have been driven, and upon some of them reluctantly and hesitatingly, to conclusions adverse to the defendant, I cannot forbear expressing a feeling that this action ought not to be maintained for the enormous sum claimed, and that a moral wrong will be done if in the final determination of this action it shall be adjudged that the defendant is under the law liable for the payment thereof. For the present, however, and upon the questions presented, the order must be that the demurrer is overruled.

OMAHA HORSE RY. CO. *v.* CABLE TRAM-WAY CO. OF OMAHA.[1]

(*Circuit Court, D. Nebraska.* October 25, 1887.)

1. COURTS—FEDERAL JURISDICTION—FEDERAL QUESTION—RETENTION OF CAUSE.
A horse-car company, claiming to have an exclusive franchise in Omaha, Nebraska, of which state it was a resident, sought in the federal courts to enjoin a cable company, also a resident of that state, from laying its tracks in Omaha, on the ground that the act incorporating the cable company was a state law impairing the obligation of contracts. The court held that the exclusiveness of the plaintiff's franchise was limited to a mere horse railway, but the constitution of the state forbidding the *damaging*, as well as the taking of private property for public use without compensation therefor, referred the case to commissioners to report what damage, if any, the plaintiff would suffer by the laying of the cable line. *Held*, that a real, substantial federal question having been involved in the case at the outset, the elimination of that question did not oust the court of jurisdiction of the question of damages.

2. EMINENT DOMAIN—DAMAGE TO PROPERTY—IMPAIRMENT OF FRANCHISE PRIVILEGE.
Section 21 of the Bill of Rights of the Nebraska constitution of 1875 provides that "the property of no person shall be taken or damaged for public use without just compensation therefor." *Held*, that where the tracks of a street railway, owning an exclusive franchise for that mode of carriage, were paralleled by those of a cable tram-way, the latter having obtained from the owner of the soil the right to occupy the streets, the property of the former

[1] See former report of this case, 30 Fed. Rep. 324.

was "damaged" and not "taken," and the provisions of Comp. St. Neb. c. 16, § 95, for ascertaining damages, being applicable only where property is "taken," damages might be assessed in an injunction suit between the parties, although they had failed to agree upon the amount of compensation.

3. SAME.

The charter of a street railway company gave it the exclusive right for 50 years to operate *horse cars* in Omaha, Nebraska; at the expiration of that time the franchise and corporate property were to revert to the city. A *cable company*, when the charter had still 30 years to run, paralleled on some streets the tracks of the railway company, and crossed them on others. *Held*, in proceedings by the latter for compensation for its property so "damaged," under the Nebraska constitution, of 1875, that the cable company was not liable for any injury flowing from the mere matter of competition, or from the fact that the better facilities of the new road attracted passengers from the old; and that the crossings worked no damage; but that the loss of passengers to the railway company caused by the inconvenience of access at those points of the route where the cable cars ran between the street cars and the sidewalk was, though difficult of accurate estimation, a legitimate matter of damage.

4. SAME.

It appeared that on those portions of the route of the street railway paralleled by the cable, the number of passengers carried by the cars would be reduced 75 per cent., and that of the 75 per cent. thus secured by the cable, 70 per cent. would be due to the competition, and but 30 per cent. to inacessibility. It was also shown that the operating expenses of the railway company were 50 per cent. of its earnings. *Held*, that 30 per cent. of the 75 per cent. of the passenger traffic so diverted should be taken as the basis of calculation and the result cut down 50 per cent. for the present year, and that the amount so ascertained be computed at 10 per cent. as damages for the unexpired years of the franchise.

5. SAME.

Where a proposed public use causes to property, no part of which is taken, an injury of such a character as, if it accrued when a portion of the property was taken, would form a proper element of the damages to the part not taken, there is a "damage" within the scope and protection of the constitutional provision, and the owner is entitled to compensation.

6. REFERENCE—HEARING—REMAND FOR ADDITIONAL TESTIMONY.

Where the opinion advising a reference to commissioners to report the plaintiff's damages plainly indicates the elements of damage to be considered, the hearing will not be sent back for additional testimony on one point of injury on the ground that the party moving therefor had but brief notice of the meeting of the commissioners; and this is especially so when, after the testimony of the other party upon that point had gone in, the movant asked for no delay, but introduced all the evidence it desired.

7. INJUNCTION—FURTHER RELIEF—ASSESSMENT OF DAMAGES.

In a suit for injunction, where the prayer of the bill is not only for the injunction but for other and further relief, the prayer is broad enough, a case being made out, to include assessment of damages.

In Equity. On exceptions to commissioners' report, etc.

G. E. Pritchett, *Thurston & Hall*, and *J. M. Woolworth*, for complainant.

J. C. Cowin, for defendant.

BREWER, J. This case is now submitted on exceptions by both parties to the report of the commissioners, and on certain motions and applications connected therewith. A brief review of the facts connected with this litigation will help to clearly understand the present questions. The plaintiff holds under special charter, granted by the territory of Nebraska, an exclusive franchise for the building and operating of a horse railway in the city of Omaha, for a period of 50 years from the first of

June, 1867. At the commencement of this suit it had constructed and in operation over 18 miles of railway. The defendant is a corporation organized under the general acts of the state of Nebraska, and having received permission from the city of Omaha, at an election held therefor, commenced the construction of a cable tram-way on certain streets therein. This bill was filed to enjoin such construction on the ground that it infringed upon the exclusive franchise of plaintiff. After examination, I held that the exclusive rights of plaintiff were limited to a mere horse railway, and did not include all modes of street railway carriage, and therefore that the defendant was not infringing upon such exclusive rights. I also held that, as the constitution of Nebraska forbade the taking or damaging of private property for public use without just compensation therefor, the plaintiff was entitled to recover of the defendant any proper damages sustained by the construction of such cable tram-way; and I directed that a commission be appointed to examine and report such damages. That commission was named by my brother DUNDY, made their examination, heard all the testimony that was offered by either party, and in June last filed their report.

One motion of the defendant is to dismiss these proceedings with reference to the assessment of damages, on the ground that this court has no jurisdiction of such matter. Both parties are citizens of Nebraska, and the jurisdiction of this court was invoked on the ground that the state of Nebraska had passed a law impairing the obligation of its charter contract with the plaintiff. That question having been decided against the plaintiff, defendant insists that the case necessarily went out of this court; that the matter of damages is a question purely under state laws, of which this court could not take jurisdiction. It further insists that the prayer for relief in plaintiff's bill, being for an injunction, is not broad enough to include the assessment of damages. I think the defendant is wrong in both of these propositions. It is the settled law of the supreme court that, when a case is presented involving a federal question, the jurisdiction of the court attaches to the whole case, and is not limited to the mere decision of that single federal question. *Tennessee* v. *Davis*, 100 U. S. 257; *Railroad Co.* v. *Mississippi*, 102 U. S. 135. In this last case, Mr. Justice HARLAN, speaking for the court, says that it is settled law in that tribunal—

"That it is not sufficient to exclude the judicial power of the United States for a particular case, that it involves questions which do not all depend on the constitution or laws of the United States; but, wherein a question to which the judicial power of the Union is extended by the constitution forms an ingredient in the original causes, it is within the power of congress to give the circuit courts jurisdiction of that case, although other questions of fact or of law may be involved in it."

Counsel's suggestion that any case might be brought in this court by the mere assertion of a right under the federal constitution, is easily answered. No mere assertion that a federal question exists, or that a right is claimed under the federal constitution, is of itself sufficient to give jurisdiction; it must appear that there is some real, substantial federal ques-

tion involved. Again, inasmuch as the prayer for relief contains also the general prayer for other and further relief, it is familiar law that the court may award such other relief as is justified by the facts stated in the bill, and may fairly have been considered within the contemplation of the parties in the litigation. This motion of the defendant must therefore be overruled.

On the other hand, plaintiff asks, practically, that the court change its decree heretofore rendered, and grant an absolute injunction; and this on the ground that the court has found that the plaintiff's property would be damaged by the construction of defendant's tramway; and that, under the clause in the Nebraska constitution heretofore referred to, it is entitled to compensation therefor. Plaintiff urges that no right of eminent domain has been granted to defendant, that the same section of the Nebraska constitution prohibits the taking and the damaging of private property for public use, without just compensation, and that as no private property can be taken for public use by any party to whom the right of eminent domain has not been given, so no private property can be damaged except under the same circumstances; and hence that, unless the parties voluntarily agree upon the amount of compensation, the construction of the tram-way should be absolutely enjoined. I think this is an error. In the first place, the Nebraska constitution does not require payment in advance for either the taking or damaging of private property for public use; in the second place, defendant has obtained from the owner of the soil the right to occupy the streets, and none of the plaintiff's property is taken. In the third place, the supreme court of Nebraska in two cases (*Railroad Co.* v. *Reinhackle*, 15 Neb. 279, 18 N. W. Rep. 69, and *Railroad Co.* v. *Fellers*, 16 Neb. 169, 20 N. W. Rep. 217,) have drawn the proper distinction between cases of taking and those of damaging property, and held that the statutory provisions apply simply to the case of taking, and that in the other case an action for damages will lie.

Defendant also moves the court to send the hearing back to the commissioners, or to a master, in order that it may offer additional testimony upon one point, and that is as to the number of passengers which daily get on or off plaintiff's cars on those streets, or portions thereof, in which plaintiff's tracks are paralleled, or proposed to be paralleled, by the defendant's tram-way. It urges in support of this that it had but brief notice of the meeting of the commissioners, and that it had no knowledge of what matters the commissioners were going to consider in forming their estimate of the amount of the damages. To this it may be replied that it asked no delay from the commissioners, it offered all the testimony which it then desired, and that this matter was plainly called to its attention in the opinion of the court directing the appointment of the commissioners. The conclusions to which I have come in reference to the report of the commissioners suggest also additional reasons for overruling this motion.

And now I come to the report of the commissioners, and, without naming in detail the various exceptions of the two parties, respectively,

I shall notice the facts, make some comments on the question of damages, and state the conclusions to which I have come.

Referring to the facts as heretofore stated, the plaintiff has 18 miles of railway. It also owns 62 cars, about 50 of which are in daily use; the daily carriage of passengers ranges from 15,000 to 18,000 persons; the average daily receipts in summer are about $800; those in June last, estimating the last three days as equal to the others, amounted to $24,874.17; in winter the receipts are about 25 per cent. less; the operating expenses are from 50 to 60 per cent. of the earnings; the value of the track varies from $10,000 to $12,500 per mile. It will thus be perceived that the net earnings run from $200 to $400 a day. The franchise of the plaintiff includes all the streets, with perhaps a single exception; the permission to the defendant covers only a limited number of streets; the commissioners, besides hearing all the testimony that either party offered, made a personal examination of the various lines, completed and projected, of both parties; the defendant's tramway crosses the plaintiff's track in one or two places; the commissioners considered that these crossings worked no damage, and allowed nothing therefor. They arrived at their estimate of damages in this way: As heretofore stated, in two places, and for a few blocks in each, the defendant's tramway occupies the same street as the plaintiff's track, being placed in that portion of the street between the plaintiff's track and the sidewalk. Passengers going to the plaintiff's cars must cross the defendant's tramway, over which will be passing, with more or less speed and frequency, defendant's cable cars. This naturally would operate to prevent some from seeking plaintiff's cars, when by the use of defendant's cars they can be carried to the same, or nearly the same, place. This inconvenience of accessibility was considered a legitimate matter of damage and compensation. They state their conclusions as to one place in this way:

"We find the average number of passengers traveling upon the cars of the plaintiff company on Tenth street, where its said road is paralleled by the defendant company, to be (1,266) twelve hundred and sixty-six per day; and the revenue per day derived from said number of passengers so traveling to be sixty-three and 30-100 ($63.30) dollars. From all the testimony offered and available by the commissioner, it is found that seventy-five (75) per cent. of the last above-stated amount would be carried by the cable company, defendant, and twenty-five (25) per cent. would be carried by the plaintiff company. Of that amount carried by the said cable company, defendant, we find seventy (70) per cent. of the amount carried by it to be so carried as the result of competition, which is not by the commission considered; and thirty (30) per cent. of the amount thus carried to be carried as the result of inaccessibility, and difficulty of reaching the plaintiff's cars and tracks,—by reason of the location of defendant company's tracks outside said plaintiff's line, and of cars moving upon and up and down the same. Your commissioners find that thirty (30) per cent. of seventy-five (75) per cent. of the sum of ($63.30) sixty-three and 30-100 dollars is the sum of fourteen and 25-100 ($14.25) dollars."

They proceed in the same way as to the other place of mutual occupation of the street, and from the two conclude that the plaintiff's damages amount to $23.65 per day, or $8,632.25 per year, which, for the

entire period of plaintiff's franchise, they think should be paid by the defendant to the plaintiff. It is upon this last matter that the defendant seeks to offer additional testimony, and files an affidavit that the average number of passengers getting on and off the plaintiff's cars at the first place named does not exceed 100 every 24 hours; and at the other, 150 every 24 hours.

Now, these are all the material facts detailed, or which the commissioners had before them for consideration, other than the information obtained from personal examination. Upon these facts I remark:

1. That while it seems clear that the plaintiff is damaged in such a manner that it ought to receive compensation, and that the case is one that comes within the purview of the constitutional provision, it is equally clear that it is difficult to point out the specific matters which are proper for consideration; and, also, when those matters are determined, to ascertain with any decree of accuracy the amount of the damage. Any injury which flows from the mere matter of competition, or from the fact that the better facilities of the new road attract passengers from the old, must be excluded; for if the defendant has a right to construct its road, as has been decided, no one has a right to complain of the better facilities or the greater inducements to passengers it provides. The greater speed and comfort of railroad travel will speedily destroy the business of a prior stage line, but this give no right of action to the latter, and furnishes no basis of damages. It is simply one of the inconveniences which attend the matter of improvement, of which no individual can complain; and the commissioners in their report have endeavored to separate this matter of competition from that of inaccessibility.

2. I remark that the basis of compensation suggested by the defendant is obviously inaccurate. It suggests the difference between the value of plaintiff's property before the completion of defendant's line, and that after. But this would include all that damage which flows from competition; and, when the new is very much better than the old, competition will practically destroy the value of the old. As between the cable and the horse railway, I have seen in Kansas City the effect of this, for there the superior speed and comfort of the cable road has practically destroyed the horse railway system. And to hold that the value of this system thus destroyed should be charged against the cable roads, would impose a burden too monstrous to be thought of. Consider for a moment the value of a property whose earnings are as vast as those of this property are shown to be, and think of charging that value as the burden of compensatory damages upon a cable railway system whose operation sweeps away the bulk of those earnings; large as are the damages awarded by the commissioners in this case, they would be but as a mere trifle compared with those which would be awarded upon this basis.

3. The difficulty of accurately estimating the damages rests not alone upon the present condition, but depends also upon the facts that the future is an element which must be taken into consideration. Who can say as to any given passenger what motive prompts him to take the car of the one road or of the other? How much is he affected by a desire

to avoid the risk of crossing the tracks of the one road to reach the cars of the other, and how much longer distance is he willing to walk at the end of his railroad traveled, rather than incur such risk? How much is he influenced by the superior speed and comfort of travel on the one over that on the other? These are questions incapable of exact determination as to the individual, as well as to the multitude of passengers. We can only form an estimate from consideration of the difficulty of access, and the risk of accidents. Further, who shall say what the future of Omaha will be? We find there to-day a city of from 60,000 to 80,000 people, growing rapidly, with vast business interests and commercial industries, and who can foretell what in the next 30 years will be the population of that city, or the magnitude of the street travel therein? And again, who shall say that the cable railway is the perfection of street carriage? May not to-morrow the electric railway or some other improvement in street carriage supplant both horse railway and cable, so that that system, which to-day seems to promise so much of profit, and to be such an injury to the horse railway system, may to-morrow itself be of little value, and no real competitor or injury to it? These and many other like considerations make it clear that no accurate measurement of the damages caused to the plaintiff's system by the construction of the defendant's cable roads can be made.

4. I remark that the lack of certainty in the measurement of the damages is no reason for refusing compensation. The law is full of instances in which there is the same lack of certainty, and where it is simply left to the sound discretion of the jury to determine what, under the circumstances, is fair and reasonable compensation. Take the common case of an injury to a person—the loss of a limb. The value of such limb, the damage from such injury, cannot be ascertained by any mathematical process. Life or limb and money are not convertible terms. There is no principle in mathematics which links the one to the other; and yet suits are maintained every day, and damages awarded, for just such injuries. All that can be done in those cases is to place the circumstances —the facts of the injury—before the jury, and leave them to say what, in their sound discretion, is just and fair compensation. All that is necessary is that there be a certainty of damage as the direct result of the act complained of, and that it does not belong to that class of damages known in the law as *damnum absque injuria*.

5. I remark that, to my mind, there is in this case a certainty of damages other than those flowing from competition, which are the direct and inevitable result of the building of defendant's cable system, come within the purview of the constitutional provision, and for which the plaintiff is entitled to compensation. Formerly all compensation was limited to cases in which property was taken. That was the scope of the constitutional provisions, but the often manifest injustice of such limitation has led to constitutional action in many states extending compensation to cases in which property is damaged, although none is actually taken. Several cases have arisen in which has been discussed the question of what injuries to property give, under such a constitutional provision, the

right to compensation. One case was before me, that of *McElroy* v. *Kansas City*, 21 Fed. Rep. 257. It is futile to attempt a general answer, or to lay down a rule to determine all cases. One proposition may be affirmed. Whenever a proposed public use causes to property, no part of which is taken, an injury of such a character as, if it accrued when a portion of the property was taken, would form a proper element of the damages to the part not taken, there is a damage within the scope and protection of this constitutional provision, and entitling the owner to compensation. Take this illustration: A railroad company condemns a right of way through a farm; the value of the strip of land thus taken is always awarded as damages; so, also, the injury which results to the balance of the farm by reason of the appropriation of the strip taken to the contemplated use; and in this injury is considered the difficulty of passage, the impairment of free access between one part of the farm and the other. The presence of a railroad track, with its moving trains through the middle of a farm, causes both risk and inconvenience in passing from one part of the farm to the other. And this inaccessibility, as we may call it, forms one element of damages. Another illustration of a similar nature. Suppose the owner of a lot in the city builds a store on the rear of that lot, leaving vacant ground between it and the street. If a railroad company condemns a right of way over his vacant ground in front of his store, thus interfering with freedom of access from the street, the same rule of estimating damages would apply, and the inaccessibility would be declared a proper subject for compensation. This principle controls the case at bar. A railroad track, with passing cars between plaintiff's track and the sidewalk, the ordinary passage-way of foot passengers, impairs more or less access to plaintiff's cars. It is a direct hindrance and injury to accessibility thereto. Why should this hinderance and injury be not a legitimate element of damages, upon the same principle that controls in the illustrations cited? That a right is given defendant to lay its track does not destroy the fact of the injury, does not deprive plaintiff of a right to compensation, any more than the right acquired by the railroad company to construct its track in the cases cited. If it be said that running a line of omnibuses would operate in the same way, I reply that that is an ordinary use of the streets, open to all, and requiring no special permission; there is no appropriation to any public use; it is only a matter of increased travel. But a railroad track is a new use; perhaps not such a one as requires compensation to the adjoining lot-owners, but one special, not free to all, and acquired only through the direct assent of the public authorities.

I conclude, therefore, upon the rule above laid down, that the commissioners were right in the manner of ascertaining compensation. As to the amount, they have assumed that the carriage of the passengers, prevented by inaccessibility from traveling in plaintiff's cars, costs nothing; the costs of carriage evidently being considered paid by the other passengers. This is not a fair way of estimation. Who can say that this diminution in the number of passengers will not be accompanied by a corresponding reduction in the number of cars, and in the expenses

of operating the road? The expense of carriage is one-half the receipts, and this should be considered as applicable to every passenger. In other words, one-half of the nickel received from each passenger goes to pay the cost of his carriage. The net earning from each is only two and one-half cents. This is all that ought fairly to be considered. I shall therefore divide the amount allowed by the commissioners, and hold that the damage is only $4,316.12½ per annum. My brother DUNDY suggests that the true way is to ascertain the present value of the damages for the unexpired years of the plaintiff's franchises computed at 10 per cent., and award that as the amount of damages to be paid. I think of no better way, and agree with him, only holding that the amount should be divided as above stated. In coming to this conclusion, I am well aware that this cannot be considered as mathematically accurate, for reasons heretofore stated; nor do I affirm that the commissioners' estimate of passengers is absolutely correct. Indeed, the question is, does it affirmatively appear that they have erred? and on this it must be remembered that they had the benefit of a personal examination. I have reached my conclusion in the same way that a jury arrives at its verdict in a personal injury case, and cannot hold that they erred, save in the one matter pointed out. Although the amount thus awarded may seem large, yet when I consider all the facts and circumstances, the certain and vast damage which defendant's cable road will inflict upon plaintiff's property, I cannot think the amount unfair or unreasonable, especially in view of that clause in section five of plaintiff's charter which provides that at the end of 50 years the roads, and depots, and other equipments shall revert to the city of Omaha.

The clerk will compute the present value from the date of entering this decree to the termination of plaintiff's franchise, and the order will be that amount is awarded as damages to the plaintiff for all the injuries done, or to be done, by the construction of defendant's cable road in all the streets which it is now authorized to occupy. All exceptions, except as above indicated, and all motions and applications, will be overruled and denied. Costs will be charged against the defendant.

IOWA ECONOMIC HEATER CO. *v.* AMERICAN ECONOMIC HEATER CO. and others.

(*Circuit Court, N. D. Illinois.* November 21, 1887.)

1. FRAUD—FALSE REPRESENTATIONS TO CORPORATE OFFICER.
   In an action by a corporation to recover damages for alleged fraudulent misrepresentations as to the merits of a certain heating device, made by officers of the company owning said device, to certain parties who thereupon organized a corporation for the purpose of selling said heater, *held*, that such statements were in effect made to such corporation.
2. SAME—FALSE REPRESENTATION—SALE OF INVENTOR'S RIGHTS.
   A corporation purchasing the right to sell a device or invention may rightfully rely upon the statements and representations of the vendors, and is not bound by the doctrine of *caveat emptor*.

3. FRAUD—PLEADING—JOINDER WITH CONTRACT.
A suit being brought for fraudulent representations in the sale of the right to sell a certain invention, the plaintiff also alleged that defendant failed to deliver to plaintiff a certain number of the patented articles as agreed. *Held*, on demurrer for joinder of tort and contract, that this latter allegation was not a cause of action sounding in contract, but was an allegation of defendants' fraudulent scheme, and as such is pertinent to the claim for damages for the tort.

F. A. Johnson and *Edwin Bean*, for plaintiff.
Payne & Porter, for defendants.

BLODGETT, J. This is an action on the case to recover damages for alleged fraudulent misrepresentations made by the defendants to the plaintiff. The declaration, in substance, avers that the defendant Coffey as president, and Young, an employe of the defendant company, made to certain citizens of Iowa, who afterwards united in the formation of plaintiff company, certain false and fraudulent representations in regard to the merits of a heating device manufactured by the defendants under letters patent issued October 9, 1883, to one Peck, which patent was owned by the defendants, and by reason of such representations plaintiff was induced to pay $15,000 for the right to sell such heater in the state of Iowa, and induced to give defendants an order for the manufacture of 100 heaters, to be supplied within 30 days, which order has never been filled.

The declaration further avers that the said representations were false, and that Coffey and Young well knew that they were false at the time they were made, and that the same were made with the intent to defraud the plaintiff, and said heaters were of no practical value, and wholly worthless, as defendants and their said agents then well knew, and that, by reason of such fraudulent conduct of the defendants, the plaintiff has sustained damages to the extent of $20,000.

To this declaration the defendants demurred, the grounds of the demurrer being: (1) That the plaintiff had no corporate existence at the time these representations were made, and that the representations complained of were not made to the plaintiff. (2) That the declaration sounds partly in *assumpsit* for the manufacture and delivery of 100 heaters, and partly in tort for the false representations complained of. (3) That it does not appear that there was any concealment by defendant or its officers or agents of the defects of the heater which made it a failure.

As to the first objection, it sufficiently appears that the representations complained of were made to the persons who afterwards united in the formation of the plaintiff company, and that the plaintiff purchased the right of the state of Iowa by reason of said representations, as well as by reason of the statements in regard to the merits of the heater contained in a circular issued by the defendant company, and which was shown or presented to the officers of the plaintiff after the plaintiff company was organized. The allegations are that the plaintiff purchased the right and paid the $15,000 by reason of these false representations. A corporation cannot be said to know anything except through its members or

agents, and representations made to individuals, by reason of which such individuals are induced to form a corporation, may be said to be made to the corporation. The statements made were the moving cause of the organization of the corporation, and it was formed to act upon the information given to those who promoted its organization; and if this information was false and fraudulent, and the corporation was damaged thereby, it may have its action for such resulting damages. In Mor. Corp. § 573, it is said:

"The agents of a corporation are subject to the general rule of the common law; that a person is liable for the direct consequences of a false and fraudulent representation whereby another is misled. Thus it has often been decided that directors are liable for fraudulent representations as to the financial condition of the company, whereby others are induced to give credit to the company, or to purchase its obligations or shares of its stock. If directors issue reports or prospectuses intended for general circulation, and to advertise and give credit to the company with the public, they are responsible for the natural consequence of their action in this respect; and, therefore, if the reports or prospectuses are false, and were made fraudulently, any person into whose hands they come in the ordinary course of events, and who is misled thereby, has his action against the directors; it is not necessary that the misrepresentation be made by the directors directly to the party complaining."

While this authority does not state just this case, yet the principle seems to cover the question here involved—that if false and fraudulent representations are made to persons who afterwards become officers or agents of a corporation, and the corporation acts on the faith of such representations, and is thereby defrauded, an action will lie in favor of the corporation for the damages thus sustained.

There can be no doubt in this case, from the allegations stated, that if these citizens of Iowa to whom these representations were made had at once formed themselves into a firm for the purpose of purchasing and vending the right to use these heaters, they would have had their action; and it is well known that the formation of a corporation is merely a method of associating capital for the purpose of transacting such business as corporations of this class are authorized to transact; hence these statements, if false, made to such persons, are clearly statements made to the corporation itself. This corporation may be said to have had its origin in the impression which was made by the statements upon the minds of the persons who organized it. The principle is also asserted in *Mason* v. *Crosby*, 1 Woodb. & M. 342; *Smith* v. *Babcock*, 2 Woodb. & M. 246; *Crocker* v. *Lewis*, 3 Sum. 1.

As to the misjoinder, the allegation of the plaintiff is that the defendants refused to sell the right to manufacture these heaters, but agreed to fill plaintiff's orders for heaters, and allow plaintiff to sell them in the state of Iowa; and that an order for 100 heaters was given, which the defendants refused to fill. No specific damages were claimed for the non-fulfillment of this order, but the allegation is that this refusal to allow others to make, and the refusal of defendants to fill the order, was part of the scheme of the defendants to conceal the radical defects of the

heaters from the plaintiff, and, in this light, this allegation is undoubtedly material and pertinent to the claim for damages.

As to the point that the plaintiff is held to the doctrine of *caveat emptor*, it is enough to say that the declaration avers positive statements by the officers of defendant company, verbally and through its circulars, as to the superior utility and success of the heaters, and the law is well settled that the plaintiff had the right to rely and act upon these representations, and if they were false and fraudulent, an action will lie to recover any damages, upon the principle that actual fraud vitiates all contracts, and entitles the party to damages by reason of such fraud. The position of defendants on this point, in effect, is that a person to whom false representations are made in regard to the utilities of a new invention is bound to know that such representations are false, and that such vendors may deal in falsehood and misrepresentation with impunity; for it is the logic of the position taken by the defendants that a party offering a new device for sale may state falsehoods, to any extent that he thinks will promote a sale, if he can thereby induce another to deal with him; because the one with whom he deals is bound, by the doctrine of *caveat emptor*, to know that the machine would not work. It will not do to turn people loose to deal in falsehood, with impunity, in that way.

The demurrer is overruled.

UNITED STATES *v.* BRANDESTEIN and others.

(*District Court, N. D. California.* November 25, 1887.)

PUBLIC LANDS—UNLAWFUL INCLOSURE—RAILROAD GRANT.

Act of congress of February 25, 1885, provides that all inclosures of public lands entered by any person or corporation without claim or color of title to said lands acquired in good faith shall be unlawful. Defendant, as licensee of the Southern Pacific Railroad Company, had inclosed certain lands of the land grant of the company. The lands had, on filing of the plat of the proposed road by the company, been withdrawn from settlement by the United States, though they had not been earned yet by the company. *Held*, that such inclosure of lands did not fall within those prohibited by the act of congress.

John T. Carey, U. S. Atty., and *H. C. McPike*, Asst. U. S. Atty., for the United States.

Milton Eisner, (*J. D. Redding*, of counsel,) for defendants.

HOFFMAN, J. This action is brought under the act of February 25, 1885, entitled "An act to prevent unlawful occupancy of public lands." The first section is as follows:

"All inclosures of public lands in any state or territory of the United States heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title, made or acquired in good faith, or an

asserted right thereto, by or under any claim made in good faith, with a view to entry thereof at the proper land-office, under the general laws of the United States, at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, creation, construction, or control of any such inclosure is hereby forbidden; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state, or in any of the territories of the United States, without claim or color of title, or asserted right, as above specified, as to inclosure, is likewise declared unlawful, and hereby prohibited."

The second section empowers the court before which the suit is brought, in case the inclosure shall be found unlawful, to make the proper order or decree for the destruction of the inclosure in a summary way, unless the inclosure shall be removed within five days after the order of the court.

The evidence in this case discloses that the defendants have erected a continuous fence on lands owned by them, or on odd-numbered sections of land within the limits of the grant to the Southern Pacific Railroad Company by the act of June 27, 1866, of which company they are licensees. This fence surrounds and incloses a large tract of land, in the center of which is an inconsiderable acreage of public land; but roadways are provided, and the fence furnished with gates, which are kept unlocked, and which afford access to the public land within the inclosure. The evidence further shows that, on January 3, 1867, the railroad company, in compliance with the provisions of the act of 1866, filed in the office of the commissioner of the land-office a plat thereof, in which the line of the road was designated. By the sixth section of the act the odd sections of land granted by the act, after the general route of the railroad shall be fixed, are declared "not to be liable to sale, entry, or pre-emption before or after they are surveyed, except by the said company, as provided in the act." The question to be decided is whether this continuous fence, constructed as above described, has been built and maintained in violation of the act of 1885, and should be removed by order of the court.

I do not understand it to be contended on the part of the United States that the act was intended to prohibit the erection of fences upon their own lands by the owners thereof, whenever, by connecting with other fences built on public lands, they form part of a continuous line of fencing, and serve to complete an inclosure of public lands. But it is urged that the title to the reserved or odd sections upon which fences have been erected by the license or authority of the railroad company is in the United States until the railroad is constructed and accepted by the government, and that, until the lands have been earned by the railroad company, the odd sections must be regarded as public land, and their inclosure within the prohibition of the act of 1885.

The defendants, on the other hand, contend that the act of congress granting lands to aid in the construction of the railroad operated as a grant *in præsenti* of certain sections of land, to be afterwards located; that when so located, by the filing in the land-office of a map designating the route of the proposed railroad, as prescribed by law, the location became

certain, and the title of the company attached to the granted sections as of the date of the approval of the act; that the provisions of the act imposing certain conditions on the company do not affect the creation or vesting of the estate granted by the act; that they are merely conditions subsequent, which render the estate liable to be defeated for breach of such conditions, and that upon such breach congress alone has power to declare or take advantage of the forfeiture. These views are maintained in a very elaborate opinion by the supreme court of Montana in *Railroad Co.* v. *Majors*, 2 Pac. Rep. 322. There are also some general expressions in the opinion of the supreme court in *Buttz* v. *Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. Rep. 100, from which the same conclusions might be drawn.

On the other hand, it has been held by DEADY, J., in two judgments marked by his accustomed vigor and clearness, that the odd-numbered sections granted by congress in aid of railroads are set apart and devoted to the construction of the roads, but that they are not granted *in præsenti* to the corporations; and that the act is, in effect, an agreement or provision that the same shall be conveyed absolutely to the corporation when, and as fast as, any 25 miles of the roads shall be completed and accepted by the United States; and that in the mean time the legal title to the unearned sections remains in the United States, who may therefore maintain legal proceedings against any one who unlawfully cuts timber upon them. *U. S.* v. *Childers*, 8 Sawy. 171, 12 Fed. Rep. 586; *U. S.* v. *Ordway*, 30 Fed. Rep. 36. I cannot add anything to the force of the arguments by which this eminent judge has maintained the conclusions he has reached. I will only remark that it would be a strange instance of improvidence or oversight on the part of congress if, when setting apart and devoting so large a portion of the public domain to aid and secure the construction of a railroad, it has conferred upon the projectors of the road the right to dispose of, incumber, or greatly impair the value of the lands, by cutting the timber, or other waste, when as yet the road only exists on paper, and when its construction has not been, and perhaps never will be, even commenced. But it is to be observed that, by the terms of the law, upon the filing of the map designating the route of the proposed railroad, the granted sections are withdrawn from settlement and occupancy under the homestead and pre-emption laws. They therefore cease to be vacant public lands of the United States, so far as that phrase imports lands open to settlement, and, whether or not the fee passes to the companies so that they can alienate, incumber, or waste them, at least an inchoate or inceptive title passes, which will ripen into a perfect title when it is earned by the construction of the road; and in the mean time the lands are held in trust for the company, by the government, which has agreed not to dispose of or appropriate them. Whether the companies may not, while the road is in process of construction, enter and build fences upon the land, was not considered or decided by Judge DEADY.

But whatever view may be taken of the nature of the railroad company's title to the granted sections before the completion and acceptance

of so much of the road as will entitle them to a patent, it is, I think, plain that the entering and construction of fences upon the land are not within the prohibition contained in the act of 1885. That act, as the debates clearly show, was intended to prevent the inclosure and appropriation of vast tracts of public land, said to be millions of acres in extent, by associations of wealthy cattle owners known as "cattle kings," without a shadow or pretense of title. These tracts were surrounded by barbed wire fences, and all persons desirous of settling upon the land under the laws of the United States were rigorously excluded, in some cases by violence or threats. Such inclosures the law was intended to prohibit, and they were required to be demolished by the decree of the court; but great care seems to have been taken to restrict the application of this unusual and summary remedy to cases of wholly unauthorized appropriations and inclosures of public lands, to which the party making the inclosure "*had no claim or color of title made or acquired in good faith.*" It certainly cannot be contended that the railroad company erecting fences on the granted lands have done so "without claim or color of title made or acquired in good faith;" and it is only to such erections and inclosures that the act applies.

PIM and others *v.* WAIT and others.

(*Circuit Court, S. D. New York.* November 12, 1887.)

1. EVIDENCE—PAROL—AUTHORITY OF AGENTS.
A "sold note," made by an agent for a principal, as follows: "Sold for account of Pim, Forwood & Co. to Sherman & Taylor, 1,000 bags African coffee," and giving terms of the sale, and signed by the agents, does not express any contract between the agents and their principal, and in an action by the latter against the former, for making such supposed sale without any authority on the part of the supposed buyers, such note does not exclude evidence showing that the principal understood and approved of the authority on which the agent so acted, although such evidence shows there was no *sale* as expressed in the writing signed by the agents.
2. APPEAL—WHAT REVIEWABLE—VERDICT.
Where the evidence upon an issue tended to support the views of each party, *held*, that the verdict of the jury should not be disturbed.

On Motion for New Trial.
Everett P. Wheeler, for plaintiffs.
William H. Townly, for defendants.

WHEELER, J. This action is brought to recover damages for negligence or misfeasance about the sale of some coffee which the defendants as brokers undertook to dispose of for the plaintiffs. Upon the trial by jury it appeared that the defendants bargained the coffee to Thompson Bros. at 9¼ cents per pound, and executed a "sold note," so called, showing such sale; that afterwards, upon the authority of Thompson Bros.,

who assumed to act for Sherman & Taylor, the defendants canceled the sale to Thompson Bros., and took from them a sold note of the coffee from the plaintiffs to Sherman & Taylor, at 9½ cents, and executed and delivered to the plaintiffs a like note; that Sherman & Taylor refused to receive the coffee; that the plaintiffs brought suit against them for damages in consequence of the refusal, in which the plaintiffs failed to recover because neither Thompson Bros. nor the defendants had authority to execute either of the sold notes to Sherman & Taylor, and that there was no contract of sale, and that the plaintiffs had paid counsel fees, and costs awarded to the defendants, in that suit. The defendants' evidence tended to show that the plaintiffs knew and approved of the execution of the sold note upon the authority of Thompson Bros., and the plaintiffs' evidence, that they did not. This question was submitted to the jury, who found for the defendants. This motion for a new trial is urged upon the grounds that the evidence as to the knowledge and approval of the plaintiffs of the execution of the sold note on the authority of Thompson Bros. was inadmissible, and that the verdict was against the weight of evidence so far that it ought to be set aside.

It is said in argument that the evidence was not admissible because its effect was to vary the terms of the sold note. The note reads: "Sold for account of Pim, Forwood & Co. to Sherman & Taylor, 1,000 bags African coffee," and, after giving the terms of sale, is signed by the defendants. The evidence tended to show that there was no sale upon any authority, and that the plaintiffs, as well as the defendants, relied upon the assumption of authority from Sherman & Taylor by Thompson Bros., which they did not have. This did tend to show that what was stated in the instrument as a sale was not a sale, unless Thompson Bros. had authority, and would vary the terms of the instrument. This instrument, however, does not show the terms of any contract between the parties to this suit, nor profess to, but only between the plaintiffs and Sherman & Taylor. The general rule, about which there is no question, only excludes parol evidence to affect written instruments in suits between parties to them. 1 Greenl. Ev. § 279. The plaintiffs and defendants are not parties to this instrument within that rule. The contract between them arose out of the undertaking of the defendants to dispose of the coffee for the plaintiffs, and that contract is not anywhere expressed in the instrument. Therefore, this evidence would not be excluded by this rule. But, further than this, the evidence which contradicts the terms of the instrument came from the plaintiffs. The instrument professes to show a sale. The gist of the action is that there was no sale. The plaintiffs had to show that to make out any case. They claimed damages because they, as they said, relied upon this paper as a representation by the defendants that there was a sale, when in fact there was none, and incurred these liabilities for expenses and costs in consequence of that reliance. In supporting this claim they contradicted the instrument by showing that what the defendants did, which went towards a sale, did not make a valid sale. Herein lay what they claimed to be negligence or misfeasance on the part of the defendants. The defend-

ants met this by showing that what they did in this respect was done with the approval of the plaintiffs. This met the plaintiffs' claim. They could not justly find fault with what was done with their own knowledge and approval. The defendants' evidence would also show that the plaintiffs relied upon the assumption of authority by Thompson Bros., and not upon the representation of the defendants implied in the presentation of the paper. This evidence of the defendants did not contradict the terms of the instrument, but met that of the plaintiffs which contradicted it. The rule invoked by the plaintiffs does not appear to have been violated.

The plaintiffs do not claim that the question of fact arising upon the evidence was not fairly laid before the jury, but insist that in their finding upon it the jury went contrary to the evidence. The transaction in respect to the delivery of the sold note to the plaintiffs was had between one of the plaintiffs and one of the defendants. This defendant testified that he fully informed that plaintiff how the business had been done, and that he approved of the method of it, and accepted the note. That plaintiff denies this. Another defendant testified that this plaintiff said shortly after, when he knew that Sherman & Taylor repudiated the sale, that the defendants had acted properly, and he did not blame them. That the plaintiffs pursued Sherman & Taylor tended strongly to show that they supposed that the sold note was executed upon due authority from them. This consideration was forcibly presented to the jury in argument in behalf of the plaintiffs. But the defendants might inform the plaintiffs of their reliance upon Thompson Bros. having authority from Sherman & Taylor, and the plaintiffs might approve of their acting on that reliance, and adopt what they had done, and proceed against Sherman & Taylor on that supposition. If the jury took that view, they would not proceed without evidence, nor so contrary to the weight of the evidence as to show that they had not fairly considered it. The weighing of the evidence is for the jury, and when they have had it to weigh, and appear to have weighed it fairly, the result reached by them should not be disturbed, although on another trial before another jury a different result might be, or probably would be, reached.

Motion for a new trial denied, and stay of proceedings vacated.

GUYOT, as Liquidator, etc., *v.* HILTON and another.

(*Circuit Court, S. D. New York.* November 29, 1887.)

TRIAL—PRODUCTION OF PAPERS—DISCOVERY.

A motion, made under Rev. St. § 724, relating to the production of books and writings, to require plaintiffs, the official liquidators of a firm, to produce for defendants' inspection, to enable them to prepare for trial, all the business books of the firm between certain dates, cannot be allowed. The proper practice in the case was by a bill of discovery.

Shipman, Barlow, and *Larocque & Choate,* for plaintiff.
Horace Russell, for defendant.

LACOMBE, J. This is an application under the United States Revised Statutes, § 724,[1] to require the plaintiff, the official liquidator of Charles Fortin & Co., of Paris, France, to produce for inspection of the defendants, in order to enable them to prepare for trial, all the business books of that firm from the years 1872 to 1878, inclusive. A similar application made in the case of *Colgate* v. *Compagnie Francaise,* was denied by Judge WALLACE, (January, 1884,) on the ground that the proper practice to obtain such relief in this circuit is by bill of discovery. A statement of the considerations which have induced the adoption of such practice will be found in the report of the same case, upon demurrer to bill of discovery, in 23 Blatchf. 86, 23 Fed. Rep. 82.
The motion is therefore denied.

TOPLITZ and others *v.* MILLER and others, and Thirty Other Cases.

(*Circuit Court, S. D. New York.* November 1, 1887.)

COURTS—FEDERAL CIRCUIT COURTS—PRACTICE—CALENDAR.

The rule of October 1, 1887, for the government of the calendar of the circuit court for the Southern district of New York, provides that cases must be tried when reached in their regular order according to date of issue and place on the calendar. *Held,* on motion to stay the trial of certain cases for the term, on the ground that a case pending in the supreme court involved the same issues, that the rule would not be departed from where the affidavit for the purposes of the motion filed by the defense denied the identity of the issues.

Actions to Recover Excess of Duties Paid under Protest. On motions to stay trials for the term.
Stanley, Clark & Smith and *Hugh J. Begly,* for complainants.
Stephen A. Walker, U. S. Atty., and *Wm. Wickham Smith,* Asst. U. S. Atty., for defendants.

LACOMBE, J. Motions are made by the plaintiffs in these several cases for orders staying the trial of these cases for the present term. The single ground upon which these motions are made is that "plaintiffs' counsel, from an examination of the papers, and from statements made by plaintiffs' attorneys and others, including some of the plaintiffs, is satis-

[1] Rev. St. U. S. § 724: "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

fied and verily believes that the same issue is presented in these cases as in the suit of *Vietor* v. *Arthur*, now pending in the supreme court;" the question involved in said last-mentioned suit being in respect to "caps, gloves, leggins, mitts, socks, stockings, woven shirts and drawers, and similar articles made on frames and worn by men, women, and children." The district attorney contends, however, that the issues in these several cases are not identical with those presented in *Vietor* v. *Arthur*. He submits an affidavit in which it is stated that, in four of the cases, some portion of the plaintiffs' claim is based upon goods composed, in part, of silks; that in more than ten of the cases the sufficiency of the preliminary step taken by the various plaintiffs is questioned; that in four of the cases, in which a commission has been issued to take testimony in Scotland, the goods upon which the plaintiffs' claim is based are Scotch caps, which, it is claimed, were knit by hand or woven in looms, and not made on frames; that in six other cases the goods are caps made in a like manner to those last referred to; and, finally, that, irrespective of any question of classification of the goods, the sufficiency of the steps necessary to be taken by the plaintiffs in order to maintain their suit is in every instance questioned by the defendants.

This court will not try the subsidiary question whether the issues in these cases are identical with those in another case, upon affidavits, and in advance of the trial. The facts upon which the motion is made being in dispute, no sufficient cause is shown for modifying the rule laid down on October 1, 1887, for the government of this calendar, namely, that cases must be tried when reached in their regular order according to date of issue and place on the calendar.

McDONALD *v.* COOPER.

(*Circuit Court, D. Oregon.* November 28, 1887.)

1. WRIT—PUBLICATION—AFFIDAVIT.
   An affidavit for an order for service of summons by publication must contain some evidence having a legal tendency to prove that the defendant could not be found in the state after due diligence, and the mere assertion of the fact is insufficient.
2. SAME.
   But a statement of facts as to residence and actual abode of the defendant, which shows, beyond a peradventure, that any search for him within the state would be unavailing, is sufficient.
3. SAME.
   And where it is necessary to show that the defendant has property in the state, the statement thereabout should be direct, and specify the property.
4. SAME—PUBLICATION.
   A summons published six times in a weekly newspaper is thereby served on the defendant after 42 days from the date of the first publication thereof.

(*Syllabus by the Court.*)

Action to Recover Possession of Real Property.
W. Scott Beebe, for plaintiff.
Julius C. Moreland, for defendant.

DEADY, J. This action is brought by Angus McDonald, a citizen of California, by his guardian, D. C. McDonald, against William Hammond, J. Abbott, G. M. Haines, and R. Clinton, citizens of Oregon, to recover possession of lots 1 and 2, in block 120, in Stephens' addition to East Portland.

The answer of the above-named defendants admits they are in possession of the premises, but only as the tenants of George Cooper, without giving his place of residence, who they then volunteer to state is the "owner" of the premises, and ask that he may be substituted as defendant.

A person in possession of real property, as the tenant of another, may decline to make a defense to an action to recover possession of the same, and plead "that he is in possession only as tenant of another, naming him and his place of residence." But he is not authorized to say that such other is the "owner" of the premises, or to ask that he may be substituted as defendant. Having declined the controversy, he should be silent as to the merit or management of it.

The landlord may thereupon apply to be made defendant in the case; and if he does not do so, he may be made defendant on motion of the plaintiff. Code Civil Proc. § 314.

Within 10 days thereafter the defendant, George Cooper, appeared and answered the complaint, denying all the material allegations therein. The answer also contains a defense, denominated therein "a further and separate answer," to the effect that Cooper is the owner in fee-simple of the premises, and entitled to the possession thereof. The plaintiff replied to this defense, denying the same.

The case was submitted to the court, without the intervention of a jury, on an agreed state of facts, from which it appears that the plaintiff was 11 years old last July, and is a citizen of California, and D. C. McDonald is his guardian *ad litem;* that the plaintiff is the only child of A. C. McDonald and Hortense, his wife, the former of whom died intestate in Multnomah county, and no administration was ever had on his estate; that on March 2, 1878, the deceased being the owner of the premises, executed, with his wife, a mortgage thereof to B. Boeschen to secure the payment of $175, with interest, and that only $50 thereof was paid; that on August 26, 1879, said Boeschen commenced a suit in the circuit court for the county of Multnomah against said Hortense and ——— McDonald, as the only child and heir of the deceased, to enforce the lien of said mortgage and the payment of the sum thereby secured; that in said suit a decree was given for the payment of the sum found due the plaintiff, and for the sale of the premises to satisfy the same, with costs, in pursuance of which they were sold by the sheriff to said Boeschen for sufficient to satisfy the decree; that said sale was duly confirmed by the court, and a deed of the premises made by the sheriff to the purchaser.

under whom the defendant holds by a chain of mesne conveyances duly executed.

It is also stipulated that if the proceedings in said suit by Boeschen had the effect to divest the plaintiff of his right to the premises, the same is now vested in the defendant.

The invalidity of the decree on which the property was sold is urged on various grounds, either of which, it is claimed, is sufficient to show that the court had no jurisdiction to make the same.

The summons in the case was served by publication. The affidavit on which the order of publication was made was sworn to on August 25, 1879, and the suit was commenced by the filing of the complaint on the twenty-sixth of the same month. On the subject of the residence of the defendants, and the diligence used to find them within the state, the statement in the affidavit is as follows: "They [the defendants] cannot be found within the state of Oregon, but both reside in San Jose, California, and that is their post-office address." As to whether the defendants, or either of them, had any property within the state at the commencement of the suit, the statement of the affidavit is that the plaintiff therein "has a good cause of suit against defendants to foreclose a certain mortgage on real property situate * * * in Oregon, executed by the defendant, Hortense McDonald, and her then husband, A. C. McDonald."

The suit was commenced against Hortense McDonald and ——— McDonald, and the summons is so entitled and addressed. The order for publication does not find that the defendants, or either of them, had any property in this state at the commencement of the suit, or that any diligence was used to find them therein, but simply states "that personal service cannot be had upon said defendants, or either of them, in this state," and directs that service of the summons be made on each of the defendants by the publication thereof in a certain newspaper, weekly, for six successive weeks, "and that a copy of the complaint and summons be deposited in the post-office, directed to each of said defendants at San Jose, California, their post-office address."

It appears from the record that the summons was published as directed, and a copy of the complaint and summons was timely deposited in the post-office at Portland, addressed to Hortense McDonald, at San Jose, California, and another to ——— McDonald in care of Hortense McDonald.

The contention of the plaintiff is that the court never acquired jurisdiction of the defendants, and therefore the decree directing the sale of the premises is null and void. Several of the objections will not be considered,—as that the affidavit for the order of publication was made the day before the commencement of the suit, that the plaintiff was sued as ——— McDonald, and the summons was so issued and published, and that the order of publication did not direct the copy thereof to be deposited in the post-office as required by Code Civil Proc. § 56, "forthwith." The objection that the decree was given without the publication of the summons, as directed in the order, is not well founded. The

summons was published six times in six successive weeks as directed, and more than 42 days elapsed from the first publication to the entry of the decree.

And finally, it is contended that the order of publication is void on either of the following two grounds: (1) The facts stated in the affidavit do not tend to show that any diligence was used to find the defendants within the state, or that they could not have been found and served therein. (2) The facts so stated do not tend to show that the defendants, or either of them, then had any property within the state.

Code Civil Proc. § 55, provides that when the service of a summons cannot be made as provided in section 54,—personally or at his usual place of abode,—"*and the defendant, after due diligence, cannot be found within the state*, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, * * * and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this state, such court or judge * * * shall grant an order that the service be made by publication of a summons, * * * when the defendant is not a resident of the state, *but has property therein*, and the court has jurisdiction of the subject of the action."

The order of publication in question was made under this section. That diligence has been used to find the defendant within the state must appear from the affidavit, and a mere statement or assertion therein that the party is a non-resident thereof is not sufficient. Nor is such statement or assertion that diligence has been used, a compliance with the statute. The affidavit must contain some evidence of the ultimate fact, besides the assertion of the affiant, on which the judicial mind may act in granting the order. And however slight and inconclusive this evidence may be, if it has a legal tendency to prove the diligence, and that the defendant could not be found in the state, it is sufficient to give the court jurisdiction, and sustain the order against a collateral attack. But where there is no evidence of such diligence except the bald assertion of the fact, or that of non-residence, the order is void, and the court does not acquire jurisdiction. *Rickertson* v. *Richardson*, 26 Cal. 153; *Forbes* v. *Hyde*, 31 Cal. 350; *Carleton* v. *Carleton*, 85 N. Y. 314; *Neff* v. *Pennoyer*, 3 Sawy. 288.

In *Carleton* v. *Carleton*, *supra*, it was held that an affidavit for the service of a summons by publication was insufficient, wherein it was stated "that defendant has not resided in New York since March, 1877, and deponent is advised and believes is now a resident of San Francisco, California," because it was merely an allegation of non-residence, and did not tend to prove that the defendant could not, after due diligence, be found within the state. In delivering the opinion of the court MILLER, J., said:

"Cases may arise where the proof of residence in a distant state at the very time, and of an absolute location there, would be so strong and conclusive as to render it entirely apparent that no act of diligence would be of any avail; and if the affidavit here had stated positively and distinctly that the defend-

ant was at the time not only a resident of the state of California, *but was then actually living in that state*, there would be ground for claiming that due diligence would be unavailing."

In *Kennedy* v. *Trust Co.*, 101 N. Y. 487, 5 N. E. Rep. 774, it was held that an affidavit for a similar purpose was sufficient, in which it was stated "that the defendants 'cannot, after due diligence, be found within the state,'—they being residents of other states therein named,—and 'that the summons herein was duly issued for said defendants, but cannot be personally served on them by reason of such non-residence.'" In delivering the opinion of the court, MILLER, J., said:

"Here is a clear statement that the defendants are non-residents, and reside in other and *distant* states, and that the summons which has been issued cannot be served by reason thereof. * * * The statement as to due diligence is not absolutely an allegation of a conclusion of law or an opinion, but, in connection with what follows, a statement of facts which tend to establish that due diligence has been used."

In *Pike* v. *Kennedy*, 15 Pac. Rep. 637, decided in the supreme court of this state on November 15, 1887, it was held, on the authority of the last two cases, that the following affidavit was sufficient in this respect:

"That said defendants reside at Walla Walla, in the territory of Washington, which is their post-office address; that personal service cannot be made on said defendants, or either of them, for the reason that said defendants have departed from this state, and remained absent therefrom for more than six consecutive weeks, and *now* reside at Walla Walla."

LORD, C. J., in delivering the opinion of the court, said:

"As we have seen, non-residence is not of itself sufficient to authorize the order for publication, because that alone is not inconsistent with the idea that the defendant may be in the state doing business, although his residence is in another state, and hence would not relieve of the necessity or requirement of due diligence. But the allegation of non-residence, in connection with the facts additionally alleged, that he was *actually living* in the resident state, would be ground for claiming that due diligence would be unavailing.

"The allegation of non-residence is specific and certain in the affidavit,—the defendants reside at Walla Walla, Washington territory, and that is their post-office address. *But this is not enough*, and the inquiry now is whether the further statement, taken in connection with the averment of non-residence, that personal service cannot be made on the defendants for the reason that they have departed from the state, and remained absent therefrom, for more than six consecutive weeks, and *now* reside at Walla Walla, show such a state of facts as render it apparent that no act of diligence would be of any avail to find them within the state. It seems to me that these averments, taken together, are legal evidence tending to show, at least, not only non-residence, but actual absence from the state at the time when the affidavit was made. * * * The averment that the defendants now reside at Walla Walla, means at this time, or at the present moment, they live or reside at that place; that is to say, that when the affidavit was made they were then living in Walla Walla. It is intended to emphasize the fact of *actual presence* at the place of residence at the time alleged, and is the reason why the affidavit says that personal service cannot be made upon them within the state."

These New York cases and this Oregon one are the only authorities of which I am aware that hold that any state of facts concerning the de-

fendant's whereabouts may be stated in the affidavit in place of the showing which the statute expressly requires,—that "the defendant, after due diligence, cannot be found within the state." But the ruling having been followed by the supreme court of the state, the decision is a controlling authority in this court on the question.

The case of *Pike* v. *Kennedy* carries the doctrine of the New York cases to the very verge. But notwithstanding this, the court does not intend to enlarge the rule, for it expressly says that the averment that the defendants *reside* at Walla Walla, and that is their post-office address, "is not enough." The facts stated must show beyond a peradventure that the diligence required by the statute would have been unavailing. So long as they are consistent with any other hypothesis, they are insufficient.

In this case, the statement is that the defendants "cannot be found in the state of Oregon, but both reside in San Jose, Cal., and that is their post-office address."

In *Pike* v. *Kennedy* the court says explicitly this "is not enough." Notwithstanding this statement, it may be true that the defendants, or one of them, could have been found in this state at that time. San Jose is in the immediate vicinity of San Francisco, the commercial metropolis of an adjoining, not a "distant," state, between which and this city there was then constant and frequent communication and intimate business and social relations. No summons was attempted to be served; nor is it stated that the defendants, or either of them, had departed from this state, or were then "actually living" at San Jose.

The affidavit is certainly fatally defective in this particular.

It must also appear from the affidavit that the defendant has "property" in this state. The bare assertion that the defendant has such property is not sufficient. Some fact or facts must be stated tending to establish this conclusion on which the judicial mind may act.

Nothing of the kind is set forth in this affidavit. And it is very doubtful if what is said, even indirectly, amounts to such an assertion. The statement is only to the effect that the plaintiff has a cause of action against the defendants to foreclose a mortgage on property within the state, executed by the defendant Hortense McDonald, and her then deceased husband, and that the defendants were his heirs at law.

Admitting, what may be implied from the execution of the mortgage, that A. C. McDonald then owned the property, it did not follow by any means that his widow and child owned it near a year thereafter, or even that he died seized of the same. He might have disposed of it by deed in his life-time or by will at his death, and, in case it had descended to the defendants, they might have disposed of it in the mean time. There is but one expression in the whole statement that is not perfectly consistent with the hypothesis that the defendants had then no interest in the property, and that is, the plaintiff has a cause of suit against the defendants to foreclose a mortgage on real property.

If the defendants had no interest in the property, the plaintiff could not maintain a suit against them on account of said mortgage, though he

might attempt to. At most this is a mere indirect, argumentative way of asserting that the defendants had property in this state. But if it was positive and direct, it was not enough, in my judgment. There should have been evidence in the affidavit that the defendants had some interest in some specific property, and this is altogether wanting.

The defendant insists that reference may be had on this point to the verified complaint on file when the order was made. In *U. S.* v. *Walsh*, 1 Deady, 282, it was held that a verified complaint in an action for a penalty is an affidavit on which a writ of arrest may issue; and in *Neff* v. *Pennoyer*, 3 Sawy. 291, it was held that an order for the service of a summons by publication might be sustained by a reference to the verified complaint on file when it was made, unless it appears that the attention of the judge was not attracted to it.

The complaint in this case does specify the property on which the mortgage was given as lots 1 and 2, in block 120, in Stephens' addition to East Portland.

But the order was made at Astoria, 100 miles away from the files of the court where the complaint was lodged; and it expressly states that it was "based" on the affidavit. On this state of facts the validity of the order must be tested by the statements contained in the affidavit alone.

This question was also considered in *Pike* v. *Kennedy*, and it appears to have been held that a statement in the affidavit to the effect that Pike and wife mortgaged lot 8, in block 183, in Couch's addition to Portland, to secure the payment of a sum of money to Klosterman Bros., to enforce the lien of which mortgage the suit was brought, was a sufficient showing that the defendants had property in the state when the affidavit was made. The court says these facts show that the defendants "did have property in the state." Yes; when they executed the mortgage, of course, but how long after? Until the affidavit is made? I doubt it. In support of this conclusion the affidavit for an order of publication in *Belmont* v. *Cornen*, 82 N. Y. 257, is professedly cited, as containing only a similar statement to that in *Pike* v. *Kennedy*. But, on examination of the former case, it will be found that the affidavit also contains the statement that the "defendants are proper parties to said action, *as owners of the equity of redemption in said premises*;" and further "that the said defendants *have property within this state*, to-wit, the said mortgaged premises hereinbefore referred to."

However this may be, the affidavit in *Pike* v. *Kennedy* specified the property that was the subject of the mortgage and the suit, but in this it does not.

Counsel for the defendant, admitting the insufficiency of the affidavit in these respects, contends that the suit to foreclose the McDonald mortgage was a suit *in rem*, and that the jurisdiction of the court did not depend on the validity of the proceeding to authorize the publication of the summons, but on the fact that the property was within the state, and the plaintiff had a lien thereon; citing *Cooper* v. *Reynolds*, 10 Wall. 308, and *Pennoyer* v. *Neff*, 95 U. S. 714.

In the former case, the effect of a judgment given in an action commenced by attachment of property, with notice to absent owners, was considered. The court held that the seizure of the property on attachment gave the court jurisdiction, and that its judgment could not be collaterally attacked, on the ground of the irregularity or insufficiency of the notice. In the latter case the effect of a personal judgment against a non-resident defendant, who did not appear to the action, and was not served with process therein, otherwise than by the publication of a summons, was considered, and the judgment declared void for want of power in the state to give extraterritorial operation to its process.

In the course of the opinion of the court delivered by Mr. Justice FIELD, it is said that, notwithstanding the conclusion there reached, a state had authority to take and appropriate the property of non-residents situated within its limits, to the payment of the claims of its own citizens against them. But this state has not authorized the lien of a mortgage to be enforced by attachment or seizure of the property in the case of a non-resident mortgagor or his successor in interest, and when it does it will be time enough to consider the effect of any cautionary or auxiliary notice that the law may require to be given of the proceeding. In the mean time, the only remedy given to the mortgagee is by an ordinary suit to enforce the lien of his mortgage by a sale of the premises, the foundation and jurisdictional element of which is an order for the service of the summons by publication.

My conclusion is, the order for publication in *Boeschen* v. *McDonald* is void on the two grounds stated, and the subsequent proceedings therein, including the sale to Boeschen, are null and of no effect.

Of course, it is not a pleasant duty to be compelled to disregard the results of judicial action in another court. But proceedings against absent parties by publication of summons are only allowed by statute, and the security against wrong and oppression which is thereby thrown around them ought to be fairly, if not strictly, enforced.

Nor will the consequence of so doing be very serious in this case. The period within which the lien of the mortgage may be enforced—10 years—has not yet transpired.

The mortgagee may still make his debt, with interest, out of the premises in another suit. Of course, the rise in value of the property will go to the heir; but as this has not cost the mortgagee anything, he cannot complain. In any view of the matter, the child and his heir is entitled to this "unearned increment," rather than the full-paid creditor.

There must be a finding that the plaintiff is the owner in fee-simple of the premises, and is entitled to the possession of the same.

HILL v. SMITH.[1]

(*Circuit Court, E. D. Pennsylvania.* November 11, 1887.)

COSTS—REFERENCE—MASTER'S FEES—KNOWLEDGE OF PARTY.

The costs of a reference to a master, to ascertain the damages resulting from an infringement of a patent, will be put upon the complainant when damages are refused, if the complainant knew, or could have known, all that was brought out by the reference, and the respondent has done nothing that would deceive the complainant, nor concealed facts.

In Equity. *Sur* exceptions to master's report.

This reference grew out of a decree which had been entered in a suit brought by the complainant against the respondent for infringement of the second claim of letters patent No. 130,853 for improvement in hog-rings, (see 27 Fed. Rep. 560.) Complainant then had the case referred to a master, to assess the damages, who made a report in which he refused damages to the complainant, and put the costs of the reference upon the respondent. To this finding of the master respondent excepted.

Morgan & Lewis and *W. C. Johns*, for complainant.

R. O. Moon and *E. P. Bliss*, for respondent.

BUTLER, J. The complainant should have costs to date of the decree, entered April 30, 1886. To that point of time he was successful. The costs subsequently created, arose from the prosecution of his claim to damages. In making this claim he was unsuccessful. In view of the circumstances, he should bear the costs created by pressing it. The result shows that they were unnecessarily incurred. If he had been deceived or misled, or by other means induced by the respondent to set up and prosecute the claim, a different view might, and no doubt would, be entertained. The complainant knew, however, or might have known, before entering upon the subject, all he knows now. He took the chances, and he must bear the consequences.

The second exception (to the proposed decree) is for these reasons sustained. The others are dismissed.

[1] Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

RYAN *v.* GOULD and another.

(*Circuit Court, S. D. New York.* November 19, 1887.)

1. COSTS—IN FEDERAL COURTS—DOCKET FEE.
   Rev. St. U. S. § 824, provides that on a trial before a jury in civil or criminal cases, or on final hearing in equity, a docket fee of $20 shall be allowed. After the usual pleadings were filed, and issue joined, the case noticed for final hearing, and called on the calendar, on complainant's motion, his bill was dismissed "with the usual costs to defendant." The clerk allowed $20 docket fee on taxation of costs. *Held*, that the docket fee must be disallowed.
2. SAME—MOTION TO DISMISS BY PLAINTIFF—"USUAL COSTS."
   The clerk in taxing costs where complainant on his own motion dismissed his bill when called for hearing "with usual costs to defendant," allowed for certified copy of file wrapper, contents of patent in suit, and certified copies of six other patents procured by defendant to properly present his defense. *Held*, that they must be disallowed. *Woodruff* v. *Barney*, 2 Fish. Pat. Cas. 250; *Worster* v. *Handy*, 23 Blatchf. 129, 23 Fed. Rep. 49, followed.

J. E. M. Bowen, for complainant.
Briesen & Steele, for defendants.

LACOMBE, J. In this case issue was joined by the filing of the usual replication, the pleadings consisting of bill, answer, and replication. After the cause was noticed by the defendant for final hearing, and in fact after it was called on the calendar, an order was made on the motion of the complainant dismissing the bill "without prejudice to the complainant's, or his assignee's rights, and with the usual costs to the defendants."

The clerk, upon taxation of defendants' bill of costs, allowed a docket fee of $20. The question raised upon this appeal, is whether, under section 824 of the Revised Statutes, such docket fee is properly taxable. The decisions upon this point are numerous and conflicting. In the views expressed by Judge HAMMOND in *Partee* v. *Thomas*, 27 Fed. Rep. 429, I entirely concur; but the prior decisions in this circuit are controlling of the question here, and the docket fee must be disallowed. *Manufacturing Co.* v. *Colvin*, 21 Blatchf. 168, 14 Fed. Rep. 269; *Andrews* v. *Cole*, 20 Fed. Rep. 410; *Worster* v. *Handy*, 23 Blatchf. 112, 23 Fed. Rep. 49.

The allowances made by the clerk for certified copy of file wrapper, and contents of the patent in suit, and for certified copies of six other patents procured by the defendant to enable him to properly present his defense, are also covered by the decisions in *Woodruff* v. *Barney*, 2 Fish. Pat. Cas. 250, and *Worster* v. *Handy*, 23 Blatchf. 129, 23 Fed. Rep. 49, and are disallowed.

NEW YORK BELTING & PACKING CO. v. NEW JERSEY CAR SPRING & RUBBER CO.

(*Circuit Court, S. D. New York.* November 19, 1887.)

1. COSTS—DEMURRER—INSUFFICIENCY OF.
   On the overruling of a demurrer, costs were duly taxed against the defendant. Subsequently, after final hearing, defendant, in taxing the bill of costs, sought to recover certain items contained in the bill taxed against it on the demurrer. *Held*, that this was an effort to reclaim costs imposed on defendant as a penalty for serving an insufficient demurrer, and the items should be disallowed.
2. SAME—DOCKET FEE.
   Rev. St. U. S. § 824, provides that on a trial before a jury in civil or criminal cases, or on a final hearing in equity, a docket fee of $20 shall be allowed. The case was dismissed on demurrer, with usual costs, and the docket fee was included in the bill of costs. *Held*, that the docket fee must be disallowed. Following *Ryan* v. *Gould*, *ante*, 754.

Turner, Lee & McClure, for complainant.
Briesen & Steele, for defendant.

LACOMBE, J. In this case the complainant originally commenced suit in the district of New Jersey by filing a bill of complaint, to which a demurrer was interposed, and which was duly set down for argument. Subsequently, in view of the condition of the calendar in that district, it was stipulated between the parties that the suit be discontinued therein, and a new one brought in the Southern district of New York, upon similar pleadings, to be filed in this district, the demurrer to be considered as set down for argument. These stipulations were carried out. The demurrer was argued, and overruled the order directing "that complainant recover of the defendant its cost in this suit to be taxed, and the defendant be, and it hereby is, assigned to answer within ten days from date hereafter."

The bill of costs on the demurrer was duly taxed, including items for filing bill, issuing subpœna, and marshal's fees for serving subpœna, in the district of New Jersey, and fee for filing the bill in the the Southern district of New York. These were paid by the defendant, and upon the bill of costs now sought to be taxed by it claim is made that these three items, and the expense of printing the brief on demurrer, should be allowed to the defendant. This is, in effect, but an effort to recover from the complainants some part of the very costs which were imposed upon the defendant as a penalty for serving a demurrer, which the court held to be insufficient. They should be disallowed.

The item for docket fee allowed to the defendants should also be disallowed, for the reasons set forth in a memorandum filed this day in *Ryan* v. *Gould*, *ante*, 754.

SHERMAN *v.* HEDDEN.

(*Circuit Court, S. D. New York.* November 7, 1887.)

CUSTOMS DUTIES—ACTIONS TO RECOVER—BILL OF PARTICULARS.

Where the bill of particulars served by plaintiff in a suit against a collector of customs, to recover duties alleged to have been illegally exacted, does not contain all the items required by section 3012, Rev. St., a motion for judgment of *non pros.* will be granted.

(*Syllabus by the Court.*)

Action to Recover Excess of Duties Paid under Protest. On motion for *non pros.*

Stephen A. Walker, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., for the motion.

Wm. F. Scott, contra.

LACOMBE, J. In this case defendant moves for a judgment of *non pros.* on the ground that the bill of particulars heretofore served in this action, in compliance with section 3012, Rev. St., is insufficient and defective, in that it does not contain the name of the importer or importers, the place from which the merchandise was imported, the date of the invoice, and the date of the payment of the duties claimed to have been exacted in excess. In opposition to the motion, plaintiff's attorney presents an affidavit of his clerk stating that, "through some inadvertence or oversight, he omitted to insert" in the bill of particulars the details above set forth, and upon the argument plaintiff applied for leave to amend the bill *nunc pro tunc.* The papers in this case present no more excuse for plaintiff's failure to comply with the express requirement of the statute than was presented in *Dieckerhoff* v. *Robertson*, *ante*, 73, and should be denied.

Upon the argument, reference was made to the subsequent granting of an order allowing amendment of the bill of particulars in the case last cited. Such order, however, is not authority controlling in future cases, because, at the time it was granted, the representative of the district attorney expressly stated in open court that, the question of power to grant leave to amend being decided against him, he had nothing further to say in opposition to the application. It should be further noted, with regard to *Dieckerhoff* v. *Robertson*, that the application in that case was simply for leave to alter the amounts claimed as excess of duty, and that it was stated, and not disputed, upon the first argument of the motion, that the figures were given erroneously in the original bill because the plaintiff had relied upon a statement furnished from or obtained at the custom-house as to the exact amount of excess, which official statement was itself erroneous.

SHERMAN v. HEDDEN.

(*Circuit Court, S. D. New York.* December 1, 1887.)

CUSTOMS DUTIES—ACTION TO RECOVER—BILL OF PARTICULARS.

Where the bill of particulars served by plaintiff in a suit against a collector of customs to recover excess of duties alleged to have been illegally exacted does not contain all the items required by section 3012, Rev. St., the court is without power to grant leave to amend *nunc pro tunc*.

On rehearing. See *ante*, 756.

William Force Scott, for the motion.

Stephen A. Walker, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., opposed.

LACOMBE, J. Careful consideration has been given to the points presented by the plaintiff upon the reargument of this motion. The result of a re-examination of the whole question is, however, but confirmatory of the opinion expressed by the court upon the reargument—that it is without power to grant the relief asked for.

If the original statute (chapter 201 of the Laws of 1866, § 36) and the section of the Revised Statutes (3012) in which it is re-enacted were mere regulations of procedure in court, the provisions of section 954 of the Revised Statutes would, no doubt, confer upon the court the power now invoked. The sections cited, however, seem, in unmistakable language, to provide a statutory limitation upon the right of recovery; and the mere use of the phrase "Bill of Particulars" does not alter their effect. If the question arose upon the trial of the case whether the plaintiff might recover in the absence of proof showing that he had within the time limited served the notice which the statute calls for, there can be no doubt that it would be held to be as necessary a prerequisite as is the service of the notice of protest, or of the notice of appeal; and it would surely not be claimed that either of those notices might be amended by the court.

In the recent instances referred to (see *Dieckerhoff* v. *Robertson*, 29 Fed. Rep. 781, and the original opinion on this motion, *ante*, 756,) where amendments of similar bills of particulars have been allowed, the objection now taken was not urged, and it does not seem to have been distinctly presented to the court in *Pott* v. *Arthur*, 15 Blatchf. 314, the provisions of section 3012 being therein disposed of as if it were merely a regulation of procedure. The application to vacate the order denying leave to amend is therefore denied; but the original order may be modified by adding a clause to the effect that the application is denied solely on the ground of want of power. Thus the plaintiff, should he seek to review this decision, will not be prejudiced by any suggestion that the discretion of the court was exercised against him.

DIECKERHOFF and others *v.* ROBERTSON.

(Circuit Court, S. D. New York. November 7, 1887.)

CUSTOMS DUTIES—EXCESS OF—ACTION TO RECOVER—AMENDMENT OF BILL OF PARTICULARS.

A motion, in an action to recover for excessive duties, to amend the bill of particulars by increasing the amount claimed therein for excess of duty, will be denied, where it appears that the mistake in making up the original statement was entirely that of the plaintiff's agent or broker, and was in no way induced by any misinformation furnished at the custom-house.

Action to Recover Excess of Duties Paid under Protest. On motion to amend bill of particulars.

A. P. Ketchum, for complainant.

Stephen A. Walker, U. S. Atty., and *Wm. Wickham Smith*, Asst. U. S. Atty., for defendant.

LACOMBE, J. In this case plaintiffs ask to amend the bill of particulars by increasing the amount claimed therein for excess of duty. The mistake in making up the original statement, however, appears to have been entirely that of plaintiffs' agent or broker, and in no way induced by any misinformation furnished at the custom-house. The motion is denied. See *memoranda* in *Castner* v. *Magone*, *ante*, 578, and *Sherman* v. *Hedden*, *ante*, 756, (filed November 7, 1887.)

WITTERS, Receiver, etc., *v.* SOWLES and others.

(Circuit Court, D. Vermont. October 5, 1887.)

1. INSOLVENCY—NATIONAL BANKS—STATE LAWS.

Among the assets of an insolvent national bank were three mortgages which were sought to be impeached by the assignees of the mortgagor as having been given in violation of the insolvency law of the state. Plaintiff, receiver of the bank, claimed that the state law was inoperative upon the assets of a national bank, and was ineffectual to divest him of the title acquired by the mortgages. *Held*, that the mortgages were governed by the state law, and the bank took them with all the limitations imposed by the laws of the state upon them.

2. SAME—PREFERENCES—LIMITATION OF TIME.

Rev. Laws Vt. § 1860, provides that a conveyance made by an insolvent, or one in contemplation of insolvency, within four months before the filing of a petition of insolvency by or against him, made with a view to giving a preference to certain of his creditors, shall be void. It appeared that the mortgages sought to be declared void were made three months before the filing of petition of insolvency by a creditor of the mortgagor; but the petition was left to be acted upon when requested, and not acted upon until nearly two months later, at the instance of another creditor. *Held*, that the statute contemplated present judicial procedure on the filing of the petition, and the delay in acting upon the petition at the instance of the petitioning creditor brought the conveyances outside the purview of the statute.

In Equity.
Chester W. Witters and *Albert P. Cross*, for orator.
Willard Farrington and *Henry A. Burt*, for defendants.

WHEELER, J. This bill is brought by the orator, as receiver of the First National Bank of St. Albans, against the defendant Sowles in his own right, and against the other defendants as assignees in insolvency of his estate, to foreclose three mortgages from him to the bank to secure debts to the amount of $60,000. The assignees defend on the ground that the mortgage is void as to them; and they have filed a cross-bill to have them set aside. The laws of the state provide that a person owing debts to an amount exceeding $300, who, among other things, makes conveyance of his property with intent to give preference to one or more of his creditors, shall or may be adjudged an insolvent debtor upon petition of his creditors; and that the creditors may, within 90 days thereafter, apply to the judge of the court of insolvency, setting forth the facts, who, on 10 days' notice to the debtor, may make an adjudication of insolvency of the debtor. Rev. Laws, § 1870. They also provide that if a person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition, with a view to give a preference to a creditor, makes a conveyance of his property to a person having reasonable cause to believe the other insolvent, or in contemplation of insolvency, and that the conveyance is made in fraud of the laws relating to insolvency, the same shall be void. Section 1860.

These mortgages were made on the seventeenth day of January, 1884. The record of the proceedings in insolvency, which resulted in an adjudication of the defendant Sowles an insolvent, and in making the other defendants assignees of his estate, shows that a petition of a creditor was sent by a clerk of the attorneys of the creditor to the judge of the court of insolvency, who, when it was presented, inquired what time they wanted fixed for a hearing, and the clerk answered, "File the petitions, and" one of the attorneys "will come and arrange as to the time of hearing;" that the petition was thus, on the twelfth day of April, 1884, filed, and remained on file without anything more being done about it until the thirty-first day of May, 1884, when another creditor appeared, and presented a petition, asking that notice be given, and this petition proceeded with, which was done, against an attempt of the first petitioning creditor to withdraw his petition. The making of these mortgages by Sowles, being insolvent, or in contemplation of insolvency, with intent to give a preference to the bank, was one of the acts of insolvency set forth in the petitions, and was the one upon which the adjudication of insolvency was made.

The bank failed on the eighth day of April, and a receiver was appointed on the twenty-second day of April, 1884. These mortgages were among the assets of the bank when they were taken possession of by the officers of the government, upon the failure. It is claimed on behalf of the orator that the distribution of the assets of an insolvent na-

tional bank, under the provisions of chapter 4, tit. 62, Rev. St. U. S., by virtue of which the assets of this bank are being collected by the orator for distribution, is a species of bankruptcy proceeding under the laws of the United States, against which the provisions of any state insolvency law are wholly inoperative; and that these provisions of the insolvency law of this state are ineffectual to divest him of the title acquired by these mortgages, which would, without question, be good and valid but for them. If these were proceedings under the state law to adjudge the national bank an insolvent, and distribute its assets, the claim that the state law was inoperative for that purpose would probably be well founded. But this state law is not invoked for any purpose connected with the distribution of the assets of the bank. The proceeding is the same as if the bank had remained solvent, and was still transacting business in the usual course. The question is one of title to the mortgaged property, between the receiver, under the laws of the United States, and the assignees, under the laws of the state,—to determine to which estate the property belongs. When that is settled, the distribution of the property will belong with the jurisdiction where the title is found to be, without reference to the other. The title is to be governed by any law applicable to it, and all such laws are to be respected in ascertaining whose it is. The bank took this mortgage with all the limitations that the laws of the state imposed upon it, the same as any individual would. The statute is a regulation of conveyances, which binds the title as to all persons claiming under them. *Knower* v. *Haines*, 31 Fed. Rep. 513. An examination of the case upon its merits is therefore necessary.

There is no fair question, and none made, but that at the time of the making of these mortgages Sowles was in fact insolvent. That it would probably create a preference, if left to become valid, he must have seen, and therefore it readily follows that he made them with a view to give a preference to the bank by them.

That the officers and agents of the bank had reasonable cause to believe that he was insolvent, and that the mortgages were made with that view, is a different question, and not, upon the evidence, so clear. He was, and for a long time had been, the cashier of the bank, and owned considerable of its stock, and of that of another neighboring bank, and had a large amount of real and personal property besides for a person in his business. He had lost heavily in stock speculations, but that the losses were great does not appear to have been known to them. There had been a run on the bank which had shaken its credit. The mortgages were devised to strengthen that. The officers appear to have had confidence in the bank, if they could restore its credit, and retain its business, and do not appear to have lost confidence in his responsibility. They did not desire or request the mortgages, and he did not wish to make them. They were advised to be made by the national bank examiner, and his advice was accepted and acted upon. His situation was not such that the officers of the bank were about to call upon him for security, but for the run on that; and, had that survived, he would

probably have survived also. The reasonable cause to believe, which the statute makes the ground for avoiding the mortgages, must be proved to have existed at that time, and is to be ascertained by what the officers of the bank then had before them, in sight, and cannot justly be inferred from what they now know, but did not then know. It is not clear that the defendants have shown enough in this behalf to defeat those mortgages.

If they had, it would remain to be seen whether the mortgages were made within four months of the filing of the petition of insolvency, according to the meaning of the statute. The creditor may apply to the judge for an adjudication of insolvency, which the judge may make on notice and proof. The application is to be made by the creditor to the judge, for the judge to act upon. Presenting a petition to the judge would be nothing, unless it should be presented to be acted upon as the judge should see fit. The control of it should be with the judge, and not remain with the petitioning creditor. There might be delay, circumstantial or incidental, and such delay might be suggested by the petitioner, without depriving the petition of the character of an active application; but this could properly only be when the petition is presented for action. Being in the possession of the judge is not enough; neither is possession by him with a filing upon it enough, for that is only his memorandum. The possession should be for present judicial procedure. In *Sage* v. *Wyncoop*, 104 U. S. 319, a voluntary petition in bankruptcy was prepared, and sent to the clerk, to be kept until he should be directed by telegraph to file and proceed with it. Rights of property affected by it turned upon the time when it was filed and proceeded with, pursuant to that direction. This petition was left with the judge, but not to be proceeded with until there should be further communication from the attorney of the petitioning creditor as to the time of hearing. The first thing to be done was to give notice to the alleged insolvent to appear and answer at some fixed time. This could not be done until a time should be fixed, and that was not to be done until the attorney moved, and therefore nothing was to be done until then. The petition was within the control of the petitioning creditor, and not within the control of the court, until the other creditor appeared, on the thirty-first day of May, and asked that it be proceeded with. None of this is gathered from proof, apart from the records of the insolvency court, but it all appears from that, and shows clearly that this petition was not understood by that court to be made in due course, and in the usual manner.

It is urged that all this was adjudged by the court of insolvency against the claim of the orator, and that the adjudication is conclusive. The court of insolvency retained the petition, the facts alleged in it were on appeal found to be true, and Sowles was adjudged insolvent. All that is included in this was conclusively settled, and is not now questioned, or to be questioned, here. Full faith and credit is to be given to that judgment everywhere. But that court had before it no question as to the title to this mortgaged property, nor as to the validity of the mortgages, and nothing was adjudged in regard to these matters. A

creditor to the requisite amount, under the insolvency law of the state, has the right, unquestionably, to prefer his petition, and put all conveyances, within four months previous, to the test of the provisions of that law; but no court has decided, so far as has been observed, that a creditor can put a petition on file, and retain control of it, without notice to the debtor, for weeks and months, and leave him in possession of his property to deal with as of full right, and then have notice given, and titles supposed to be good disturbed, which had stood much longer than that.

The value of the mortgaged property is so small in comparison with the debt that there can be no reasonable expectation of redemption; therefore the time of redemption should be made very short.

Let there be a decree of foreclosure, with right of redemption for 15 days after entry of the decree; and let the cross-bill be dismissed, with costs to the orator.

WITTERS *v.* SOWLES and others.

(*Circuit Court, D. Vermont.* October 5, 1887.)

1. FRAUDULENT CONVEYANCES—BY INSOLVENT—KNOWLEDGE OF GRANTEE.
   Defendant was heavily indebted to the bank of which he was cashier, and, within four months of the filing of a petition by a creditor to have him declared an insolvent, (under Rev. Laws Vt. § 1870,) transferred certain securities to the bank, with a view to preferring it over his other creditors. *Held*, that knowledge on the part of defendant of his insolvency affected the bank of which he was cashier with such knowledge, and made the transfer of such securities void, under Rev. Laws Vt. § 1860, which provides that a conveyance made by an insolvent, or one in contemplation of insolvency, within four months before the filing of a petition of insolvency by or against him, with a view to giving a preference to certain of his creditors, the latter having knowledge of his insolvency, is void.[1]
2. SAME—BY INSOLVENT BEFORE INSOLVENCY—DATE OF TITLE VESTING.
   Other securities were deposited by the cashier with his bank, and an equal amount of his own paper withdrawn. *Held*, that title to the securities immediately vested in the bank, and, such deposit taking place more than four months before the filing of the petition in insolvency, the transfer did not come within the purview of the statute.
3. SAME.
   Defendant, being indebted to the bank of which he was cashier, transfered to it on the books of another bank the stock which he held in the latter, but did not deposit the certificates for such stock in his own bank, and take up his paper held by it until some time later. *Held*, that the title of defendant's bank to the stock transferred, dated from the deposit of the certificates with it, and not from the transfer on the books of the other bank.
4. BANKS—NATIONAL BANKS—AUTHORITY OF EXAMINER.
   A national bank examiner is not an officer or agent of the bank, and has no authority, as such, to act for the bank, and cannot bind it by any act done in its behalf.

[1] In the absence of statutory prohibition, a debtor, though known to be in failing circumstances and contemplating an assignment, may prefer one or more of his creditors by conveying property to them to pay or secure a *bona fide* debt, though the effect of the transaction be to defeat the collection of claims equally meritorious. Gilbert v. McCorkle, (Ind.) 11 N. E. Rep. 296. See Woonsocket Rubber Co. v. Falley, 30 Fed. Rep. 808, and note.

In Equity.

This case is between the same parties, and based on the same facts, as the case of *Witters* v. *Sowles*, *ante*, 758, which see for full statement of facts.

Chester W. Witters and *Albert P. Cross*, for orator.

Willard Farrington and *Henry A. Burt*, for defendants.

WHEELER, J. The orator is receiver of the First National Bank of St. Albans, and the defendants Lewis and Leach are assignees of the estate of the defendant Sowles in bankruptcy. This bill is brought to confirm the title of the orator as receiver to notes and evidences of debt of the face value, on the twenty-ninth day of December, 1883, of about $9,800, and to 255 shares of the capital stock of the National Union Bank of Swanton, and to a contract of the face value of $890, called the Wright contract,—all of which formerly belonged to defendant Sowles, and are claimed by the other defendants as his assignees. They have filed a cross-bill, praying that these securities, or the proceeds of the securities, may be decreed to them. The facts in respect to the insolvency of Sowles, his knowledge of it, the cause which the officers of the bank had to believe it, and the commencement and prosecution of proceedings in insolvency against him, are as stated in the other case between the same parties. According to the testimony, on the twenty-ninth of December, 1883, he got those securities together, and computed their value with a view to using them in payment or security of his indebtedness to the bank. On the twenty-first day of January, 1884, he went to the National Union Bank of Swanton, and transferred his stock in that bank to the First National Bank of St. Albans. On or about the twenty-fifth day of that January he discharged $10,000 of his paper held by the First National Bank of St. Albans, and placed those notes and evidences of debt among the assets of the bank, as the property of the bank, and treated them as bonds, and that item on the books of the bank was increased that amount. On the second day of February, 1884, he discharged $10,000 more of his paper, held by the bank, and put certificates of 255 shares of the stock of the National Union Bank of Swanton among the assets of the bank as its property, and treated them as bonds, and that item was further increased that amount on the books of the bank. The transfer of the bank stock was made by advice of the national bank examiner. These transactions were had without the knowledge of any of the officers or agents of the bank.

The Wright contract was put with the rest, in the latter part of March, and all were found among the assets of the bank when possession was taken by the officers of the government, resulting in this receivership. The petition of May 31, 1884, was presented to the judge of the court of insolvency, asking that the prior petition be proceeded with. There was no reservation of any control over it, but it was left to be proceeded with by the judge in due course, according to his judicial discretion and judgment, and it was filed to be proceeded with accordingly. The delay upon that was the delay of the court. The adjudication of insolv-

ency was made upon the first petition so taken up, and carried along by that. When that petition was presented, there was an active application made to the court, and, when it was so taken into the files of the court to be proceeded with, it was filed within the meaning of that part of the statute of the state relating to insolvency which avoids preferences made within four months of the filing of the petition. Rev. Laws Vt. § 1760.

These conveyances, transfers, or payments were made upon good consideration, to secure or satisfy just debts, and were honest, proper, and lawful, at common law, and were not affected by any statute but this one relating to insolvency proceedings. As that statute, by its terms, did not reach back of four months before the filing of the petitions to be proceeded with, which is considered to be the thirty-first of May, what was done before the thirty-first of January is not affected by it. These notes and evidences of debt are understood to be such that, as between the owner and holder and a purchaser, the ownership of and beneficial interest in them would pass by delivery. When the defendant Sowles, as cashier of the bank, took his own notes from among the assets of the bank, and discharged them as paid, and placed these notes among the assets of the bank, in place of those so discharged, the property in these notes became vested in the bank, and his right to them ceased, as much as if he had put his money among the moneys of the bank, and taken up his notes to the same amount; the title to that, by that act, would have gone to the bank. This was all done and completed several days before the thirty-first of January, and was lawful and proper, so far as any statute undertakes to reach it. The orator appears to be entitled to a decree confirming his title to these notes and evidences of debt. The bank examiner was not an officer or agent of the bank, and he had no authority, as such, to act for the bank in any manner, and could not bind it by any act done or undertaken in its behalf. He represented a department of the government which supervises and controls the banks as to whether in certain cases they shall do business at all or not, but it does none for them, other than to wind up their affairs for their creditors. The examiner makes report to that department to furnish a basis for action with reference to the continuance of the banks in business. His reports might be favorable or otherwise, as any advice he should give might be followed. He doubtless acted for the best interests of the creditors of the bank in giving this advice, but what was done in following it had no more effect than as if it had been done without it. The transfer of the stock on the books of the other bank was without consideration or contract. The certificates were kept by him, and there was nothing on which the bank could stand to hold or enforce ownership of the stock. On the second of February, when he placed the certificates among the assets of the bank as the property of the bank, and took up his obligations to an amount equal to its value, the transfer became complete and valid. The operative part was within the four months, and within the reach of the statute. He did this being in fact insolvent, and with a view to give a preference, as before found. If the

bank had reasonable cause to believe this, the transaction is avoided by the statute. The other officers of the bank did not know of it at the time. When they did know of it, the state of insolvency had so far progressed and made itself apparent that all were affected with knowledge of it. Perhaps they thus had left to the bank the right to repudiate the transaction, and to stand upon the obligations of the paper taken up. If so, and they availed themselves of that right, the stock could be left to go to the defendants; if not, and they stood upon the transaction as made by Sowles, acting for the bank, as well as for himself, they must take his act for the bank as he could perform it, and as if it had been done by any one else affected as he was. This would include his knowledge of his insolvent condition, and the purpose of the transfer. The bank must be affected by the knowledge which the only one acting for it about this transaction had. The transfer of this stock is avoided by the statute. *A fortiori* the transfer of the Wright contract is avoided. The defendants the assignees appear to be entitled to have this stock, and the Wright contract, or the avails of these, decreed to them.

Let there be a decree for the orator confirming his title and right to the notes and evidences of debt, and the avails of them, according to the prayer of the bill; and for the defendants' assignees, that they are entitled to the stock of the Union National Bank of Swanton, and the Wright contract, and the avails of them, and for delivery of the stock and contract if now in the orator's hands, and for an account of the avails if converted, according to the prayer of the cross-bill; without costs to either party.

WITTERS, Receiver, *v.* SOWLES and others, Assignees.

(*Circuit Court, D. Vermont.* November 11, 1887.)

1. LIMITATION OF ACTIONS—COMMENCEMENT OF SUIT—PAROL EVIDENCE.
   The time of commencement of judicial proceedings to avoid a statute bar may be shown by parol.
2. PRACTICE IN CIVIL CASES—REOPENING OF CASE—CUMULATIVE EVIDENCE.
   A case will not be reopened for the introduction of newly-discovered evidence, where such evidence is merely cumulative, and its sources were well known to the parties at the first hearing.
3. JUDGMENT—STAY OF—NEWLY-DISCOVERED EVIDENCE.
   Proceedings upon a decree will be stayed for the purpose of allowing parties to take and file testimony newly discovered, when such testimony appears to be material, and its materiality was not so direct and apparent that the failure to discover and produce it on the first hearing amounted to laches.

In Equity.

For statement of facts of this case, see *Witters* v. *Sowles*, *ante*, 758.

Chester W. Witters, for plaintiff.

Willard Farrington and *Henry A. Burt*, for defendants, assignees.

WHEELER, J. This cause has now been heard on a motion by the defendants for leave to take new testimony as to the reasonable cause

of the officers of the bank to believe that the defendant Sowles was insolvent, and that the mortgages were made with a view to give a preference to the bank, and as to whether the petition in insolvency was filed to be proceeded with when it was lodged with the judge of the court of insolvency.

The evidence claimed to be newly discovered as to the first point appears to be so far merely cumulative, and its sources were so well known to the defendants or their solicitors, that there is no ground apparent for opening the case on that subject.

At first it seemed that the second point would be governed by the record, and that parol evidence would not be admissible to affect it in any way But the period of four months next before the filing of a petition within which conveyances may be avoided is a sort of limitation, and it appears to be well settled that the time of commencement of judicial proceedings to avoid a statute bar may be shown by parol. *Day* v. *Lamb*, 7 Vt. 426; *Gardner* v. *Webber*, 17 Pick. 407; 2 Greenl. Ev. § 431. Therefore, this evidence may be admissible, and quite material. It appears to be in fact newly discovered. Its materiality was not so direct and apparent that the failure to discover and produce it appears to amount to such laches that the defendants ought to be deprived of the opportunity to produce it now, upon some terms. The question of terms is reserved.

Proceedings upon the decree entered are stayed, and leave is granted to the defendants to take and file testimony as to the transaction of filing the petition of insolvency, at any time before December 1st, and the plaintiff has leave to file testimony in answer thereto at any time before December 17th, on such terms as may be hereafter fixed.

WITTERS, Receiver, *v.* SOWLES and others, Assignees.

Circuit Court, D. Vermont. November 11, 1887.)

JUDGMENT—STAY OF—NEWLY-DISCOVERED EVIDENCE.

A decree will be stayed for the taking and filing of newly-discovered testimony which is material, and which could not have been produced on the first hearing.

In Equity.

For statement of facts of this case, see *Witters* v. *Sowles*, *ante*, 758.

Chester W. Witters, for plaintiff.

Willard Farrington and *Henry A. Burt*, for defendants, Assignees.

WHEELER, J. This cause has now been heard on a motion by the defendants to take new testimony with respect to the reasonable cause of the officers of the bank to believe the defendant Sowles to be insolvent, and that the transfer of the notes and securities in question was made

with a view to give a preference, with respect to the filing of the petition in insolvency, and with respect to what the defendant Sowles did with the notes and securities when he discharged the debts to which they were applied from the books of the bank.

The motion as to the testimony on the first point is denied, and as to that on the second point granted, for the reasons stated in respect to the motion in the other case between the same parties heard with this. The testimony of Albert Sowles as to the other point appears to be in fact newly discovered, and to have been so far kept by him from the knowledge of the other defendants and their counsel that they ought not to be precluded from producing it now upon some terms. The question of terms is wholly reserved.

Leave is granted to the defendants to take and file testimony as to the transaction of filing the petition in insolvency, and to take the testimony of Albert Sowles as to what he did with the notes and securities applied to the debts discharged from the books of the bank on January 25, 1884, at any time before December 1st, and the plaintiff has leave to take and file testimony in answer thereto at any time before December 17th, on such terms as may be hereafter fixed.

WITTERS *v.* SOWLES and Wife.

(*Circuit Court, D. Vermont.* November 1, 1887.)

1. BANKS AND BANKING—NATIONAL BANKS—LIABILITY OF SHAREHOLDERS—MARRIED WOMEN.
   Rev. St. U. S. § 5151, provides that "the 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 the par value thereof, in addition to the amount invested in such shares." *Held*, that this section includes a married woman who holds stock in a national bank, and her separate property can be charged to satisfy an assessment levied upon the shareholders on the insolvency of the bank.
2. SAME.
   And the liability of the married woman to respond to such assessment being personal under this section, and the amount sought to be recovered being a sum certain, the remedy to enforce the assessment against the married woman, and to charge her separate property, is an action at law, and not a bill in equity.
3. SAME.
   The contracts of a bank are not contracts of the individual stockholders; and where an assessment was made upon the shareholders of a national bank to satisfy a contractual liability, a married woman who held stock in such bank could claim no immunity from the assessment on the ground that she had no legal capacity to contract.

In Equity.

See case between same parties, *ante*, 130.

Chester W. Witters, for plaintiff.

Edward A. Sowles, for defendants.

WHEELER, J. This bill is brought by the orator as receiver of the First National Bank of St. Albans to charge an assessment to the amount of the par value of 400 shares of the stock of $100 each upon the separate property of the wife, and has been heard on demurrer to the bill. The principal causes of demurrer urged are that neither a married woman nor her property is liable to such assessment, and that the remedy, if any, is at law, and not in equity.

The liability sought to be enforced is created by statute of the United States, which declares that the 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 par value of their stock in addition to the amount invested in that. Rev. St. U. S. § 5151. In *Doctor Hussey's Case*, 5 Coke, 132, it was agreed by all the judges that a *feme covert* was liable to an action with her husband for the penalty incurred under the statute of 2 Westm. *c.* 35, for abducting and procuring the marriage of a ward against the will of the guardian. And in *Foster's Case*, 6 Coke, 107, it was likewise agreed that a married woman was also liable for the penalty of £20 forfeited to the queen by every person above the age of 16 years for every month of non-attendance at church by force of the statute of 23 Eliz. *c.* 1. And it is laid down by Sergeant HAWKINS that, generally, a *feme covert* shall answer as much as if she were sole, for any offense not capital against the common law or statute; and that if a wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same, as he may be generally to any suit for a cause of action given by his wife, and shall be liable to answer what shall be recovered thereon. 1 Hawk. P. C. 3. The same is stated by Lord BACON, Bac. Abr. "Baron and Feme," G. The provision in the constitution of New York, that the stockholders in every corporation "shall be individually responsible," was held to include a married woman who had stock in a state bank. *In re Bank*, 22 N. Y. 9. This case is cited with approval by the supreme court of Rhode Island, and a married woman holding stock held liable under a statute of that state making stockholders in corporations, generally, responsible. *Sayles* v. *Bates*, 5 Atl. Rep. 497. This married woman appears, upon these books and cases, to be personally holden for this assessment if she is in fact a shareholder Sound reasoning appears to lead to the same conclusion, for the statute declaring the liability makes no distinction or exception among those who are shareholders, except as to those holding the stock as executors, administrators, guardians, or trustees, and that exception has no application to this case. Rev. St. § 5152. The common law as to the rights of a husband in his wife's personal property, generally, and as to her right to separate property, prevailed in Vermont, where this bank was located and all the parties resided, when this liability accrued, if at all. The statutes of the state provided that stocks or bonds given by a parent to a daughter should belong to the daughter, if married, in her own right. That statute, however, does not extend to this case, for this stock was not given to this woman by her parent.

Rev. Laws Vt. § 2323. But married women have, independently of any statute, always been held to be capable of holding stocks of corporations, as well as other choses of the same nature, in their own right, in Vermont. *Porter* v. *Bank*, 19 Vt. 410; *Stearns* v. *Stearns*, 30 Vt. 213; *Richardson* v. *Merrill*, 32 Vt. 27; *Caldwell* v. *Renfrew*, 33 Vt. 213; *Howard* v. *Bank*, 40 Vt. 597; *Curtis* v. *Hapgood*, (cited by BARRETT, J.,) 43 Vt. 228. The laws of the United States make no provision as to the capacity of persons to take and hold stock in national banks. Such capacity is left to be determined by the laws of the states where the stock is taken and held. *Lorillard* v. *Oil Co.*, 18 Blatchf. 199, 2 Fed. Rep. 902; *Fetter* v. *Newhall*, 21 Blatchf. 445, 17 Fed. Rep. 841.

The principal argument against the liability is that it rests upon contract, and that, at the time in question, in Vermont the contracts of married women were left as at common law, and were wholly void. The act of 1884, authorizing married women to make contracts generally, had not then been passed. Laws Vt. 1884, p. 119. It is true that the liability does rest upon contract, but not upon the contract of the stockholder. The contract is made by the bank when the liability of that for which the assessment is required is created. The stockholders have no part in that contract. The affairs of the bank are managed by the directors, and its contracts are made by them, or pursuant to their authority. When those contracts are made, the statute binds the stockholders to them to the extent of the par value of their stock. *Richmond* v. *Irons*, 121 U. S. 27, 7 Sup. Ct. Rep. 788. If the stockholder was present and objected, the liability would be no less. The shareholders generally become such by contract, but the liability does not accrue then. They place themselves where the law makes them liable when the banks make contracts; and any one may do that who is capable of becoming a stockholder, and married women in Vermont have, and always have had, that capacity.

The conclusion follows that under the laws of the United States and of the state this married woman is the shareholder of these shares, and as such became responsible for the debts of the bank for which this assessment is wanted, and by the action of the comptroller became personally liable for the assessment. The question remains whether this liability can be enforced by this suit in equity.

It is said by Mr. Justice GRAY, in *Price* v. *Abbott*, 17 Fed. Rep. 506, that actions to recover such assessments are suits at common law. The amount of the assessment is conclusively fixed by the comptroller of the currency. *Kennedy* v. *Gibson*, 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 673. There is no marshaling of assets or liabilities to be had in court. Nothing is sought but the recovery of a sum certain of money. For this a judgment at law is a plain, adequate, and complete remedy, and the statute would seem to exclude a suit in equity for it. Rev. St. § 723. But whether a suit in equity can be maintained or not for less than the par value of the stock, it seems to be well settled that a suit for the full amount, in the federal courts, against ordinary persons, must be at law. *Casey* v. *Galli*, 94 U. S. 673. This suit should therefore have been at

law, unless there is some relief against the property of the married woman defendant which may be had in this proceeding, and which a court of law could not give. At law, judgment would be rendered against her, with or without her husband, as should be proper, on which execution would issue, by virtue of which her property liable to execution could be taken. If, however, her separate property can be charged in equity for her personal liabilities, still this proceeding might be upheld. Many suits in equity have been maintained to reach the separate property of married women where there was no personal liability, but none has been cited or observed where the aid of a court of equity has been had to charge their separate property with any liability for which they were personally holden. In *Biscoe* v. *Kennedy*, 1 Brown, Ch. 18, note, the orator first brought a bill to charge the separate property of the married woman in the hands of a trustee with a debt contracted by her while sole, without bringing suit at law. The bill was dismissed. Then a suit at law was brought, which was prosecuted to outlawry of the husband, and a bill filed to reach the property of the wife in the hands of her trustee, which could not be taken in execution. This suit succeeded. The cases where the separate property of a married woman has been charged in equity have proceeded upon the ground that the property itself had been benefited in some way, so that in equity it ought to respond; or that credit had been given to it, so that it ought to answer the debt. In this case there is no ground to pretend that the bank in any manner benefited the property sought to be reached, so that it ought to respond on that ground.

The property of married women has been holden to be the means of credit, because, being their own separate property, they had the disposition of it in any manner they should see fit, and had, expressly or impliedly, so dealt in respect to it that in equity the property ought to go in satisfaction of the debt charged upon it. In England, the mere contract of a married woman having separate estate was held to be an implied appointment of the estate to satisfy the engagement, because she could bind only that; and, as it was to be presumed that she intended to bind something by her entering into the engagement, it would be presumed that she intended to bind that. Therefore her property was held to satisfy her engagement as surety for others, without other evidence of an intention to charge it. *Hulme* v. *Tenant*, 1 Brown, Ch. 16; *Murray* v. *Barlee*, 3 Mylne & K. 209; *Owens* v. *Dickenson*, Craig & P. 48. In this country, while her separate property may be charged by her dealings in respect to it, her general personal engagement does not appear to be sufficient to charge it. *Partridge* v. *Stocker*, 36 Vt. 108; *Frary* v. *Booth*, 37 Vt. 78; *Stephen* v. *Beall*, 22 Wall. 329. Therefore, when her engagement is that of a mere surety, her separate property is not holden. *Yale* v. *Dederer*, 18 N. Y. 265; *Willard* v. *Eastham*, 15 Gray, 328; *Dale* v. *Robinson*, 51 Vt. 20.

The liability sought to be enforced in this proceeding is in its nature that of a surety. The bank is the principal in contracting the debts to meet which, or the balance of which, after exhausting its assets, the as-

sessment is made. The shareholders have no interest in the making of the debts, except as they may be interested in the fate of their stock. But the statute binds them for the bank. Upon the principles of those American cases, the property of married women would not be specifically charged with such liability. And if the principles of the English cases prevailed here, they would not affect such separate property. The married women, when stockholders, have no part in creating the liability; therefore there is no ground to infer an intention to charge their separate property because they are presumed to make something liable for any debts created by them. The liability is forced upon them by the statute, and there is no entering into it by them from which any presumption of an appointment of their separate property to satisfy it can be drawn. The liability is purely personal, and is entirely separated from the property, except as that may be reached to satisfy the personal judgment. The remedy appears to be at law, the same as it is for any cause of action accruing against a married woman. A married woman could not at that time be sued at law in Vermont apart from her husband. If he could not be made liable with her, that might be a ground for proceeding in equity against her where there might be a decree against her without him. But the common law cast upon the husband all the obligations of the wife, however arising, and there is no defect in procedure at law on this account. 2 Kent, Comm. 143.

There is no ground to be found for maintaining this bill; therefore it must be dismissed.

Let there be a decree sustaining the demurrer, and dismissing the bill of complaint for want of jurisdiction in equity.

WITTERS, Receiver, *v.* SOWLES, Ex'r, and another, Trustee, and another.

(*Circuit Court, D. Vermont.* November 11, 1887.)

EXECUTORS AND ADMINISTRATORS—DEBTS OF DECEDENT—RESIDUARY LEGACY.

The levy of an execution upon property of a testator in the hands of the residuary legatee, to satisfy a debt of the testator, will be vacated where it is shown that the executor still has in his hands property of the estate not yet surrendered to such residuary legatee.

In Equity.

For statement of the facts of this case, see *Witters* v. *Sowles*, *ante*, 130.

Chester W. Witters, for orator.

Edward A. Sowles and *Kittredge Haskins*, for defendants.

WHEELER, J. Final decree against the estate of the testator in the hands of the executor, and in default of payment therefrom against the same in the hands of the trustee, and in default of payment therefrom against Susan B. Sowles, according to the decision on final hearing,

has been entered herein. *Witters* v. *Sowles*, *ante*, 130, 139. On default of payment execution has been taken out running against the goods, chattels, or lands of the testator in the hands of the executor, and for want thereof against any such in the hands of the trustee, and for want thereof against the goods, chattels, or lands of Susan B. Sowles. The marshal has levied the same upon lands of the testator in the hands of the trustee, and threatens to sell the same to satisfy the decree. The defendants have moved to set aside the levy on the ground that there are lands of the testator in the hands of the executor which ought to go first to satisfy the decree, and which were pointed out to the marshal to be taken for that purpose. There is no question, and none is made, but that it is within the power of the court to vacate the levy for this cause. *Krippendorf* v. *Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27; *Covell* v. *Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355. It is manifest that the assets in the hands of the executor ought to be exhausted before those in the hands of the trustee are taken; for the liability on which the decree is founded accrued against the former, and the latter could be holden to satisfy it only for want of the former.

The only question there is, therefore, on this motion, is whether the lands pointed out are of the estate of the testator in the hands of the executor. That they were of the estate of the testator is not disputed; therefore the question is narrowed down to whether they are in the hands of the executor. The creditors of the testator had the first lien upon the assets of this estate. That was provided for by the bond of the executor pursuant to the laws of the state. Rev. Laws, § 2067. Susan B. Bellows was residuary legatee. The executor was executor of her will, and Margaret B. Sowles was residuary legatee in that. The probate court found that there were sufficient assets to pay the debts and legacies, and leave a large amount for the residuary legatee, and thereupon decreed that the executor pay the debts and legacies, and decreed the residue to the estate of Susan B. Bellows as the residuary legatee; and at the same time that court decreed that the executor pay all her debts and legacies, and decreed the residue to Margaret B. Sowles, residuary legatee. These decrees settled the liability of the executor for the debts and legacies. *Weeks* v. *Sowles*, 58 Vt. 696, 6 Atl. Rep. 603. They left the estate in the hands of the executor to pay the debts and legacies from, and settled the right of the residuary legatee to the residue after such payment, but left the adjustment of that to her and the executor. It appears in the case that the debts and legacies are not all paid. The executor has the right, under the laws of the state, to hold possession of the real estate so long as may be necessary for the purposes of making payment. Rev. Laws Vt. §§ 2182, 2185. He may also surrender the same to a devisee during the progress of the settlement. Section 2185. *Dunbar* v. *Dunbar*, 3 Vt. 472; *Lyman* v. *Webber*, 17 Vt. 488.

The orator sets forth that the lands pointed out as in the hands of the executor have been by him surrendered to the residuary legatee by virtue of his authority as executor, and that thereby they have ceased to be in his hands as executor. The only evidence in the case bearing upon

this point, directly, is that of the residuary legatee herself. She testifies in answer to interrogatory 100 that the real estate was not transferred to her; in answer to interrogatory 110, that she assumed control of the house where she lives; in answer to interrogatory 114, that this is all the real estate she has had anything to do with since the decrees; in answer to interrogatory 241, that she has received farms towards her legacy of $20,000; and in answer to interrogatory 324, that the executor has in his hands the other real estate. Nothing has been pointed out or observed to contradict this testimony. It is not understood that the real estate pointed out to the marshal includes any of these farms, or the place mentioned as the place where she lives. This is not, however, very clear. If not, it is found to be in the hands of the executor, and should be exhausted for the purpose of satisfying the decree before taking the assets in the hands of the trustee. She joins with the others in setting up in this motion that this real estate is still in the hands of the executor. This would estop her from afterwards claiming that it was not, but was included in that surrendered to her, if she made the motion herself, or it was done by her authority. The motion is signed by her husband as solicitor. He is the executor, and in a somewhat adversary position. There might be a question about his authority, and none should be left about her renunciation of this property for this purpose. As trustee she appears to be entitled to have the levy suspended until the real estate pointed out is exhausted, when her renunciation is made clear. This can be done by filing an acknowledgment that the motion is made with her authority.

Let an order be entered that on the filing of an acknowledgment by Margaret B. Sowles, taken by a notary public, that this motion is made by her authority, if done within six days, the levy heretofore made be suspended until the estate named in the motion as being in the hands of the executor is exhausted.

SHELDON and another *v.* WHEELER and another.

(*Circuit Court, N. D. Illinois.* November 21, 1887.)

CONFLICT OF LAWS—ASSIGNMENT FOR BENEFIT OF CREDITORS—NON-RESIDENCY—ATTACHMENT.

A voluntary assignee of a non-resident under the laws of another state cannot hold assets found in Illinois against attaching creditors resident in that state.[1]

P. L. Shuman, for plaintiff.
Butz & Eschenburg, for garnishee.

[1] A voluntary general assignment for the benefit of creditors, if valid where made, will be valid to transfer personal property wherever situated, except as it conflicts with the rights of resident creditors. Schuler v. Israel, 27 Fed. Rep. 851, and note.

BLODGETT, J., (*orally.*) This is an attachment suit, the plaintiffs being citizens of Illinois, and the defendants citizens of Connecticut. The suit was commenced against the defendant as a non-resident of this state, under the attachment laws of Illinois; an attachment writ issued and served by summoning certain persons as garnishees. One Merwin intervenes, and claims to be the owner of, and entitled to, the proceeds of the indebtedness garnished, on the ground that he is the voluntary assignee of Wheeler & Co., the attachment debtors, who reside and do business in the state of Connecticut. Wheeler & Co. made a voluntary assignment, under which Merwin is the acting assignee, for the benefit of their creditors, and Merwin sets up a superior right and claim as such assignee to the assets attached.

I am satisfied that the law in this case was properly stated by the supreme court of Illinois in *Heyer* v. *Alexander*, 108 Ill. 385, where it is stated, in substance, as the true rule, that a voluntary assignee under the laws of another state will not be allowed to take the property of the assignor found in this state, as against a creditor of the assignor resident in this state who has brought an attachment for the purpose of reaching the assets of such non-resident debtor. In other words, that each state, being a separate and independent sovereignty, will see to it that its own citizens are protected in the collection of their debts against non-resident debtors, so far as the assets of such debtors are within the jurisdiction of the state. There have been some later decisions by the supreme court of Illinois, but I do not think they disturb the principle upon which *Heyer* v. *Alexander* was decided.

The demurrer to the interpleader is sustained, and the interpleader dismissed.

In re Extradition of LUDWIG.

(*Circuit Court, S. D. New York.* September 19, 1887.)

EXTRADITION—ADJOURNMENT OF HEARING.

It is within the discretion of the commissioner to adjourn the hearing of extradition proceedings on motion of the sovereignty making the demand for the accused, and the prisoner is not entitled to be discharged from custody on *habeas corpus* on the ground that the adjournment is unreasonably long, unless it is made to appear that the commissioner has abused his discretion.

On *Habeas Corpus.*

Robert Waite, for Ludwig.

Solomon & Dulon, for the German government.

LACOMBE, J. The first question raised in this case is whether the adjournment of the hearing granted by the commissioner was unreasonable. That his power to grant adjournments at the request of either party is unquestionable was held in *Re Macdonnell*, 11 Blatchf. 100. It is said in that case that "the commissioner must exercise a just and reasonable

discretion on that subject," and that it is only when such discretion is abused that the courts will afford relief. While the adjournment in the case at bar was undoubtedly extremely liberal, I am not prepared to say that it was unreasonable, especially in view of what the papers before the commissioner showed as to the character of the evidence which might be expected on the adjourned day.

It is unnecessary to consider the other points raised upon the argument, as the first one is controlling of this application. The prisoner may be remanded to the custody of the marshal till the hearing is closed, without prejudice to a renewal of the application for discharge, should the German government not close its case on September 27th.

UNITED STATES v. CARROLL.

(*District Court, E. D. Missouri, E. D.* November 21, 1887.)

ELECTIONS—OFFENSES—INDICTMENT.

Rev. St. U. S. § 5512, provides for the punishment of any registration officer who "*does any act unauthorized by law relating to or affecting the registration,*" and its last clause provides for the punishment of any person who "*aids, counsels, procures, or advises any * * * officer to do any act*" therein made a crime. In Missouri, a registration officer is not authorized to write a person's name on the registration book unless he applies for registration, and takes a certain oath. An indictment against defendant alleged that an indictment against one M. for writing names of persons on the registration book, who had not applied for registration or been sworn, had been found, and that M. had been tried and convicted thereon, and that defendant had aided, counseled, and procured said M. to do the act in question. *Held*, that the offenses described in the section are misdemeanors, and that the advising an officer of registration to do an unauthorized act is a substantive and not an accessorial offense, and the indictment should allege what specific offense the officer of registration committed, and that the defendant advised and procured him to do it.

On Demurrer to Testimony.

Thomas J. Molloy was indicted and tried in the circuit court of the United States for the Eastern district of Missouri, under section 5512, Rev. St. U. S., for doing an act unauthorized by law, to-wit, writing the names of persons in the registration book in his custody who had not applied for registration, or taken the oath required by law. *Vide* 31 Fed. Rep. 19. Subsequently James Carroll was indicted under the last clause of section 5512, for "counseling, procuring, and advising" said Molloy to do the act for which he had been tried and convicted. On the trial of the latter indictment, after a jury had been called and sworn, defendant's counsel interposed an objection to the admission of any testimony, because the indictment was bad in that it did not show that Molloy had done any specific acts which amounted to an offense, at the instigation of the defendant.

Thos. P. Bashaw, Dist. Atty., and *D. P. Dyer*, for the Government.

Chester Krum and *Wm. C. Marshall*, for defendant.

THAYER, J. Counsel for the government concede that in cases of misdemeanor there is no such thing known to the law as an accessory before the fact or at the fact; and the proposition is elementary that all who are in any way concerned in the commission of an act which is a misdemeanor are principals. *State* v. *Lynburn*, 1 Brev. 397; *U. S.* v. *Gooding*, 12 Wheat. 475, 476; *U. S.* v. *Hartwell*, 12 Int. Rev. Rec. No. 9, p. 72, (date August 27, 1870.)

It is also true that Judge BREWER and myself have held that the offenses described by sections 5511 and 5512, Rev. St. U. S., are misdemeanors, and not felonies. It is also obvious that the present indictment was drawn on the theory that defendant was an accessory before the fact, or at the fact, to some main offense committed by the registration officer, Molloy, and that it was essential under an old rule of the common law applicable to felonies only, to show on the face of the indictment that the principal offender, Molloy, had been indicted and convicted. But the offense committed by Molloy being a misdemeanor, the defendant could not be an accessory before the fact. Consequently the theory on which the indictment was drawn is wholly erroneous. There can be no reasonable doubt of the correctness of the foregoing propositions. I think it is equally clear that, under section 5512, "to counsel, procure, and advise" a registration officer to do an act unauthorized by law, (which seems to be the offense intended to be charged against the defendant,) is in itself a distinct offense, different from the offense which a registration officer commits when he does "an act unauthorized by law." This conclusion not only results from a careful reading and analysis of the statute, but it is confirmed by authority.

Thus, in the case of *U. S.* v. *Hartwell*, *supra*, where a statute made it a felony on the part of an officer to loan public money in his charge, and the same section further provided that all persons advising or participating in such act, on conviction, should be punished as therein provided, Judge CLIFFORD, in effect, held that two distinct offenses were created by the section. In the case of *U. S.* v. *Gooding*, *supra*, where a statute made it an offense to engage in and carry on the slave trade, or to aid and abet such enterprises, Judge STORY held that the words "aid and abet" were used to describe a substantive offense, and not an offense that was merely accessorial. It is clear, therefore, that counseling, advising, and procuring an officer of registration to do an unauthorized act, is a substantive offense, and should be indicted as such, and not as an accessorial offense; and that it may be punished, although the registration officer has not been previously convicted, or even prosecuted.

This much being determined, the indictment in the case at bar is clearly bad. It is not alleged therein that the registration officer, Molloy, did any specific acts amounting to an offense; and that the defendant, Carroll, counseled, procured, and advised him to do the acts in question,—all of which facts should, in my opinion, be averred in an issuable form to make a good indictment. The bill merely states that a certain indictment, which is set out *in hæc verba*, was found against Molloy, and that he was put on trial, and convicted, and that Molloy acted

according to the counsel, procurement, and advice of the defendant. There is not a single direct allegation in the indictment that Molloy was an officer of registration, or that he did any act amounting to an offense. All the information given on those points must be gathered from the indictment against Molloy, which is set out merely by way of recital. Evidently, the pleader supposed that it was sufficient to aver that Molloy had been convicted on a certain indictment, and that it was unnecessary to allege specific acts done by the registration officer amounting to an offense.

In my opinion, the allegation that an indictment of a certain kind was found against Molloy, and that he was convicted, is wholly immaterial; for, as this defendant was not an accessory to the offense committed by the registration officer, but, if guilty of any offense, was guilty of a distinct and independent crime, neither the indictment against Molloy nor record of conviction would be admissible in evidence against this defendant to establish *as against him* that Molloy had in point of fact committed the acts described in the indictment against Molloy. I feel confident that the indictment in the case at bar is bad in law, and that the defendant should not be put on trial under the same. I will sustain the objection against the admission of any testimony to support the indictment, and order the defendant's discharge.

UNITED STATES *v.* CHAMBERLAIN.

(*District Court, E. D. Missouri, E. D.* November 16, 1887.)

ELECTIONS—OFFENSES AGAINST—REV. ST. U. S. § 5521.

A supervisor of election was indicted under Rev. St. U. S. § 5521, for neglecting and refusing to challenge the vote of an individual representing himself to be a person whom said supervisor knew to be dead. *Held* that, if for any reason he did not at the time know that such vote was being offered, then he was not guilty of any offense.

Indictment for Violation of section 5521 of the Revised Statutes of the United States.

Thos. P. Bashaw, U. S. Dist. Atty., and *D. P. Dyer*, special counsel, for the United States.

Wm. C. Marshall, for defendant.

THAYER, J., (*charging jury.*) The indictment in this case charges, in substance and effect, that John W. Chamberlain, the defendant, was duly appointed, by the circuit court of the United States for the Eastern district of Missouri, one of the supervisors of election for the Fifty-second election precinct of the city of St. Louis, the same being in the fourth ward of this city, and within the Eighth congressional district of the state of Missouri; that, as such supervisor, he served at an election held in that precinct on November 2, 1886, at which election a

representative in congress for the Eighth congressional district of Missouri was voted for; that, while so serving as supervisor of election at that precinct, some person representing himself to be Ed Maher, residing at 907 Biddle street, offered a ballot for a representative in congress then being voted for; that such ballot was accepted as a lawful ballot by the judges of election at said precinct, and that defendant, though present and aware that the Ed Maher residing at 907 Biddle street was dead, nevertheless neglected and refused to challenge the vote so offered and accepted.

By way of explanation, I will say that, under the laws of the United States, the circuit court of the United States, on the written request of a certain number of citizens residing in the district where such court is held, has power prior to the holding of an election for a representative in congress in such district to appoint what are termed "Supervisors of Election" for the various voting precincts of cities having over 20,000 people within the congressional district, whose duty it is to guard and scrutinize the election in so far as it relates to the election of a congressional representative. The duties of such officers are in part defined by the following paragraph of section 2017 of the Revised Statutes of the United States, which I will read:

"Sec. 2017. The supervisors of election are authorized and required to attend at all times and places for holding elections of representatives or delegates in congress, and for counting the votes cast at such elections; *to challenge any vote offered by any person whose legal qualifications the supervisors, or either of them, may doubt.* * * *"

The phrase "challenge any vote offered by any person whose legal qualifications the supervisor may doubt" means simply this: that it is a supervisor's duty to enter an objection or protest before the judges of election against the receipt of a ballot for a representative in congress from any person whom the supervisor believes is not for any reason a legally qualified voter at the precinct where such vote is tendered; and, at the time of making such objection, it is also the supervisor's duty to state to the judges of election the grounds of disqualification; that is to say, the facts on which the objection or challenge is based. The laws of the United States contain this further provision, which I will also call to your attention, as the indictment is founded on the particular section I am about to read. It is as follows:

"Sec. 5521. If any person be appointed a supervisor of election, * * * and has taken the oath of office as such supervisor of election, * * * and thereafter neglects or refuses, without good and lawful excuse, to perform and discharge fully the duties, obligations, and requirements of such office until the expiration of the term for which he was appointed, he shall not only be subject to removal from office, with loss of all pay or emoluments, but shall be punished by imprisonment for not less than six months, nor more than one year, or by a fine of not less than two hundred dollars, and not more than five hundred dollars, or by both fine and imprisonment, and shall pay the costs of prosecution."

As it is made the supervisor's duty to challenge a vote if he entertains a doubt of the voter's qualification, it follows, under the statute I last

read you, that, if a supervisor knowingly neglects or refuses when acting as supervisor to challenge the vote of any person offering to vote in his presence whom he knows or believes to be disqualified to vote at that precinct for any reason, then he commits an offense against the laws of the United States. The court accordingly instructs you that if you find from the evidence that defendant was appointed supervisor of election for the Fifty-second election precinct of the city of St. Louis at the election held November 2, 1886, that while serving in that capacity at said precinct a person with the knowledge of the defendant represented himself to the judges of election to be Ed Maher, residing at 907 Biddle street, and tendered a vote in that name for a representative in congress from the eighth congressional district of Missouri, which vote was accepted and placed in the ballot-box, and that defendant intentionally omitted to challenge said vote, that is to say, did not object to or protest against the acceptance of said ballot by the judges of election, although he knew that said Ed Maher was dead, then he should be found guilty of the charge laid in the indictment. To warrant you in finding the defendant guilty of the charge laid in the indictment, all the facts last stated must have been proven by the prosecution, not only to your satisfaction, but beyond any reasonable doubt.

Now, gentlemen, under the statute which I have read to you, it is obvious that the defendant cannot, and ought not to, be found guilty unless there was an intentional omission on his part to challenge the vote in the name of Ed Maher when such vote was offered, if it was offered, although he knew that Maher was dead, and that some one was attempting to vote in his name. It follows, therefore, that if he was absent from the room when the vote in that name was received, and for that reason, or for any other reason, he did not know at the time such vote was offered in the name of Maher that it was being offered, then he was not guilty of any offense, and you should so find.

The defendant, as I have understood him, claims that he was absent from the room where the votes were polled when said vote in the name of Maher was received, if any such vote was offered, or at least he claims that he was not aware at the time of the transaction that any such ballot was being offered. There is other testimony in the case tending to corroborate the defendant's statement, particularly the testimony of the witnesses James McCormick and George W. Thorn, and some entries contained in the registration list, to which defendant's counsel has alluded. You are the exclusive judges of the credibility of these witnesses, and of all the witnesses, and it is your province to determine what weight you will give to their testimony. It is your duty to carefully weigh the oral testimony, and to consider the entries which appear in the registration list to which allusion has been made, and even if you find that some person did vote in the name of Maher, and that defendant knew that Maher was dead, still you should not convict the defendant of the charge in this indictment unless the evidence satisfies you, beyond any reasonable doubt, that defendant stood by and saw or heard the vote in the name of Maher offered, and intentionally kept silent and permitted the judges of election

to accept such fraudulent ballot without challenging the same or making any objection thereto.

In conclusion I will say to you, in view of what has occurred during the argument, that defendant is on trial merely upon the charge stated in this indictment of intentionally neglecting to challenge a fraudulent ballot, knowing it to be fraudulent. You will confine your attention solely to that charge, ignoring any other charges against the defendant that may have been made by counsel in the course of the argument. The entries in the poll-books, and in the defendant's report, are before you, and are to be considered solely for the purpose of enabling you to determine whether the charge in the indictment is true or false.

LEATHERBURY *v.* UNITED STATES.[1]

(*Circuit Court, S. D. Mississippi.* November 7, 1887.)

PUBLIC LANDS—CUTTING TIMBER—BOXING PINES.

Boxing of pine trees for turpentine, by which the trees are not felled nor severed from the soil, is not a cutting of timber with intent to dispose of the same in a manner other than for the use of the navy, within the meaning of Rev. St. U. S. § 2461, where the trees so boxed are not upon public lands reserved for supplying timber for the navy, and where there is no intent to export, dispose of, use, or employ the trees or timber in any manner whatsoever.[2]

Luke Lea, for plaintiff in error.

J. B. Harris, Dist. Atty., *contra.*

PARDEE, J. This writ of error is prosecuted to reverse a conviction under an indictment of which the following is the material part for this case:

"That heretofore, to-wit, during the years 1883, 1884, 1885, and 1886, in said district, and within the jurisdiction of this court, Geo. S. Leatherbury did unlawfully cut, and cause to be cut, a quantity of timber, to-wit, 31,784 pine trees of the value each of fifteen cents, then and there standing and growing upon certain lands of the United States, theretofore acquired, to-wit, (inserting description of lands,) with intent to dispose of the said timber, in a manner other than for the use of the navy of the United States, to-wit, for his own use and benefit against the peace and dignity of the United States," etc.

The statute of the United States under which the indictment was found and the prosecution had, is section 2461, Rev. St. U. S.; and it provides, among other things:

"If any person shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting, any live-oak or red cedar trees, or other timber on, or shall remove, or cause or procure to be removed, or aid, or assist, or be em-

[1] See 27 Fed. Rep. 606.

[2] As to the right of a settler on public lands to cut timber thereon, see U. S. v. Murphy, *ante*, 376, and note.

ployed in removing, any live-oak or red cedar trees, or other timber from, any other lands of the United States, acquired, or hereafter to be acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the navy of the United States, every such person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months."

On the trial the following bill of exceptions was taken:

"On the trial of this cause it was proved that the cutting charged in the indictment was done by boxing pine trees, on the lands therein mentioned, for turpentine purposes; that none of the trees boxed were thereby felled or severed from the ground; that the lands on which the trees were standing had been entered under the homestead law; that no patent had been issued to any of the enterers; that the boxing was with their consent, and under contracts with the defendant, made, as they and he testified, in good faith, and with no intent to defraud the United States or violate any law; that the gum extracted from the trees was conveyed to a distillery operated by the defendant, and there converted to his own use; that there was an average of one and a half boxes to each tree, making 1000 boxes to about 667 trees, the yield of gum from that number of boxes being three barrels per month for a turpentine season of eight months; that the value of the gum delivered at the distillery was from $1.50 to $2.50 per barrel, the average being $2.00 per barrel. There was no evidence of the net value of the gum at any time or place; and, apart from the yield of the boxes and the value of the gum, as above proved, there was no evidence as to the value of the trees when boxed or afterwards.

"The court, in charging the jury, instructed them that the boxing of the trees for the purposes stated was an unlawful cutting of them, and an indictable offense. And the jury were also instructed that the value of the gum, as proved, was a circumstance from which they might infer the value of the trees. To these rulings of the court the defendant, by his counsel, immediately excepted, and now tenders this, his bill of exceptions, which is signed and made a part of the record in this court."

The following is the verdict in the case:

"We, the jury, find the defendant guilty as charged in the indictment, and assess the damage at thirty-one thousand trees at the rate of ten cents a tree; say three thousand and one hundred dollars."

The contention in this court is that there was error in the instructions to the jury to the prejudice of the plaintiff in error. (1) That boxing trees for turpentine is not cutting trees with intent to export, dispose of, use, or employ the same in any manner whatsoever. (2) That the value of a pine tree cannot be inferred from the value of the gum taken therefrom delivered at a distillery.

Section 2461, Rev. St., was originally the first section of an act approved March 2, 1831, entitled "An act to provide for the punishment of offenses committed in cutting, *destroying*, or removing live-oak and other timber or trees reserved for naval purposes." See 4 Statutes at Large, 472. The first part of the section provides for the offense of cutting or destroying oak, or cedar, or other timber standing or growing or being on lands reserved for supplying timber for the navy. No intent is specified. Provision is next made for the offense of removing such trees or timber from such lands. In this, also, the act of removing constitutes the offense, without reference to any intent. Then follow the provisions

quoted above, which provide for the cutting or removing of trees or timber *with intent to export, dispose of, use or employ* the same in any manner whatsoever, other, etc. From this it appears that, in the legislative mind, cutting trees or other timber is not the same as destroying trees or other timber, and that while cutting, destroying, or removing timber from lands reserved for supplying timber for the navy are each denounced, without intent referred to, the cutting or removing of trees or timber on or from lands not reserved is denounced when done with a certain specific intent. And it is safe to conclude that, while the object of the section was and is to preserve the timber on all the public lands, where the lands have not been reserved for the use of the navy, trespasses other than the cutting or removing of the trees or timber with the intent to export, dispose of, etc., were not contemplated nor provided for. See *U. S.* v. *The Helena*, 5 McLean, 273. But in this case the question is clearly made whether the boxing of trees for turpentine, by which the trees are not felled, nor severed from the soil, and where there is no intent to export, dispose of, use, or employ the trees or timber in any manner whatsoever, is a cutting of timber with intent to dispose of the said timber in a manner other than for the use of the navy. It is very difficult to make out that the boxing of a pine tree for turpentine, which is well understood in turpentine districts to mean cutting into a tree more or less deep, in such a way as to cause the resin or gum of the tree to run and gather in the basin formed at the bottom of the cut, is a cutting of the tree in the sense in which the word cut is used in the statute, where it evidently means to sever or fell. And if this should be satisfactorily answered, and it be shown that the cutting of the statute includes any cutting, however slight, then it seems that the requisite intent, to constitute an offense, is wholly lacking. It is not even plausible to argue that an intent to procure turpentine from a tree is an intent to dispose of the timber. It is not necessary to consider whether, under the statute referred to, the value of the resin obtained from a pine tree, delivered at a distillery, is a proper circumstance to be considered in determining the value of the tree.

The judgment of the district court will be reversed, a new trial awarded, and the case remanded to the district court, there to be proceeded with according to law.

NEW YORK PAPER-BAG MACHINE CO. *v.* UNION PAPER-BAG MACHINE CO.[1]

(*Circuit Court, E. D. Pennsylvania.* November, 1887.)

1. PATENTS FOR INVENTIONS—AGREEMENT TO ASSIGN—RECORD—NOTICE.
   There is no authority under the patent laws to record an agreement for a future assignment of a patent not yet issued, and if recorded it does not amount to notice.
2. SPECIFIC PERFORMANCE—LACHES—NOTICE.
   Specific performance of a contract to assign a patent will not be decreed when the complainant has been guilty of laches, unless the defendant has acquiesced in the delay; and when specific performance of such a contract is sought after a subsequent assignment of the patent to a third party, the complainant must show that he performed, or tendered performance of, his part of the contract, and that the assignee had notice of his contract.

In Equity.

Frederic H. Betts and *Wayne MacVeagh*, for complainant.

Francis T. Chambers and *George H. Harding*, for respondent.

BUTLER, J. On the twenty-sixth day of January, 1880, Leinbach & Wolle, copartners in trade, entered into a contract with Mark L. Deering, in the following words:

"That whereas the party of the first part, (Leinbach & Wolle,) and the party of the second part, (Deering,) have each and severally applied to the United States patent-office for a patent covering a new style of paper bag, known as the 'Square Satchel-Bottom Bag,' and whereas these applications have been adjudged in interference one with the other; now, therefore, it is mutually agreed by and between the parties hereto as follows, to-wit: Party of the first part, for and in consideration of the sum of one dollar in hand paid by party of second part, the receipt whereof is hereby acknowledged, and also in consideration of the covenants and agreements on the part of the party of second part to be performed and kept, hereby agree to withdraw their application for said patent aforesaid in favor of the said Mark L. Deering, party of second part, so that the patent-office may at once allow a patent to him; and, furthermore, said party of first part agree to have issued to said Deering ten thousand dollars of the full-paid stock of a company about organizing in New York, to be styled the 'New York Paper-Bag Machine & Manufacturing Company,' or in lieu thereof, at their option, to pay him the sum of one thousand dollars in cash. Party of the second part, for and in consideration of the covenants and agreements of the party of first part to be performed and kept, and also for one dollar in hand paid, the receipt whereof is hereby acknowledged, hereby agrees and binds himself to assign over to the 'New York Paper-Bag Machine & Manufacturing Company,' when said company shall have been organized as aforesaid, the patent which shall be granted to him by the United States patent-office, covering the said new square satchel-bottom bag as aforesaid, with any and all future patents which he may be able to obtain covering paper bags, and he also agrees to apply for an interference with the patent heretofore granted to one Daniel Appel, of Cleveland, Ohio, the aforesaid company to pay all expenses, and, when a patent has been allowed him on that claim or claims, to also assign that patent over to the above named company.

"In witness whereof the parties have hereunto set their hands and seals."

[1] Reported by C. Berkeley Taylor, Esq., of the Philadelphia bar.

This agreement was signed by the parties, duly acknowledged, and recorded in the patent-office.

Leinbach & Wolle promptly proceeded to form the contemplated company; but encountered great difficulty in persuading others to embark in the enterprise; and it was not until the sixth day of December, 1884, that they succeeded in organizing a company.

Deering, although anxious for a speedy execution of the contract, exhibiting much uneasiness and dissatisfaction with the delay respecting it, *appeared* to acquiesce; and fully justified Leinbach & Wolle in believing he did. He did not, however; and before many months had elapsed he sought other purchasers. He applied to the defendants with this view, and continued to communicate with them from time to time, urging the purchase. On the first of February, 1881, he wrote as follows:

"*E. J. Howlett & Co.*, 520 *Commerce St., Phila.*—GENTLEMEN, SIRS: Inclosed please find patent for improvement in manft. of paper bags. You may remember I called upon you in the summer of 1879; at that time my patent was with interferences with the Cleveland Paper Co.'s. I next wrote you a letter in August, same year, to which I received an answer dated Sept. 5, '79, saying you would buy my patent if awarded to me, and would give me more for it than any one else. I was again in Philadelphia the latter part of August, or the first of Sept., 1880; called at your place of business, but you were at the seaside at that time. This time I had the patent with me, as you will see it was issued May the 11th, '80.

"I suppose you are aware that the Cleveland Paper Co. have had some eight or ten patents issued to them on paper bags; all of them, however, is intended to avoid my patent. My atty. claims that they all are infringements upon mine, and that it is impossible for them to make a bag of that description without infringement with mine. On Saturday last, Jany. 29th, I made it my special business to go in their machine-shop; there I saw, as I were already informed, a machine for making a bag, which is a face simlar of mine; but, if course, the clame the have so many patents the do not infringe upon me, and I clame it is impossible for them to make a square satchel-bottom bag without infringin on me. I am informed by good authority that the intent to buil a number of those machines, and manufacture the bag *the clame in spite of me.* Now, if such is the case, it will not pay me to put an injunction upon them, as I am not in the bag business, *but I really want to see some one do so.* Now, I propose to assign to you my patent for five hundred dollars, which will let me out just about clear.

"You are the only party who they are afrade of, and for that reason I hope that you will take this off my hands. Then I will keep still, and let them go ahead, and when the proper time comes I hope you will straghten them out good. Hoping you will give this proposition due consideration, and hear from you soon. Very truly yours, MARK L. DEERING."

On the twentieth of April following, the defendant took an assignment, on the terms proposed; and three days later recorded it.

Leinbach & Wolle continued their efforts for the formation of a company. For more than a year, however, after this assignment, they had no communication with Deering, nor with his assignee, the defendants. They were aware of Deering's uneasiness and eagerness for prompt performance of the contract, of his poverty, and anxiety to realize something upon his invention. They continued to write him, stating their failures

and prospects, apparently seeking to hold him steady respecting his engagements. He, however, made no reply; and they were unaware even of his whereabouts. About a year later, in April, 1882, Leinbach & Wolle, having seen the record of the assignment, tendered the defendants $1,200, and demanded a transfer of the patent. This being refused, they hunted up Deering, and, on the twenty-seventh of September, tendered him the sum named in the contract, and demanded an assignment. He also refused, on the ground that he had nothing to assign. On the third of October, 1884, the defendants commenced suit against Leinbach & Wolle for infringement of the patent. On the sixth of December following, Leinbach & Wolle succeeded in forming a company. Addressing themselves again, very earnestly and persistently, to Deering, and offering him $10,000 of stock in this company, they eventually succeeded in inducing him to accept the offer, and execute an assignment to the company.

The bill sets forth these facts, (about which there seems to be no room for dispute,) and in addition thereto alleges a verbal understanding between Leinbach & Wolle and Deering, contemporaneous with the written contract, or nearly so, that the contemplated company should not, or need not, be formed until after the completion of machinery (then in process of construction) for the manufacture of bags; further avers that the defendants had knowledge of Deering's previous contract, when taking their assignment; and that the assignment was obtained through fraudulent misrepresentations, respecting Leinbach & Wolle's ability to carry out their undertaking.

It is thus seen that the plaintiff's case is, or appears to be, presented in a double aspect: (1) As founded on the legal title to the letters patent, derived through Deering's assignment of 1885; the relief sought being the cancellation of the alleged fraudulent and inoperative assignment, an apparent incumbrance or cloud upon the title, from which litigation and trouble is threatened. (2) As based upon an equitable title, arising out of Deering's original contract with Leinbach & Wolle; the relief sought being the specific execution of this contract, through an assignment of the legal title by the defendants.

The first aspect or proposition is readily disposed of. The alleged fraud on which it rests has no existence. The bill founds it on the alleged knowledge of the previous contract, when taking the assignment, and the alleged misrepresentations to Deering. But it is quite clear that Deering had a right to sell the legal title which remained in him, and the defendants a right to purchase, notwithstanding they had the information imputed. The facts as stated in the bill, do not, therefore, constitute a fraud. If Deering was imposed upon in parting with his interest, (of which we do not find any reliable evidence,) he alone could complain of it.

As respects the second aspect or proposition, a question of law lies at the threshold, about which, however, there seems little room for controversy. Ordinarily equity cannot be invoked for the specific performance of contracts respecting personal property; an action at law for the breach

being held to afford an adequate remedy. In 2 Pars. Cont. 522, it is said:

"This distinction, in equity, regarding specific performance, is well established everywhere."

In Bisp. Eq. § 368, it is said:

"In regard to personalty it is a general rule that equity will not decree specific performance of contracts respecting this species of property, for the reason that compensation in damages is ordinarily sufficient."

In special instances, however, where the circumstances are extraordinary, either as respects the property or the situation of the parties, where an action for damages would not afford an adequate remedy, equity may be invoked for specific performance. It is unnecessary to dwell upon the subject. The cases cited by counsel: *Secombe* v. *Campbell*, 2 Fed. Rep. 357; *Newell* v. *West*, 13 Blatchf. 114; *Pontiac* v. *Merino Co.*, 31 Fed. Rep. 286, 289, (to which may be added 2 Pars. Cont. 534, and *Thombleson* v. *Black*, 1 Jur. 198,) show that letters patent and copyrights fall within the exception to the general rule stated.

Starting with the fact that Leinbach & Wolle took an equitable title, by the contract of 1879, it must appear (to entitle the plaintiffs to a decree) that they faithfully performed (or tendered performance of) their part of the contract; and also that the defendants had notice of its existence, when taking the assignment.

As respects the first question, it must be remembered that the contract to which we allude is the one in *writing*. The alleged verbal understandings are of no consequence, except to the extent they may tend to show acquiescence of Deering in Leinbach & Wolle's delay, previous to April, 1881, when he assigned to defendants. That there was delay within this period, such as would be fatal to the claim for specific performance, in the absence of acquiescence by Deering, seems quite clear. Ordinarily time is not of the essence of contracts respecting either real or personal property. In special instances, however, it is. Here the circumstances were such as seem to have required prompt action. The life of the patent was running, and the lapse of every month tended to diminish its value. No precise time was specified for performance. The assignment was to be made to a company, then "about organizing." It follows that Leinbach & Wolle were entitled to a reasonable period to organize the company, and no more. When organized, it was their duty to pay the consideration, and take the assignment. Some 15 months elapsed between the date of the contract with Leinbach & Wolle and the assignment of the defendants, a delay which, as before suggested, would be fatal to the plaintiff's claim, in the absence of proof that Deering acquiesced in it. He certainly led Leinbach & Wolle to believe he acquiesced; and the effect is the same as if he did. Subsequently to the assignment, however, there is no evidence that he justified Leinbach & Wolle in believing he continued to acquiesce. He declined to answer their communications, or to have any intercourse with them. His acquiescence after this event, however, would have been immaterial. The

defendants had his title, and stood in his stead. They did not acquiesce in the delay. Leinbach & Wolle must be treated as having notice of this assignment, which was promptly recorded; and yet they allowed a year to pass without offering to perform. It is no excuse to say they were unaware of the record. Besides, the conduct of Deering in breaking off communication with them was of itself notice, or at least an indication, that some change had occurred, and that the delay was no longer acquiesced in. The situation required a high degree of vigilance; the exercise of which would have led to a discovery of the assignment soon after its execution. Conceding that Leinbach & Wolle had a right to call for the execution of an assignment to themselves, instead of the company specified on paying the consideration, at the time of their tender in April, 1882, they were therefore too late, in our judgment, to be justified in demanding specific performance.

As respects the second question, *i. e.*, notice to the defendants of the previous contract, when taking their assignment from Deering, or of facts relating to the subject, sufficient to put them on inquiry, we think the difficulties in the plaintiffs' way are equally serious. The only evidence of actual notice is that found in the testimony of Deering. This is flatly contradicted by Howlett. In the absence of contradiction, however, the testimony could not be relied upon. The character of Deering, as developed by this case, and disclosed by its history, is such as to forbid reliance upon his statements. In addition to this, the circumstances under which he appears as a witness are very disparaging to him, and unfortunate, at least, for the plaintiffs. After he had divested himself of all possible interest in the patent, and had nothing therefore, to sell, (unless, indeed, it might be his influence or testimony,) he was tendered, and received $10,000 of the stock of the company, apparently as a consideration for executing another assignment. The plaintiffs knew, as well as he, that the paper would convey nothing, and be valueless. Their act has, therefore, rendered them liable to the damaging suspicion that their object was to induce Deering to cast his lot in with theirs, to identify himself with them, and consequently to afford them the assistance of his influence and testimony.

We have not overlooked the fact that the plaintiff's counsel appeal to the testimony of Pettee in support of the averment that defendant had actual and direct notice of the contract. We do not find, however, anything in this testimony to justify the appeal. Whether Pettee had information of the contract is not entirely clear. In view of all he says, we are inclined to think he had information from Deering of some connection between Leinbach & Wolle and Deering regarding the invention, though of an indefinite and uncertain character. All he had came from Deering; and all through his letters and testimony he asserts his disbelief of Deering, characterizing him as a man entirely unworthy of credit. Whether he informed the defendants of Deering's assertion, that he had a connection with Leinbach & Wolle, he says he does not know; that, as it was his duty, under his employment, to communicate such information, he presumes he did, but has no recollection about it; that he had several con-

versations with Mr. Howlett, but cannot recall that he did communicate this. Such is the substance of his testimony, and it falls short of proving that he did communicate what Deering told him about an assignment to Leinbach & Wolle, if Deering told him this. It is said the witness is an unwilling one, and we think this is true. We not only think him unwilling, but suspect his truthfulness. His communications with Mr. Howlett about the letters in evidence indicate that his integrity is of a low order. But the plaintiffs' case is not aided by this view. He is their witness, and we cannot assume that he had more information than he says he had, or that he communicated more than he declares he did. The burden of proof is on the plaintiffs. They must establish the facts on which their case rests, fully and clearly. This cannot be done by inferring and assuming that their witness is dishonest, and holds something back. But there are circumstances which justify a belief that the witness did not (in his conversations) communicate the information referred to, *i. e.*, the information that Deering said he had "assigned" to Leinbach & Wolle, if Deering did so inform him. We do not find this information, nor anything like it, in his written communication of April 5, 1880; yet this communication was made after (and not very long after) the conversation referred to, between Pettee and Deering. Pettee says the conversation was of about the same date as that of his letter to Leinbach, February 28, 1880. If he intended to communicate it, thought it worth communicating, why should he not have communicated it then? What greater probability is there that he did so verbally at another time?

The position taken that notice to Pettee, (if he had it,) is notice to the defendants, is clearly unsound, and requires no further attention. He was not the defendants' agent to purchase the patent, and had nothing whatever to do with it.

There is no implication of notice from the record of the contract. This record was unauthorized, and is consequently unimportant.

Had the defendants notice of facts sufficient to put them upon inquiry? As proof that they had, the plaintiffs appeal to the Pettee letters, and the testimony of Pettee himself. The testimony of Pettee, however, goes no further in this regard than the letters; and the only question, therefore, is whether the letters convey the required information. There are but two which are supposed to be important. In the first, dated April 5, 1880, a postscript is found containing these words:

"From a Bethlehem paper I see Leinbach has applied for a charter. I saw Deering, and he talks tremendous big; but he is an infernal liar, and no reliance whatever is to be placed in him. Did you ever see him?"

This certainly communicates nothing of any value. The second is dated February 8, 1881, (before referred to,) and is as follows:

"Appel is trying to make a square bag, but I do not think it will amount to anything. I met Appel a short time ago, and he told me it was more difficult to make the bag than a satchel-bottom bag, and he was constructing the machine to make satchel-bottom bags if he fails to make this bag. Appel never succeeded in making any of the fancy bags *he has stolen*. He had a variety of about ½ doz. on the Deering plan, and made many efforts, at heavy

cost to Taylor, only to fail. *This reminds me that Julien mentioned to me that you were negotiating with Deering for his patents. I have not seen Deering lately. He became connected with a bag Co. in N. York. A company that Leinbach got up. Deering told me great stories about the company, or the machine they had to make the bag. I never believed one word about the wonderful machine. This company may have all come to grief. The bags are no good—no, I do not mean that, but I mean no machine will ever be gotten up to make them.* If you can make any use of the patents for 'brush fence,' you might for a song purchase them. Deering, I think I told you long ago, is an infernal liar."

Here is information that Deering said he had "become connected with a bag company in New York; a company that Leinbach got up." This, however, is not information, nor a suggestion, that Deering had entered into a contract to transfer his invention to this company. Besides, no such company existed. Nor does it contain a suggestion that he had entered into such a contract with Leinbach & Wolle. Furthermore, the letter informs him that the writer does not believe there is any truth in what he has been told; and also informs him, in effect, that Deering still has control of the patent, for he is told he can buy it of him for a song. How could the defendants buy it of him, if he had already parted with, or lost control over it? Now, if this testimony stood alone, we think it would be insufficient to justify a conclusion that the defendants had information which should have put them on inquiry respecting the contract in question. When considered in connection with the testimony of Howlett, its insufficiency is even more apparent. This witness, who took the assignment, representing the defendants, testifies very positively that he had no information whatever on the subject from any source; that he took the assignment in entire ignorance of the contract, or of any circumstance tending to create a suspicion of its existence. His testimony is severely criticised, but we have seen nothing to justify disbelief of it. He was subjected to a lengthy, able, and somewhat embarrassing cross-examination, and while some discrepancies appear in his statements, they are not of such a character as to shake confidence in his truthfulness. On the other hand, his replies to Pettee's suggestions that the letters (in evidence) should be destroyed, and that his (Pettee's) testimony might be damaging, (though he did not understand how it could,) and should, therefore, if possible, be kept out of the case, indicate that he is a man of integrity.

It follows from what has been said that the bill must be dismissed, with costs.

SIEBERT CYLINDER OIL-CUP COMPANY *v.* BEGGS.

(*Circuit Court, S. D. New York.* November 9, 1887.)

1. PATENTS FOR INVENTIONS—ASSIGNMENT—RIGHT TO SUE FOR INFRINGEMENT.
Where it is apparent from the terms of the assignment that the intention of the patentee is to transfer thereby all his rights under the patent, the whole legal title is in the assignee, and he may sue for infringement in his own name; the fact that the transfer took the form of an assignment, rather than that of a license, in order that the transferee might sue in his own name, is immaterial. Following *Siebert Co.* v. *Phillips Co.*, 10 Fed. Rep. 677.

2. JUDGMENT—EFFECT OF DECISION—SUGGESTION OF COLLUSION.
The force of a decision of the circuit court construing an instrument assigning a patent is not to be done away with on the ground that the suit in which the decision was rendered was a collusive one, where the only proof as to collusion is an affidavit on information and belief, in which no further sources of information or grounds of belief are set forth than a clipping from a distant newspaper.

3. PATENTS FOR INVENTIONS—ASSIGNMENT—CONSTRUCTION.
Siebert Co. v. *Phillips Co.*, 10 Fed. Rep. 677, construing the assignment of letters patent No. 138,243, issued to John Gates for improvements in lubricators for steam-engines, is not overruled by *Wilson* v. *Chickering*, 14 Fed. Rep. 917.

In Equity. On motion for preliminary injunction.

Wetmore & Jenner, for complainant.

Wells W. Leggett, for defendant.

LACOMBE, J. This is an application for a preliminary injunction to restrain the defendant from infringing letters patent No. 138,243, issued to John Gates for certain improvements in lubricators for steam-engines. It is opposed solely on the ground that complainant has no such right and title as will authorize him to sue in his own name. The patent has been adjudicated upon, and the very question now raised answered in *Siebert Co.* v. *Phillips Co.*, 10 Fed. Rep. 677. In that case Judge LOWELL, construing the evidence of plaintiff's title, uses this language:

"The assignment to the plaintiff was made an assignment, rather than a license, in order that they might sue in their own names—so the contracts recite; but there is no legal objection to this: the motive is not material, and, the whole legal title being in the plaintiffs, they may maintain suit without joining the patentee."

This decision, based on the same facts as those here presented, should ordinarily be controlling. Defendant, however, seeks to avoid that result by contending—*First*, that the former suit was a collusive one; and, *second*, that the instruments were not carefully considered, and that the learned judge was in error as to their effect, as is indicated in a later decision of his in *Wilson* v. *Chickering*, 14 Fed. Rep. 917.

The first contention is wholly unsupported by proof. The only affidavit submitted is one on information and belief, in which the affiant sets forth neither the sources of his information nor the grounds of his belief, except by affixing to his affidavit a clipping from a western newspaper. It need not, therefore, be considered.

There is nothing in the later decision of Judge LOWELL inconsistent with the views expressed by him in the case reported in 10 Fed. Rep. In *Wilson* v. *Chickering*, the patentee "licensed and empowered plaintiff to manufacture for the term of ten years, * * * and to sell the same; but in case of plaintiff's bankruptcy, the license shall end." In the present suit, the conveyance under which plaintiff claims title, so far as the granting part is concerned, is in the following words:

"The party of the first part has sold, assigned, and transferred, and by these presents does sell, assign, and transfer, to the party of the second part, all his right, title, and interest in and to the said improvements as secured to him by letters patent aforesaid, for, to, and in all parts of the United States and territories lying east of the Rocky Mountains; * * * the same to be held and enjoyed by the said party of the second part within and throughout the above-specified territory, but not elsewhere, for his own use and behoof, to the end of the term for which said letters patent were granted."

The interpretation of patent conveyances, like that of all other written instruments, is to be according to the intent of the parties as evidenced by the words used. No particular form is required, although there must be some operative words expressing at least an intent to assign in order to constitute an assignment. *Campbell* v. *James*, 18 Blatchf. 107, 2 Fed. Rep. 338.

It seems clear from an examination of the facts in the two cases before Judge LOWELL that in the piano case the intention was to reserve to the grantor everything except the right to manufacture and sell for a term of 10 years, while in the oil-cup case the grantor intended to transfer all that he had, except, perhaps, the right to an extension. There seems no reason, therefore, why the decision of Judge LOWELL construing the very instruments now before the court should not be followed on this application for a preliminary injunction, and the plaintiff's motion is therefore granted.

THOMSON and another *v.* SMITH & GRIGGS MANUF'G Co. and others.

(*Circuit Court, D. Connecticut.* November 26, 1887.)

1. PATENTS FOR INVENTIONS—NOVELTY—CLASPS.
   The plaintiff claimed under letters patent No. 326,357, issued to Jacob J. Unbehend, for a clasp, "a flexible tongue support consisting of two plates superimposed one upon the other, and connected together by a metallic band embracing the said plates at one end thereof." Also, "in a clasp, a flexible tongue support consisting of two plates provided with corresponding slots, and a metallic band passing through the said slots and embracing the rear end portions of the plates to tie the same together." *Held*, that the band described in these claims is not a patentable novelty.

2. SAME—INFRINGEMENT—BUCKLES.
   Plaintiff claims under letters patent No. 326,357, granted September 15, 1885, to Jacob J. Unbehend, for a clasp or buckle especially adapted to arctic over-shoes. The plaintiff's device is a buckle in which the tongue is hung in recesses between two plates, one superimposed on the other, with flanges on each side of the recesses, to prevent lateral motion, and to retain the hinge-

pin in the recesses. Defendant manufactures a buckle in which the tongue is hung in notches in the flanges of the lower plate, which are turned up to make the notches. These flanges are not guards, but the parts upon which the tongue is hung. *Held*, that this was not an infringement of plaintiff's patent.

George W. Hey, for plaintiffs.
Charles E. Mitchell and *George E. Terry*, for defendants.

SHIPMAN, J. This is a motion for a preliminary injunction to prevent the alleged infringement of letters patent No. 326,357, granted September 15, 1885, to Jacob J. Unbehend, for a clasp or buckle especially adapted to arctic overshoes. The inventor, in the specification, describes the invention as follows:

"This invention has more particular reference to the style of clasps in which the tongue is hinged between two flexible plates by a cam-shaped hinge-pin entering between the plates and prying the same apart when swinging the tongue towards its open position, thereby imparting the spring action to the clasp. My invention consists, first, in the combination, with the two tongue supporting plates superimposed one upon the other, and connected together at one end, of guards across the side edges of the flexible portions of said plate to retain the hinge-pin of the tongue in its proper bearings on the plates, and also prevent lateral displacement of said plates in relation to each other; and the invention also consists in a novel, simple, and effective means for connecting together one end of the tongue-supporting plates, all as hereinafter more fully explained, and specifically pointed out in the claims."

It is an improvement upon letters patent, No. 305,410, granted to the same patentee, September 16, 1884, which was for a clasp in which the tongue was hinged between two flexible plates, or rather between the leaves of a double flexible plate, by a cam-shaped hinge-pin entering between the plates, as above described. The improvement consists simply in the guards, and in the band which connects the two plates together. In No. 305,410, as well as in this patent, the hinge-pin of the tongue has its bearings in transverse recesses closed in front, which are formed near and between the forward ends of the two plates. The hinge-pin, without the guards, performs its office well. In this patent, for the purposes named in the part of the specification which has been quoted, a lateral projection is formed upon each forward end of the upper plate and upon each side of the recess, and these projections are turned at right angles to the plate. These two plates are firmly connected by a metallic band, which is wrapped around the rear ends of the plates. The edges of the embraced portion of the plates are notched, the notches serving as counter-sinks for the band. The five claims of the patent which are alleged to be infringed, are as follows:

"(1) In a clasp, the tongue hinged between two plates, and guards across the edges of the said plates, in front and rear of the hinge-pin of the tongue, substantially as and for the purpose set forth.

"(2) The combination, with two plates superimposed one upon the other, and flexible from each other, and a tongue hinged between said plates, of guards across the side edges of the flexible portions of said plates, to prevent lateral displacement of the plates in relation to each other, as set forth.

"(3) The tongue and its cam-shaped hinge-pin, in combination with two plates superimposed one upon the other, connected together at one end, and provided at their free ends with bearings for the hinge-pin, and with an opening between said bearings for the reception of the tongue, and guard-lips projecting from the edges of one of the plates, across those of the other plate at the side adjacent to the aforesaid opening, and in front and rear of the hinge-pin, substantially as described and shown.

"(4) In a clasp, a flexible tongue support consisting of two plates superimposed one upon the other, and connected together by a metallic band embracing the said plates at one end thereof, as set forth.

"(5) In a clasp, a flexible tongue support consisting of two plates provided with corresponding slots, and a metallic band passing through the said slots, and embracing the rear end portions of the plates, to tie the same together, substantially as described and shown."

The defendants' buckle or spring clasp is assumed to have the two superimposed plates,—one a base plate, and the other a supporting plate; and it has a tongue, or holding lever, provided with cam-shaped pivots which turn in their bearings. The two plates are connected together at their rear ends by a band which is integral with the base plate, and is bent around the superimposed plate. Near the forward ends of the plates, the inside edges of the lower plate are turned upward, and form flanges at right angles to the plate. In each of these flanges a notch is made, opening upward. The laterally-projecting pivots of the lever rest in the notches, as their bearings. These notches are the only means of hanging the lever to the frame. With the flanges removed the clasp is useless.

In deciding this motion, I have not the benefit of carefully taken testimony, but, aided only by *ex parte* affidavits, it seems to me that there is an important difference between the two devices. In the plaintiffs' device the tongue is hung in recesses between the plates and the flanges; on each side of the recesses are guards to prevent lateral motion of the plates, and to help retain the hinge-pin in the recesses. In the defendants' device, the tongue is hung in notches in the flanges of one of the plates, which are turned up in order that the notches may be made. These flanges are not guards for the notches; their office more resembles that of ears upon which the hinge-pin is hung. In the plaintiffs' device, the guards are something additional to the recesses in which the lever is hung, while in the defendants' device the so-called guards are the part upon which the hanging of the lever depends, and without them there would be no buckle. Neither do they prevent lateral motion of the plates, because they do not come in contact with the spring-plate, which is connected with the other plate only at their closed rear ends. The guards of the plaintiffs' buckle, and the flanges of the defendants' buckle, are for a different purpose. I do not think that the band of the fourth and fifth claims contains patentable novelty. It is simply a band to tie or secure the spring to the frame of the buckle.

The motion is denied.

KIESELE *v.* HAAS and another.

(*Circuit Court, S. D. New York.* November 25, 1887.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—STATUARY.
   Letters patent No. 190,769 of May 15, 1877, to August Kiesele for a new and improved composition for casting ornamental figures consisting of paraffine, stearine, and pulverized sugar, is not anticipated by the patent of March 5, 1872 to Henry Hirsch, the compound covered by which consists of paraffine, bees-wax, and gypsum.
2. SAME—ANTICIPATION—OFFER TO PROVE.
   Where a witness called to prove prior use is objected to before the examiner, on the ground that the answer does not conform to the requirements of Rev. St. U. S. § 4920, relating to proof of prior use, and the answer is not amended in that respect, the testimony of the witness will not be considered on the hearing.
3. SAME—INFRINGEMENT—PROOF.
   Complainant proved the purchase from defendants at their business establishment of two statuettes which the clerk who made the sale stated at the time were manufactured by defendants. An examination of a piece of one of the statuettes disclosed the ingredients of the composition covered by the patent, and nothing else. Defendants admitted the sale, but claimed that although they did not know what the statuettes sold were made of, the statuettes did not contain the patented composition. *Held*, that the evidence established infringement.

In Equity.

Arthur v. Briesen, for the complainant.

Charles F. Holm, for the defendants.

COXE, J. On the fifteenth of May, 1877, letters patent No. 190,769 were granted to the complainant for a new and improved composition for casting ornamental figures consisting of paraffine, stearine, and pulverized sugar.

The defenses are non-infringement and want of novelty. The complainant proved the purchase from the defendants at their business establishment of two statuettes made in imitation of Bartholdi's "Liberty," it being stated at the time by the employe who made the sale that they were manufactured by the defendants. A piece of one of these statuettes was analyzed, and was found to contain the ingredients of the patent and nothing else. The defendants admit that the infringing figures "seem to be" made by them, but they assert generally that they do not use the complainant's composition. When, however, they are asked if these figures contain the ingredients of the patent they answer that they do not know. The denial, in substance, is this: Although the defendants do not know what the statuettes sold by them are made of, they do know that these statuettes do not contain paraffine, stearine, and sugar. A denial so vague, illogical, and incomplete, in circumstances like the present, amounts almost to a confirmation of the proof which it is intended to overthrow.

One witness was called to prove prior use, but as there is no allegation in the answer under which the testimony is admissible, (section 4920,

Rev. St.,) the court is not at liberty to consider it. The objection was taken before the examiner, and the defendants were thus notified at the earliest possible moment of the complainant's position, and yet no motion to amend the answer was addressed to the court.

The patent granted to Henry Hirsch, March 5, 1872, does not anticipate the complainant's patent or affect it in the remotest degree. The compound covered by the Hirsch patent consists of paraffine, bees-wax, and gypsum.

The complainant is entitled to the usual decree.

BALDWIN v. CONWAY & Co., Limited.

(*Circuit Court, S. D. New York.* December 1, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.

The plaintiff applied for a preliminary injunction to restrain the infringement of a patent. The patent had not been adjudicated on, and it was questionable if the invention was patentable. *Held*, that a preliminary injunction should not issue.

G. G. Frelinghuysen, for complainant.
John H. Kitchen, for defendant.

LACOMBE, J. This is an application for a preliminary injunction to restrain the defendant from infringing the patent for improvement in police nippers granted to the plaintiff July 7, 1874, and numbered 152,822.

It appears that police nippers consisting of a small chain of suitable length with a cross-bar attached at each end; similar to those used on chain halters and trace chains, were in use for many years prior to plaintiff's application. When nippers thus made were used, the links of the chain being twisted between the fingers of the policeman, pinched and hurt them, thus preventing his keeping as firm a hold as necessary. When, also, for any cause it became necessary to twist the chain more or less, in order to adapt the nippers to prisoners having small hands or wrists, the difficulty was increased. In the original nippers the chain is fastened to an eye which projects inwardly from the cross-bar about three-eighths of an inch. The plaintiff's alleged invention consists merely in elongating this eye to about four times its original length, thus bringing the chain entirely without the hand, and preventing the injury to the fingers from the movement of the links.

There has been no adjudication upon the patent; and, while it may be that the elongation of this eye is, as the plaintiff claims, a patentable invention within the decisions, and not obnoxious to the criticisms so forcibly expressed in *Atlantic Works* v. *Brady*, 107 U. S. 200, 2 Sup. Ct. Rep. 225, still its claim to be considered such rests on so slender a foun-

dation that, in the absence of an adjudication in its favor, a preliminary injunction should not issue.

The motion is denied.

HAMMACHER and others *v.* WILSON.

(*Circuit Court, D. Massachusetts.* November 3, 1887.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DAMAGES AND PROFITS.
   Under a decree directing the master to take an account of the profits which the defendant had received from the infringement of the patented invention, and to report the damages, if any, in addition to the profits, the master found that the complainant's profits were in excess of his damages, and reported the amount of the profits realized by the defendant attributable to the patented invention. *Held*, that an allowance to the defendant of 10 per cent. of the entire profits, as manufacturer's profits, was reasonable, and that the complainant was not entitled to any damages in addition to profits.
2. SAME.
   On an accounting for infringement, it appeared that, prior to a certain date, the defendant had had an exclusive license to manufacture and sell the patented article, paying a license fee of about 10 per cent. on the proceeds realized, and that subsequently the complainant had acquired a similar license, which continued in force to the bringing of the suit, paying a royalty of three cents per article on all sales. *Held*, that the evidence failed to show such an established license fee as would constitute a proper measure of damages.
3. SAME.
   Whether or not the statement made on the accounting of the costs in the manufacture and sale of the patented article, and patented improvements thereon, presented a reliable basis for the calculation of profits made, and whether or not the master should not, therefore, have reported the license fee alone, as the proper amount of the complainant's recovery, are questions of fact for the master.
4. SAME—INFRINGEMENT—DAMAGES—MASTER'S REPORT.
   Upon the hearing of exceptions to a master's report of profits, the defendant requested the court to direct the master to report the evidence necessary to a clear understanding of the exceptions. It appeared that the evidence was taken orally before the master, who only took notes, and that no request was made at the time that the testimony should be reported to the court. The master stated that it would be impossible to convey to the court a correct idea of all the testimony upon the accounting. *Held*, that the motion should be refused.

In Equity. On exceptions to master's report. See 26 Fed. Rep. 239.

D. C. Linscott, for complainants.

I. D. Van Duzee, for defendant.

COLT, J. This case now comes before the court on exceptions to the master's report. The master was directed to take an account of the profits which the defendant had received from the infringement of the patented invention, and to report the damages, if any, in addition to the profits, which the complainants have sustained since August 16, 1880. The master finds that the defendant has made and sold 4,092 pairs of the infringing pedal feet, and that the profits realized by the defendant

attributable to the patented invention were $632.36. He does not consider the complainants entitled to the entire profits made by the defendant, but only such profits as may fairly be attributed to the patented invention, and he therefore allows the defendant 10 per cent. of the entire profits. The master also finds that the complainants' profits are in excess of their damages; and that, consequently, they are not entitled to recover any damages in addition to profits.

It is clear that the complainants were not entitled to an allowance of the entire profits realized from the sales of the pedal feet, but only to such as might be attributable to the patented improvement. In making an allowance of 10 per cent. to the defendant, the master was right, and the complainants' exception to this finding should be overruled.

The defendant has also filed numerous exceptions. The most important exception raises the question whether the master did not err in finding some other measure of profits and damages than the license fee. Previous to August 16, 1880, the defendant had an exclusive license to manufacture and sell the patented pedal feet, paying a license fee of about 10 per cent. on the proceeds realized. Subsequently the complainants, Hammacher & Co., acquired an exclusive license, paying a royalty of three cents per pair on all sales. It may be doubted whether this evidence shows such an established license fee as would constitute a proper measure of damages. But even if such license fee were shown, the master was directed to find profits as well as damages, and he finds the profits realized equal a certain sum, while he makes no allowance for damages based upon the license fee, because the profits are in excess of the damages. I can discover no error in these findings.

The defendant also excepts to the amount of profits found by the master, on the ground that the statement of costs in the manufacture and sale of the pedal foot, and patented improvement thereon, presented no reliable basis for a calculation of profits, and that the master should have reported the license fee alone as the proper amount for the complainants to recover. This was a question of fact, for the master to decide, and I see no reason to disturb it upon the record before me.

The defendant also excepts to the mode in which the master calculated the profits on the patented improvement, and he contends that the amount allowed was excessive, and he also excepts to certain findings of fact. Upon careful examination, I am satisfied that the master committed no error in these respects.

The other exceptions are immaterial. The evidence was taken orally before the master, who only took notes, and no request was made at the time that it should be reported to the court. The master says it would be impossible to convey to the court a correct idea of all the evidence upon this accounting. Under these circumstances, I do not see how the court can properly comply with the request of the defendant to direct the master to report the evidence necessary to a clear understanding of the exceptions.

Exceptions overruled.

ANGLO-AUSTRALASIAN STEAM NAV. CO. *v.* CORNELL STEAM-BOAT CO.[1]

(*District Court, S. D. New York.* November 18, 1887.)

TOWAGE—BREAKING OF TOW—DAMAGE TO THIRD PARTY—LIABILITY OF TUG.

Respondent's tug was about to take two boats across the North river, but had assumed no part of the work of securing the boats to be towed. Unknown to the master of the tug, a third boat, the canal-boat W., was designed to be included in the tow, and was partly attached to the tow by her own men; but before both necessary lines were made fast, word was passed from the tow to go ahead, and on starting forward the lines of the W. gave way, and she drifted upon and injured libelant's steamer. On suit brought against the tug for the damage, *held*, that she was not liable.

Action for Damage caused by the breaking of the canal-boat William Walker from her tow, injuring libelant's vessel.

Owen & Gray, for libelant.

Benedict, Taft & Benedict, for respondent.

BROWN, J. I am satisfied that the immediate cause of the breaking adrift of the canal-boat William Walker, and of the ensuing collision, was that the signal to start was passed to the respondent's tug before both of the lines of the lighter were made fast. One small line had been fastened, the other not. In a few moments the small line parted, and the boat drifted down against the libelant's steamer.

The respondent's tug in this case did not assume any part of the duty of arranging or securing the three boats to be towed. Her captain, I think, plainly understood that only two boats were to be taken, not including the Walker. The work of securing the lighter was undertaken entirely by her own men, and it was they who determined the time to start, and to pass the signal, "all right," to the tug. The blame of the faulty start must rest on the lighter, and not on the tug. *The Martino Cilento*, 22 Fed. Rep. 859; *The Jack Jewett*, 23 Fed. Rep. 927. I find nothing in *The Quickstep*, 9 Wall. 665, 671, to the contrary. As I must hold that the captain of the tug did not know that the Walker was attached, or designed to be attached, to the other two boats that he agreed to take in tow, I cannot find any blame resting upon the tug, and therefore must dismiss the libel, with costs.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

THE GREENPOINT.

LOUD and others *v.* THE GREENPOINT.[1]

(District Court, E. D. New York. November 18, 1887.)

COLLISION—VESSEL TOWED INTO SLIP—PARTED LINE—DRIFTED VESSEL—TUG

The tug Greenpoint moved the schooner Hart along-side the schooner Herriman, which was lying in a slip, and the Hart put out a line to the Herriman, which line shortly afterwards parted, allowing the Hart to drift upon libelant's vessel, the Flint, causing damage, for which the tug was sued. The evidence indicating that the Hart was still fast when the tug cast off, and that the line had parted after such casting off, and by reason of its insufficiency, *held*, that the Hart, and not the tug, was in fault for the collision, and that the libel should be dismissed.

Geo. A. Black, for libelant.
Geo. T. Walker, for claimant.

BENEDICT, J. This is an action by the owner of the schooner Flint to recover of the tug Greenpoint the damages caused by a collision between the schooner Emma F. Hart and the schooner Flint, while the latter was lying at the bulkhead in the slip between One Hundred and First and One Hundred and Second street. The tug had been employed by the Hart to move her across the slip to a place along-side the schooner Herriman, a vessel then lying on the upper side of the slip. The tug then took hold of the Hart and moved her to the desired position along-side the Herriman, where the Hart put out a single line to the Herriman; but owing, it is said, to some delay caused by the frozen condition of the hawsers of the Hart, the Hart did not stop along-side the Herriman, but moved on until she brought up against a lighter lying at the bulkhead, and her anchor thereby let go. The anchor was got up, and shortly after the line that was holding the Hart to the Herriman parted. When the line parted the Hart moved down upon the libelant's vessel, doing the damage sued for. The wind at the time was blowing from the northwest, the eddy tide was strong, and there was considerable motion of the water in the slip. It was dark. The immediate cause of the collision was the breaking of the line by which the Hart had endeavored to secure herself to the Herriman. This was a single line, too light for the work, as it turned out. The decisive question of the case is whether the Hart's line broke by reason of its insufficiency to hold the schooner, and after the tug had cast off from the Hart, to secure a better position, when the tug was in no way fast to the Hart; or whether the line had already parted when the tug cast off her lines, and so the Hart was left by the tug, with no line out, and exposed to the danger of being carried by the wind and tide upon the libelant's vessel.

Upon this question my conclusion is that when the line parted the tug had her lines cast off, was not attached to the Hart in any way, and had no means of attaching to her in time to avoid the colision. It is agreed

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

by all that the tug was informed by a hail from the master of the Hart when the line parted, and it is highly improbable that the tug, after being thus informed, would have cast off her lines from the schooner altogether, and so left the schooner with no line out on the wind and tide. The clear weight of the evidence is in accordance with the probabilities of the case, and it shows that the line parted after the tug had cast off. The master of the Hart indeed swears to the contrary, but he is interested to cast the blame on the tug, and he is overborne by the testimony of other witnesses. In my opinion, the sole cause of the collision was the insufficiency of the line which the Hart had put out to the Herriman, for which the Hart, and not the tug, is responsible.

The libel must be dismissed, and with costs.

THE HACKENSACK.

MORAN *v.* THE HACKENSACK.[1]

(*District Court, E. D. New York.* November 21, 1887.)

COLLISION—FOLLOWING VESSEL—PROXIMITY—SUDDEN STOP.

It is a fault in a vessel following another vessel, and going with the flood tide in the East river, to approach so near the vessel ahead as to be unable to avoid her in case of a stop on the part of the leading vessel.

Carpenter & Mosher, for libelant.
Peter S. Carter, for claimants.

BENEDICT, J. The testimony in this case has satisfied me that the cause of this collision was the approach of the Hackensack to the Dumont ahead of her so near that, when the Dumont, in order to allow a vessel to pass, stopped her engine and reversed, the Hackensack had not time to avoid collision, although she promptly stopped her engine, and ported her wheel.

The proof is that the tide was strong flood, and that, as soon as the Dumont stopped and reversed her engine, the Hackensack stopped and hove her wheel hard a-port, but in spite of those efforts she ran into the Dumont. This shows the Hackensack to have been in dangerous proximity to the Dumont. To be so near the vessel ahead in that place was a fault, and the fault that caused the collision. There was no fault on the part of the Dumont. She made no stern-way but simply stopped and reversed her engine. When she did this she had the right to presume that in that place and tide no vessel would be so near her from behind as to strike her stern without backward movement on her part.

Let the libelant have a decree, with a reference to ascertain the amount of the damage.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

PERRY and others *v.* CLIFT and others.

(*Circuit Court, E. D. Tennessee.* November 10, 1887.)

REMOVAL OF CAUSES—ATTACHING OF JURISDICTION—AMENDMENT OF PARTIES—REMAND.

After removal, the bill was demurred to on the ground that the heirs of P., who appeared in the caption as necessary parties, were not properly made parties; the bill containing no allegation that their names and residences were unknown, or that they were non-residents. The demurrer was sustained, and the bill amended by setting out the names of the heirs, and their citizenship as of the same state as that of the complainant. There was no severable controversy. *Held*, the amendment being compulsory, the case should be remanded, and not dismissed.

On motion to remand.

W. D. Speers, for complainants.

Cooke, Clift & Cooke for respondents.

KEY, J. This suit was removed from the chancery court of the state, upon the ground that complainants are citizens of New York, and the defendants citizens of other states. The bill in its caption shows that it is filed against several parties, and, among them, "the heirs of E. G. Pearl, deceased, names and residences unknown." There is no allegation in the bill that complainants had used any effort to ascertain the names of these heirs or their residence, or whether they are citizens of this state. After the removal of the cause to this court by a part of the defendants, their solicitors demurred to the bill upon several grounds, of which one is:

"Said bill shows upon its face that the heirs of E. G. Pearl, deceased, are necessary parties to said bill. There is no allegation in said bill that the names or residences of said heirs are unknown, or that they are non-residents, and the said heirs are not made parties to this suit in the manner required by law."

The demurrer was sustained upon this point, and complainants were allowed to amend their bill, and, within the time given, did amend it by alleging that Dyer Pearl, William E. Pearl, Cora Pearl, and Anna K. Pearl are the heirs at law of E. G. Pearl, and that they are citizens of New York. After the filing of this amended bill, complainants' solicitor moved to remand the cause, "because the complainants and a part of the defendants reside in and are citizens of New York," and defendants' solicitors move to dismiss the amended bill, "because it shows that some of the complainants and the heirs of Pearl, a part of the defendants, are citizens of New York, and the matters of controversy alleged by the bill are not severable, and this court has no jurisdiction to determine it." In other words, that the cause was properly removed, and the jurisdiction of this court took hold of it, and complainant cannot deprive it of it by his amended bill. It may be admitted that, if the amendment has been made in order to defeat the jurisdiction of the court, it should not be permitted to stand. In this case, however, complainant has been compelled

to amend his bill by defendants' demurrer, on penalty of having his bill dismissed should he fail to amend. Now, when he does amend, as defendants insist he must, must his bill still be dismissed? The bill is amended precisely as defendants' demurrer demands; that is by giving the names and citizenship of the heirs of E. G. Pearl. There is no denial of the truth of the allegations of the amended bill, so that, with it as part of the pleadings in the cause, the court has no jurisdiction of the cause.

Under the facts stated, we must overrule the motion to dismiss the amended bill. In the view I take of the case, it must be remanded to the court from whence it came. Whenever, in the progress of a suit, it appears to this court it has no jurisdiction, it is made its duty by law to remand the cause. I conclude, therefore, that complainants' motion should be sustained, and the cause remanded.

ST. LOUIS WIRE-MILL CO. *v.* CONSOLIDATED BARB-WIRE CO. and others.

(*Circuit Court, E. D. Missouri, E. D.* November 9, 1887.)

1. COURTS—JURISDICTION—RESIDENCE OF CORPORATION.
   Under Rev. St. U. S. § 739, providing, in substance, that no civil suit shall be brought against a citizen 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," it is always for the federal court to determine whether a non-resident corporation sued therein has transacted business to such an extent within the district, and has such a representative or agent therein, that jurisdiction to render a personal judgment against the corporation may be acquired by service on that agent.
2. SAME.
   A manufacturing corporation of Kansas, having its chief office in that state, was accustomed to make occasional purchases of raw material, either by correspondence or by sending an agent there for that purpose, at St. Louis; but it never had a business office in Missouri, nor did it maintain an agent in the state. It was sued in the federal courts in Missouri, and service had upon its general manager, while he was in St. Louis on a pleasure trip. *Held*, that the corporation was not "doing business" in Missouri, and that the service was insufficient to support a personal judgment against it, notwithstanding Rev. St. Mo. § 3489, providing that, when a non-resident corporation has no office or place of business within the state, summons may be served upon any "officer, agent, or employe in any county where service may be obtained."

At Law. On plea to jurisdiction.

Leo Rassieur and *Dexter Tiffany*, for plaintiff.

Torrey & Givan, for defendant.

THAYER, J., (*orally.*) The case of the St. Louis Wire-Mill Company against the Consolidated Barb-Wire Company comes before the court on a plea to the jurisdiction and upon the testimony offered in support of and in opposition to that plea. The plea to the jurisdiction filed by the defendant, a foreign corporation, raises the question of the suffi-

ciency of the service to bring the corporation within the jurisdiction of this court. Service was had upon a person by the name of A. A. Henley, who is described in the return as "secretary and agent of the defendant corporation," and it was had under section 3489 of the Revised Statutes of Missouri, which provides "that a summons shall be executed where the defendant is a corporation or a joint-stock company organized under the laws of any other state or country, and having an office or place of doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business, or, if it have no office or place of business, then to any officer, agent, or employe in any county where such service may be obtained."

The testimony shows that the defendant corporation, created by the laws of Kansas, has its chief office or place of business at Lawrence, Kansas; that it has never had a business office in the state of Missouri, and has not maintained an agent in this state for the transaction of any business. It appears that it has made occasional purchases of plain wire in the city of St. Louis, either by correspondence or by sending an agent here for that purpose. It also appears that in December, 1885, A. A. Henley, who was served with process in this case, purchased of this plaintiff, in the city of St. Louis, about 500 tons of wire. Subsequently a controversy arose as to the terms of purchase. That controversy remained open and unadjusted until after the sixth of October, 1886, at which time Henley and his wife, as the testimony shows, came to this city for the purpose of attending the St. Louis fair. While here he was called upon at his hotel by the secretary of the plaintiff who had in view an adjustment of the old account. Some conversation was had on that subject. The parties failing to agree, the secretary of the plaintiff and Mr. Henley proceeded to the office of the Southern Wire Company to confer with other officers of the plaintiff corporation with respect to a settlement. Further conversation took place on the subject at the office of the Southern Wire Company; but it resulted in the parties failing to come to any understanding. While at the office of the Southern Wire Company, Henley, it appears, asked the officers of that company to give him a quotation upon 500 tons of plain wire, as if he desired to make such a purchase. No quotation was given him, however, and no purchase was made. After Henley left the office of the Southern Wire Company, and within a few hours, he was served with process in this suit as being an agent of the defendant. This is a sufficient statement of the facts in the case for the purposes of the present decision.

Chief Justice WAITE remarked, in *Railroad Co.* v. *Koontz*, 104 U. S. 10: "It is now well settled that a corporation of one state, doing business in another, is suable where its business is done if the laws make provision to that effect." And in the case of the *Insurance Co.* v. *Woodruff*, 111 U. S. 146, 4 Sup. Ct. Rep. 364, it was said by Justice BLATCHFORD "that a corporation of one state doing business in another is suable in the courts of the United States established in the latter state, if the laws of that state so provide, and in the manner provided by those laws;"

citing the cases of *Insurance Co.* v. *French*, 18 How. 404; *Railroad Co.* v. *Harris*, 12 Wall. 65; *Ex parte Shollenberger*, 96 U. S. 369; and *Railroad Co.* v. *Koontz*, 104 U. S. 10. Notwithstanding these decisions, it cannot be assumed that any mode of service upon a foreign corporation, that may be prescribed by the statutes of a state, or that such service as is held to be sufficient by the state courts, will always be deemed sufficient service in the courts of the United States located within such state or elsewhere. Under section 739 of the Revised Statutes of the United States, it is provided, in substance, that no civil suit shall be brought against a citizen 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." It will always be a question, therefore, for the federal courts to determine under what circumstances a foreign corporation may be said to be found within a given district; that is to say, they must determine whether such corporation has transacted business to such an extent within the district, and has such a representative or agent therein, that jurisdiction to render a personal judgment against the corporation may be acquired by service on that agent. What is here said has reference, of course, to ordinary foreign business corporations, other than foreign insurance companies who have been required as a condition of doing business in a foreign state to appoint an agent therein on whom processes may be served.

In the case of *St. Clair* v. *Cox*, 106 U. S. 359, 1 Sup. Ct. Rep. 354, it was held to be essential to the validity of service on a foreign corporation, by delivering a writ to one of its agents, that the corporation should at least be engaged in business within the state where served, and that the agent on whom the service is had should, at the time of service, be within the state in an official capacity; that is to say, engaged in the business of his principal. In the same case it was apparently held that valid service cannot be obtained unless the agent upon whom the writ is served stands in a representative character to the company; that a service had upon a subordinate employe, or upon an agent employed in a particular transaction, would not be valid. This latter ruling, however, has no bearing upon the case at bar, as the service in the present instance was had on the manager of the defendant corporation, although he is described in the return as being merely "secretary and agent." There can be no doubt of the fact that he stood in the capacity of representative of the company, if he was in this state on the company's business, and the company was transacting business in this state within the meaning of the decisions.

In the case of the *Good Hope Co.* v. *Railway Barb Fencing Co.*, 22 Fed. Rep. 635, it was held by the circuit court of the United States for the Southern district of New York that a foreign corporation was not engaged in business in the state of New York for the purpose of authorizing suits against it in the federal court,—it appearing that the corporation in question had only made occasional purchases of goods in the city of New York, by sending an agent for that purpose, and had maintained no office within the state, or transacted other business therein.

The question as to what sort of business transactions by a foreign corporation within a state will justify the finding that it is engaged in business therein, and validate a service of process had upon its agent, was also elaborately considered in the case of *U. S.* v. *Telephone Co.*, by Judge JACKSON, reported in 29 Fed. Rep. 37–41. It was there held that a corporation must transact within the state some substantial part of its ordinary business through an agent appointed for that purpose. According to the rule announced in that case, it is clear that if a corporation merely makes an occasional purchase of goods in a foreign state, but neither keeps an office or maintains an agent therein for the transaction of its business, it cannot be said "to be engaged in business in such state," and for that reason service of process upon an officer or agent of a corporation found in such state will not be effectual, in the federal courts at least, to confer jurisdiction over the corporation.

Such seems to be the conclusion reached by all the federal courts that have thus far had occasion to consider the question as to what constitutes a carrying on of business within a state, and in that conclusion I concur. When it is said that a corporation is engaged in business in a foreign state, and for that reason has voluntarily subjected itself to the operation of the laws of such foreign state regulating the service of process on foreign corporations, reference is plainly had to business operations of the corporation carried on within the state through the medium of agents appointed for that purpose, *that are continuous, or at least of some duration*, and not to business transactions that are merely casual, such as an occasional purchase of goods or material within the foreign state. The result is that the service in the present case must be held insufficient to sustain a judgment against the corporation, because the corporation in question was not engaged in business in this state within the meaning of the various decisions of the supreme court on that subject.

There will be a judgment for the defendant on the plea to the jurisdiction.

FARMERS' LOAN & TRUST CO. *v.* BURLINGTON & S. W. RY. CO. and others.

In re NEUMAN and others.

(*Circuit Court, W. D. Missouri.* December 10, 1887.)

RECEIVER—SALE UNDER CONTRACT WITH—ENFORCEMENT.

Intervenor had a lien on a line of road leased by the defendant, which lien defendant agreed with its lessor to pay. Defendant made the leased portion a part of its own line, and placed a mortgage on the whole line. The road went into the hands of a receiver, who, acting under an order of the court, made a contract with the intervenor to purchase his interest, and pay him from the proceeds of the sale of the road under the mortgage. The sale was made and conditionally confirmed The claim of intervenor not having been paid, he applied for an order setting aside the sale. *Held*, that the contract with the intervenor having been made by the order of the court, the court is bound to enforce it. The sale should be set aside, and the receiver placed again in possession.

The following are the principal facts: Prior to 1872 the Lexington, Lake & Gulf Railroad Company, a corporation organized under the laws of the state of Missouri for the purpose of building a railroad from the city of Lexington southward, had expended large sums of money in grading and tieing a portion of its road, and upon such road was an existing lien of something over $10,000, evidenced by a note and trust deed, and given for liabilities incurred in its construction. In that year it leased its road in an incomplete condition to the Burlington & South-Western Railway Company. The latter united this leased road with that portion of its own road running northward from Lexington to Unionville, making it one property and line of road with one common stock and one franchise, and known as "the Linneus Branch of the Burlington & South-Western Railway Company." Upon this Linneus branch in its entirety was placed a mortgage of $1,600,000. By the term of a contract entered into between the parties about a year after the lease, as well as after the execution of said mortgage, the lessee agreed to pay the liabilities of the lessor to the extent of $20,000, which included, as admitted, the debt above described. That debt became, by transfer, the property of the intervenors. In 1877 certain proceedings were had, by which, as it is claimed, this deed was foreclosed, and the legal title to the road upon which it had been given, to-wit, the road south of Lexington, vested in the intervenors. In the mean time, default having been made in the payment of the coupons on the $1,600,000 of bonds, a suit had been commenced in this court to foreclose the mortgage. The intervenors were not made parties to that suit. A receiver was appointed, who took charge of the whole line, and in April, 1876, a decree of foreclosure was entered, but no sale was made until 1880; the road in the mean time being operated by the receiver. In 1879 the intervenors, who claimed to own that portion of the road south of Lexington, entered into negotiations with one Brown for the sale of it to him for $50,000, whereupon the receiver obtained from this court an injunction restraining the parties from interfering with his possession, which injunction broke up the negotiations. Thereafter the receiver entered into negotiations with the intervenors for the purchase of their claim and interest. Before these negotiations were consummated, the receiver applied to the court for authority to issue receiver's certificates, to amount not exceeding $500,000, for the purpose of completing the road south of Lexington, and at the same time, and by the same petition, applied for authority as follows:

"Your petitioner also asks for authority to settle and adjust, by payment or purchase, any claims against said Lexington, Lake & Gulf Railway Company which may seem to be prior or adverse to the claims of the Burlington & South-Western Railway Company under the contract by which said Lexington, Lake & Gulf property was acquired."

Upon this petition, the receiver obtained authority to issue such certificates, and also the following authority in reference to the purchase of claims:

"And the said receiver is further authorized and directed to settle and adjust, by payment or otherwise, any outstanding claims against the Lexington, Lake & Gulf Railway Company under the contract before mentioned, and to purchase in any outstanding or adverse lien, or title to any portion or all of said property, and any right or title so acquired to be conveyed to him, as receiver, for the benefit of the parties in interest herein."

The authority to issue receiver's certificates provided that those certificates should be a first and specific lien only upon that part of the road south of Lexington. In fact, no receiver's certificates were issued, and nothing done towards the completion of that part of the road; but in March, 1880, a contract was made between the receiver and the intervenors by which the latter sold their claims and interest for $17,750. That contract provided for payment by the receiver out of the money coming into his hands from that part of the road south of Lexington, or from the sale of receiver's certificates which had been previously authorized as above stated, or from any earnings of that portion of the road, or arising from the sale thereof under the decree heretofore entered. On the thirtieth of November, 1880, the road as a whole, and without any separate appraisement of the two parts south and north of Lexington, was sold for $1,000,000, payment of which sum was made in mortgage bonds, as authorized by the terms of the decree. On July 5, 1881, this sale was confirmed, with a reservation of power to make any further orders, decrees, and directions in respect to the property, and with regard to any claim, right, interest in, or lien upon it. And now the claim of the intervenors not having been paid as adjusted by the terms of said contract, they insist that, unless it be paid within some reasonable time, the order of confirmation should be wholly set aside, and possession of the entire road again taken by the court. On the other hand, while it is conceded by the receiver and the purchasers at the sale that the intervenors have a prior lien upon that part of the road lying south of Lexington, they insist that the only order should be one fixing the amount of such lien, and decreeing a sale of that portion of the road for its satisfaction.

J. W. Noble and *G. F. Davis*, for intervenor.

G. W. Smythe, for the railroad company.

BREWER, J. The question is as to the duty of a court in respect to a contract made by its receiver under its directions. The theory of the one side seems to be that the issue of receiver's certificates, or the execution of other similar obligations, simply gives to the holder a lien which he may enforce in any of the ordinary methods of judicial foreclosure. He is not a party, must intervene if he wishes to insist on payment, and, intervening, occupies the position of any other lienholder. He has advantages in that his priorities are judicially declared in advance, but beyond that, nothing. Thus it is conceded that the intervenors are now in court, that they have a prior lien on the road south of Lexington, and that the court may adjudicate its amount, and order a sale therefor. But all that any lienholder may acquire. The inter-

venors might have done this before their contract with the receiver. Did that profit them nothing? On the other hand it is insisted that it is the duty of the court to see that contracts made by its orders are performed; that it ought not to remit the holder of such a contract to the remedies of lien or debt holders; but on the mere suggestion of omission or failure itself, take measures to secure performance, and such measures as will most certainly and promptly secure it. In other words, it owes to the holders of its contracts, not the duty merely of providing a forum in which such holders may enforce performance; it owes performance. To that end it should continue its receivers in office, and retain possession of the property until every contract has been fully performed, and if purchasers of the property fail to discharge all the obligations it has placed upon such property, it should not let the purchase stand. The condition of a final and absolute confirmation is the satisfaction of all such obligations. Here a sale has been conditionally confirmed. An obligation cast by the receiver under orders of the court remains unpaid. The confirmation should not be made absolute, or the property passed from the control of the court, with that obligation outstanding. I agree with the last-named views. The court should be chary of promise, but eager of performance; careful not to burden property in its possession with obligations, and equally careful to see that every obligation is discharged before that possession is finally surrendered. It owes performance, and should assume all its burdens, and not turn the holder of its contracts off with simply the assurance that he has a valid lien which he may foreclose. The confirmation which was entered was only conditional and with a reservation, such as gives the court still full control. *Burnham* v. *Bowen*, 111 U. S. 776, 4 Sup. Ct. Rep. 675.

Doubtless the court might, prior to the sale, have modified the decree so as to provide for separate sale of the two parts of the road lying respectively north and south of Lexington; in which case, even if the rights of the intervenors had not been protected by the purchasers, only the sale of the latter part need have been disturbed. But the sale was made of the road as a whole, and there is nothing before me to justify an apportionment of the proceeds. Counsel for the receivers and purchasers say that the road south of Lexington had ceased to be of any value, and that to set aside the sale of the whole, unless this debt, chargeable only upon a valueless part, is paid, would simply be coercing the purchasers and owners of valuable property to pay for other property which they do not want. Assuming it to be valueless, although it is in evidence that $600,000 was expended in work upon it, and still there are strong equities why the intervenors should not be remitted to a foreclosure of their lien, and some equities in favor of charging their debt upon the entire road. This now claimed valueless part was valuable enough to be included in the mortgage, the decree, and the sale. When negotiations were pending for a sale by the intervenors, the receiver, representing the entire properties, deemed it of sufficient value to interfere by injunction, break up the negotiations, and prevent the intervenors from realizing on their claim. Subsequently he deemed it of sufficient value

to apply for and obtain authority to borrow $500,000 on receiver's certificates to complete the road, and further authority to purchase the claim of intervenors. After thus baffling and delaying them, it may not be inequitable to hold that the road, as a whole, should bear the burdens and losses of delay. But it is unnecessary now to determine absolutely the rights of the parties. It is enough to hold that the sale of the property as a whole should not stand, with this receiver's obligation on a part unsatisfied. The order will therefore be that the order of confirmation and the sale be set aside, and the receiver directed to take possession of the property, unless within 90 days the claim of the intervenors be paid. If it be paid, the order of confirmation will be final.

AMERICAN ZYLONITE CO. *v.* CELLULOID MANUF'G CO.

(*Circuit Court, S. D. New York.* December 14, 1887.)

1. PRACTICE IN CIVIL CASES—DISMISSAL OF CASE—EQUITY.
   Prior to the term, the complainant, without application to the court, entered a rule in the common rule book discontinuing the cause on payment of costs. *Held,* that the complainant in an equity action cannot in this manner discontinue a suit. An order of the court is necessary.
2. SAME—PATENTS FOR INVENTIONS—INFRINGEMENT SUIT.
   In an action for the infringement of a patent, the complainant asked to discontinue on payment of costs. Defendant objected, for the reason that the testimony relied upon to show prior invention was of such a character that defendant might not be able to procure it again. *Held* that, as a condition of the discontinuance, it should be stipulated that defendant's record may be used in any new suit brought against it by complainant.

In Equity.

Prior to the term, the complainant, without application to the court, entered a rule in the common rule book discontinuing the cause on payment of costs. The defendant, having printed its proofs, placed the cause upon the calendar, and, when it was reached on the regular call, insisted that it should be argued or dismissed upon the merits; that the complainant could not, without the consent of the defendant or the court, discontinue an action in equity; and that it was discretionary with the court to grant or refuse such permission. The court adopted the view that the cause was not discontinued, and set it down for a day certain, to be then disposed of. The complainant now moves for leave to discontinue, on payment of costs.

E. M. Felt and *H. M. Ruggles*, for complainant.

Frederic H. Betts, for defendant.

COXE, J. The *ex parte* entry in the rule-book was a nullity. A complainant in an equity action cannot in this manner discontinue the suit. An order of the court is necessary. *Conner* v. *Drake*, 1 Ohio St. 170. The right, however, of a complainant to dismiss a bill before hearing,

where the defendant has acquired no substantive rights, is well nigh absolute. It must be an extraordinary case where the court refuses to exercise its discretion. *Railroad Co.* v. *Rolling-Mill Co.*, 109 U. S. 702, 713, 3 Sup. Ct. Rep. 594; *Stevens* v. *Railroads*, 4 Fed. Rep. 97.

I have examined the defendant's record sufficiently to be convinced that there is nothing which particularly distinguishes this from other equity actions. It is asserted that the testimony relied upon to establish prior invention is of such a character that the defendant may be unable to procure it again, but the rights of the defendant will be protected in this regard if the complainant is compelled, as a condition of the discontinuauce, to stipulate that the defendant's record may be used in any new suit which may be instituted against it by the complainant. *Brush* v. *Condit*, 22 Blatchf. 246, 20 Fed. Rep. 826.

Upon filing such a stipulation, and paying the costs, the action may be discontinued.

THORNBURN *v.* DOSCHER and another.

(*Circuit Court, D. Oregon,* November 21, 1887.)

1. EJECTMENT—PLEADING—OWNERSHIP.
   In an action to recover the possession of real property, the defense of ownership by the defendant or another must be specially pleaded.
2. DOWER—WHO ENTITLED TO—RESIDENCE.
   A woman who is not a resident of the state is not entitled to dower in any lands therein of which her husband did not die seized.
3. SAME—ESTIMATION OF VALUE.
   In estimating the value of a widow's dower in land aliened by the husband in his life-time, she ought to have the benefit of the increase in value between the date of such alienation and the death of the husband, not arising from improvements made or placed thereon.

(*Syllabus by the Court.*)

Action to Recover Possession of Real Property.

John W. Whalley and *James K. Kelly*, for plaintiff.

Seneca Smith, for defendants.

DEADY, J. This action is brought by the plaintiff, a citizen of Arkansas, against the defendants, citizens of Oregon, to recover dower in a tract of land included in the William Blackistone donation, lying on the west bank of the Wallamet river, just north of Portland, and valued at $50,000.

It is alleged in the complaint that on December 24, 1865, and prior thereto, Thomas Thornburn was seized of an estate of inheritance in the premises, and that at and during such time the plaintiff was the lawful wife of said Thornburn, and so lived with him until his death, at Prescott, Arkansas, on October 20, 1886; that the plaintiff's right to dower in said premises has not been aliened, and that she is entitled to the undivided

one-third thereof during her natural life, the present value of which is $16,000.

The answer of the defendant, besides sundry denials, contains four defenses, called therein "further and separate answers."

The plaintiff demurs to the first, third, and fourth of these defenses, because the facts stated therein do not constitute a defense, and moves to make the second one more definite and certain.

The first defense consists of an allegation that the defendant Anna Doscher is the owner in fee-simple of the premises, and that her co-defendant is her husband. At common law this defense could have been given in evidence under the general issue of "not guilty." But the Code of Civil Procedure, § 316, provides that "in an action to recover the possession of real property, the defendant shall not be allowed to give in evidence any estate in himself or another in the property * * * unless the same be pleaded in his answer." That Anna Doscher has an estate in fee in the premises is a defense to this action, and the demurrer thereto is not well taken.

The second defense is that Thomas Thornburn purchased the premises at a sale on an execution against the property of William Blackistone and John C. Doscher, and received from the sheriff a deed therefor, in trust for the use and benefit of Anna Doscher, and thereafter, in pursuance of said trust, conveyed his interest in the premises "through" Joseph N. Dolph, to said John C. Doscher. Without stopping to consider the legality of this defense, it is enough to say that the facts and circumstances constituting it are stated sufficiently definite and certain.

The third defense is that on December 24, 1865, Thomas Thornburn conveyed his interest in the donation of William Blackistone to Joseph N. Dolph, and never thereafter owned or was seized of any part thereof; and that the plaintiff has never been a resident of this state.

The fourth defense is that at the time of the sale to Dolph, as in the third defense mentioned, the premises were not worth over $200.

By the law of this state, since May 1, 1854, a widow is entitled to dower in "all the lands whereof her husband was seized of an estate of inheritance at any time during marriage." 2 Or. Laws, § 2954. But if the husband aliens such lands, and they "shall have been *enhanced* in value after the alienation," the same "shall be estimated in setting forth the widow's dower according to their value at the time they were so aliened." Id. § 2960. "Any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state, of which her husband died seized, and the same may be assigned to her or recovered by her, as if she and her deceased husband had been residents within the state at the time of his death." Id. § 2974.

The third defense is based on section 2974. The object of this section is not to give a non-resident widow the right to dower. That was already done by section 2954, which gives the right generally, and without qualification as to alienation by the husband or the residence of the parties. Although the provision is affirmative in form, it has a negative operation. Therefore it must be construed as if it read: "No wo-

man residing out of the state shall be entitled to dower of the lands of her husband lying in this state, of which he did not die seized."

By a necessary implication the section denies to a non-resident woman the right to dower of lands of which her husband was not seized at the time of his death.

Cases may arise in which the time when the woman was non-resident, with reference to the act of alienation by her husband, or even his death, may be material in the construction of this statute. But in this case it appears that the woman never was a resident of the state, and therefore no such question can arise.

It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether. Or it may for the security of titles, and the protection of innocent purchasers, provide that a non-resident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence or consent, and ostensibly as a single man.

This very case appears to be a good illustration of the wisdom of the provision. Thornburn was probably a transient person. His wife was unknown; and probably the fact that he had one was never even suggested. To subject persons buying property of him under such circumstances to a claim of dower in after years, might well be thought inexpedient, if not unjust, and, therefore the legislature has denied it.

In *Bennett* v. *Harms*, 51 Wis. 251, 8 N. W. Rep. 222; *Pratt* v. *Tefft*, 14 Mich. 191; and *Ligare* v. *Semple*, 32 Mich. 438, this question arose under a similar statute, and it was held that the widow was not entitled to dower.

The fourth defense is made under section 2960. To begin with, it may be admitted that the word "enhanced," taken in an unqualified sense, is equivalent to "increased," and comprehends any increase of value, however caused or arising. But under the circumstances it ought to be construed to include only the value caused by the improvements put upon the land by the tenant or those under whom he claims, and not that which arises fortuitously, or from what may be called natural causes.

I know that at common law the value at the time of alienation was the basis on which the value of dower was estimated. 4 Kent, 65. But it was always an unjust rule, and founded on special reasons that have no force at this time, or in this country, where it has been ably criticised and questioned.

A. buys a piece of wild land, such as this was in 1865, of a known married man, and omits to obtain the wife's relinquishment of dower. When the husband dies, and the widow's right of dower becomes a vested interest in one-third of the land for her natural life, the same has increased in value many times, without either the labor or capital of the purchaser. On what consideration of public policy or natural justice should she be deprived of her share of this increase in value for the ben-

efit of one who gave nothing for it, and deliberately took the chances on her husband surviving her? None has been suggested, nor can there be any. Sitting in this court, if the case was to turn on the decision of this question, I might not feel justified on the authorities in sustaining the demurrer to this defense. But if I were sitting in the supreme court of the state, I would do so without hesitation.

To provide that a woman shall have, at the death of her husband, dower in all the lands of which he was seized of an estate of inheritance during the marriage, and then declare that, in case the husband aliened the same during his life, she shall not have the benefit of the intermediate rise in value of the property, is a legal "juggle," that may fitly be characterized as keeping the word of promise to the ear, and breaking it to the hope.

Since writing the above, I have been fortunate enough to come across *Powell* v. *Manufacturing Co.*, 3 Mason, 347, in which Mr. Justice STORY, with his usual research and wealth of learning, holds that at common law a woman was dowable of the lands aliened by her husband during marriage, according to their value at the time of the assignment, less the value of improvements placed thereon by the purchaser, or directly consequent on such improvements; citing with marked approbation the same doctrine, as announced by Mr. Chief Justice TILGHMAN, in *Thompson* v. *Morrow*, 5 Serg. & R. 289. In conclusion he says:

"This doctrine appears to me to stand upon solid principles, and the general analogies of the law. If the land has, in the intermediate period, risen in value, she receives the benefit; if it has depreciated, she sustains the loss. Her title is consummate by her husband's death, and, in the language of Lord COKE, that 'title is to the quantity of land, viz., one just third part.' "

The motion is denied, and the demurrer is overruled.

EDWARDS *v.* KANSAS CITY TIMES CO.

(*Circuit Court, W. D. Missouri, W. D.* October Term, 1887.)

1. LIBEL AND SLANDER — CHARGE OF INCEST AND PREGNANCY — PARTIAL FAILURE TO JUSTIFY.
   If defendant, a newspaper corporation, publishes an article stating that the plaintiff had committed incest with her brother, and was pregnant thereby, but does not attempt, either by answer or evidence, to establish the pregnancy, plaintiff will be entitled to a verdict.[1]
2. SAME.
   A newspaper published a statement that plaintiff had committed incest with her brother, and was pregnant thereby. At the trial for libel it did not attempt to prove pregnancy, but introduced testimony as to the incestuous

[1] To constitute a complete defense to an action for libel, a justification, by alleging the truth of the matter charged as libelous, must be as broad as the defamatory accusation. Thompson v. Pioneer Press Co., (Minn.) 33 N. W. Rep. 856.

intercourse, which plaintiff denied. *Held*, that though technically the plaintiff would be entitled to a verdict, yet if the jury believed she were guilty of incest, her reputation could not be seriously injured by the charge.

3. SAME—CHARACTER OF PLAINTIFF—EVIDENCE.
In an action against a newspaper for libel, defendant introduced testimony to show the untruthful character of the plaintiff, and that at the funeral of two children, with whose murder the libel was connected, plaintiff was laughing, and showing a feeling of indifference. *Held*, that these facts were to be considered in estimating the true character of the plaintiff.

4. SAME—NEWSPAPER ARTICLE—SOURCE OF INFORMATION.
In an action against a newspaper for libel, it appeared that the article in question was taken from a neighboring sheet as a mere matter of news, and with no circumstances of aggravation or malice. *Held*, that the plaintiff was entitled to compensation for the injury suffered, and the manner of the publication was to be considered by the jury, either in mitigation or aggravation of damages.[1]

5. SAME—DAMAGES—TRANSACTIONS AFTER PUBLICATION.
In an action against a newspaper for libel, *held*, that matters that transpired after publication cannot be considered in mitigation of damages.

Action for Libel.

Crosby & Rusk, for plaintiff.

J. W. Wofford, for defendant.

BREWER, J., (*charging jury.*) I congratulate the parties in this case that the question between them is to be submitted to a jury of your intelligence, and one who has so patiently watched the progress of the trial. I regret to say that much of the argument of counsel on both sides has been matter of denunciation and appeal, matter which I think helps a jury very little in determining the real rights of the parties. You are not trying the case between the counsel, but between the parties, and we are to try the case upon the evidence before us. We are not to go out of this case and consider other questions, or other parties; we are not here to try over again the question of the guilt of Oliver Bateman. That murder case comes only incidentally and collaterally into this case, and the question we are to try is between the plaintiff and defendant, growing out of the fact that defendant has charged her with wrong-doing. the charge I will not read. The article which was published has been read in your hearing. It is, substantially and in effect, that this plaintiff was guilty of incest with her brother, Oliver Bateman; that is one specific important matter. It says, growing out of that incest, pregnancy followed, and that she was then with child as the result of this incestuous intercourse; and then it says that this incestuous relation, continuing and occurring on the day of the murder, was the real and primary cause

[1] In an action for libel evidence is admissible in mitigation of damages that the defendant believed in the truth of the charge alleged to be libelous, Morris v. Lachman, (Cal.) 8 Pac. Rep. 799; where the charge is made after reasonable and proper investigation, Bronson v. Bruce, (Mich.) 26 N. W. Rep. 671. The fact that an article published in a newspaper and charged as libelous was copied from another paper, without any actual intention of doing harm, may be shown in mitigation of damages. But this fact is no justification. Regensperger v. Kiefer, (Pa.) 7 Atl. Rep. 724. If it appear that there was no intention to injure, in the publication of a libel, and all proper precautions were observed in such publication, the amount of recovery will be limited to such damages as must inevitably have resulted from the wrong. Evening News Ass'n v. Tryon, (Mich.) 4 N. W. Rep. 267.

of the commission of that crime. Of course, these two latter charges rest upon the first and principal one,—that is, the charge of incest; and yet they are each of them contained directly, or by plain implication, in this article.

The defendant does not attempt, either by answer or evidence, to show that the plaintiff was in fact pregnant; therefore, under the pleadings as they stand, as that is a charge of matter which necessarily and naturally exposes her to the contempt of her fellow-beings, the plaintiff is entitled to a verdict, and the question which you are to determine is the amount of that verdict. It may be under the pleadings any sum from one cent, a merely nominal verdict, up to $50,000, the amount claimed. It is not an easy matter in cases of this kind to say exactly what a verdict should be. So far as the question of the amount is concerned, there is no market value. If the defendant had been charged with carrying off and destroying a thousand bushels of wheat belonging to the plaintiff, you would have little difficulty in determining how much you should award her by your verdict, for wheat has a market value. It is bought and sold day by day. But there are many things that have no market value. A limb, a life, has no market value; a man's hand is taken off in a railway accident,—there is no market value from which you can say it was worth so much; no more can you, when we are dealing with this intangible, but no less real, thing, a person's character and reputation, coin it into dollars and cents; and yet it is well settled, and justly so, that he who takes away a limb of another negligently, shall make him compensation, and he who injures another's character in like manner shall make him compensation, and in the ordinary proceedings of our legal system the question is left to the deliberate judgment of 12 men, taken from the body of the people; men of different experiences in life; men of prudence, intelligence, and integrity, who are to say what, in their judgment, will compensate the plaintiff for the injury. In this case it is a matter of compensation alone. Cases sometimes arise where a newspaper, or an individual, wantonly, maliciously, corruptly, and with the intent to degrade and destroy one's reputation, publishes a libel against him. In such cases the jury are warranted, and many times it is their duty, to do more than simply compensate,—they may give what the law calls punitive damages, that is, damages by way of punishment; and whenever a case is presented in which one occupying the responsible position of proprietor of a daily newspaper, especially one of large circulation and importance, so prostitutes his position and uses his power that, to gratify private malice, for the mere sake of punishing one whom he hates and desires to ruin, he publishes a gross falsehood against him, then my convictions and feelings are so strong and intense that I should feel it a duty which I owed to the community to urge upon a jury to give such a verdict, such a ringing verdict, as would not merely punish him for his wrong, but also be a lesson to all others occupying a similar position. Just the same as I would if, for instance, one of you jurymen, sworn to do justice between this plaintiff and defendant, should, either out of affection for the plaintiff or hatred to the

defendant, give her a larger verdict than she is entitled to, or a less verdict out of favor or through affection for the defendant,—just as in such a case I should feel that it was my duty to call upon a jury trying that case to punish you severely on account of your action.

But this case is not such a case. The plaintiff introduced no testimony tending to show that the defendant had any malice or feeling against her; on the contrary, it affirmatively appears that the article as published by the defendant was taken from a neighboring sheet as a mere matter of news, so that no circumstances of aggravation, wantonness, or malice, which justify and oftentimes compel a ringing verdict for the purpose of putting a stop to such wrong, exist in this case. I do not mean to say that that takes away from this plaintiff, in the slightest degree, the right of compensation for the injury which she has suffered. I simply mean to say to you gentlemen that it is your duty to inquire simply how much has this plaintiff been injured. What will compensate her for the wrong that has been done? And that amount she is entitled to at your hands. How are we to determine what is compensation, is the thing to be considered. It may be a matter of comparatively little moment if the offense is itself trivial. If the publication against a politician was simply that he is a liar, you might say that that was not a very aggravated charge; but when you charge a grave and serious crime against another, then the injury to character is certainly of a different kind. Now I need not say to you that a charge against any one of a crime of this character is to charge an offense of a serious nature. It is human with us; we could not be men, honest men, and not feel shocked to think that a girl would commit a crime so revolting as incest with her own brother.

Another matter for you to consider is this. What was her character,—her reputation? We use the term "character" often in two senses: in one sense it is used to refer to one's actual life; in another, and that is the sense in which we use it in this case, it is the reputation which we bear in the community. Of course, what you may say about me does not change me. If I am an honest man, if my life has been pure, the fact that every one of you may say that I am dishonest and impure does not change the fact. My life, my character in that sense is not changed; but if I have lived during 50 years of life in such a way that the community believes I am an honest man, that I am a pure man, that is my reputation in the community in which I live. If you publish a false statement that I am dishonest, that I am impure, you know how people will float this statement from one to another, until the community may come to believe that I am dishonest and impure. By this libel you have injured my reputation in the community, and that is something which every honest man prizes,—his good name in the community in which he lives. Now if it so happens that my life has been dishonest and impure, and you charge me with that, and prove that that is the fact, then I am entitled to nothing, for you have simply made public the actual truth. So, on the other hand, if, whatever may have been my actual life, the community here believes that I am dishonest, that I am

impure, then your statement to that effect makes very little impression upon my reputation; the people already believe it, already think that is so, and so I have not suffered; my reputation has not been damaged by your statement. Now go a little further: suppose it be true that I am known in the community, and justly so, as a common drunkard, a bar-room loafer, one that every man despises as he meets, and one of you should circulate or publish a statement against me that I had told a lie, or that I had stolen money. That may not have been my reputation before. People may simply have looked upon me as a mere wreck, a dissipated and worthless man, and may not have looked upon me as one who was a liar or a thief. Of course, in a certain sense, by that publication or statement you have injured my reputation; you have gotten people to believe I am worse than they thought me before; but, on the other hand, if I had such a reputation, how naturally you would say: "Well, it does not hurt much. People thought of me about as badly before as they do after the statement; my character and reputation in the community is not worth much; you cannot hurt that which is already badly injured." Now that thought comes right into this case. The defendant says that the plaintiff's character is bad; that her reputation in the community was not that of a pure, truthful, honest, upright woman; and though this specific charge may not be technically true, yet she was not hurt much, because it only added to a bad reputation that she had already. Now, in respect to her reputation, you have the testimony of these witnesses as to what it was in that community; you have also the testimony of one witness in which he says that he saw this plaintiff and her brother having improper intercourse. If it be true that she did have that incestuous intercourse with her brother, then, although it may not be true that she was pregnant as a result of that intercourse, your common sense tells you her reputation was not badly injured; she has suffered very little by this additional charge. But the plaintiff says there is no foundation for this testimony of Morgan Miller's. She says that it is not true, and you have her testimony as against his. She says, also, that upon the face of his testimony it is apparent, from its contradictions, its misrecollections, that he was not telling a true story. She says it is not true, because, as he locates himself, it was impossible for him to have looked into that little log-house and seen anything, such as he tells. She says that it is not true, because it is contrary to human experience that parties, intending such a violation of law and decency, would commit the offense in such a public manner, with the door open, and that door opening towards the house in which her parents and brothers and sisters lived, and where persons might be expected to be. It is not for me to decide these questions of fact. That is your province. I simply leave the question for you to determine, saying that it is but common sense, common justice, that if she were guilty of such an offense, though technically, your verdict must be for the plaintiff, her reputation has not been injured seriously by this charge.

Again, it is said that she perjured herself, and that fact was known, and that her reputation is that of one guilty of perjury; and it is said

that at the coroner's inquest she testified, and testified falsely, that her brother was at home on the afternoon of this murder. She says that she gave no false, no perjured testimony; that she intended to say that which was true before the coroner's jury, as well as on the evening of Thursday or Friday thereafter. It is for you to say whether her explanation is correct or not; whether she did, in fact, perjure herself or not. She further says that even if it be true that before the coroner's jury she did commit perjury, it was done through a sister's love for her brother, and to shield him from the suspicions of so revolting a crime as the murder of these two little girls. Now if you find that she did commit perjury, then the question for you to consider is, whether that explanation takes away the moral quality of this offense; whether there is an apology, excuse for a sister, believing her brother innocent of a crime, to perjure herself to shield him from suspicion. While, of course, it would not detract in the slightest degree from the legal character of the offense, it would not make her any the less a perjurer, yet it is for you to say whether that did or did not take away the moral enormity of the offense. Now, taking all these things together, what was the character of this female plaintiff? Was it good or bad? And according as it is good or bad, so it is more or less injured by the accusation made against her in this particular; for, as I said at the outset, to charge against a pure woman, one known to be pure, and having a good reputation in the community, such an offense is a serious accusation. To charge that against one who has forfeited her good name by her own conduct is not so serious an accusation.

Another matter I forgot to notice, and that is, the testimony of one or two witnesses as to her conduct at the time of the funeral of these little girls, as well as the testimony of one or two witnesses as to her conduct at the times these gentlemen called upon her at the house. Some of these witnesses say that in the sad hour of that funeral this girl was there laughing, and making apparently light of the sad events which were passing, and that she seemed at the time of this interview to be laughing, or snickering, manifesting a feeling of indifference. Now if that is all true, it simply throws light upon the question of the girl's character. Of course it does not follow from that that she was impure or untruthful, but it is simply a circumstance to place before you the real, true character of the plaintiff. Now the defendant says, conceding all the plaintiff claims, conceding that she may be a pure girl, conceding she may have been a truthful girl, conceding her reputation is perfectly good, yet this article was published, not from any malice against the plaintiff, not through any negligence, or picked-up information obtained from listening to the scurrilous story of some disappointed and disgruntled neighbor, but was published as a matter of news, taken from a respectable sheet, published in the vicinity of this murder, and that is a matter to be considered by the jury. Although a newspaper may be actuated from no personal malice, and have no private feelings to gratify, yet a case might arise where, with great negligence, it takes a story from some irresponsible party, who seeks this way of getting a libel before the

community. Take this very case: suppose there was some one in this little village of Flag Springs who, through business troubles, through jealously, or from ill will, desired to wrong and injure the plaintiff, and came to any newspaper and told such a story as this, and without any inquiry of the responsibility of the party telling it, without any efforts to find out the truth, such paper published the charge, you would feel that there was negligence on the part of the defendant,—an indifference to the rights of others which certainly would demand serious attention at your hands; for the law is that a man cannot shield himself from responsibility for a libel by the fact that some one told him, and if he took the statement of some person whom at the time he did not know,—took the statement of such person without making any fair and reasonable inquiry,—you would very properly say that that was negligence on his part, and he should be held to a fuller and larger responsibility. The defendant says it did nothing of this kind; that it found in a responsible sheet, published in the vicinity of this murder, this item of news, and published it without head-lines, or without anything to attract unnecessary attention, as a matter of news affecting such a terrible tragedy as this. Of course I do not mean to say that the fact that the information in this article was thus obtained, relieves the defendant of responsibility, or justifies you in failing to give compensation to the plaintiff for the damages which she has suffered; but it is a matter to be considered by you, because it is a function and duty of newspapers to furnish information to its readers of the current events. I say, it would be a physical impossibility to send an agent to every place, where events, tragedies are transpiring, to ascertain by personal examination the exact facts. A paper could not give us all which we have a right to hear of the current events of the day. When Garfield was shot every man in the land was eager to know all the particulars in full, with all information concerning the event and its surroundings. Suppose, in such a time as that, a paper in the far west published an untruthful statement coming by the associated public press dispatches, or borne to it from some Eastern and reputable paper, which represented something about an individual in Washington which was not true, the paper would take the risk of the untruth, and must compensate for any damages which were suffered, but at the same time it would be acquitted of that which we call negligence and wantonness in the publication; and so the defendant, conceding for this question all that the plaintiff may claim, says it simply discharged the functions of a newspaper, gathering from all quarters of the land information respecting every event of public interest, and that this fearful murder of these innocent children was something which sent a thrill of horror through all this western community, and that every fact connected with it was eagerly sought after, and so in the honest and faithful discharge of its duties to the public it published that which it had every reason to believe was the truth. These matters are to be considered on one side or the other of aggravation, or mitigation of damages. You are to see to it that plaintiff is compensated for the injury which her character has sustained; but while doing that you are

not required to render such a verdict as will put a check and stop upon the legitimate pursuit of information in respect to matters of public interest.

Of course you will look at this question of mitigation as it is suggested in view of the facts that transpired before the publication. Any matters which have transpired subsequently thereto, do not come in to mitigate. At the time the publication was made, what was the condition of affairs? Upon what was it made, and was it upon a reasonable or unreasonable belief in the truth of it? There is another rule of libel, that where the party, having been sued for libel, justifies, as it is called,—that is, comes in by answer and says the charge is true,—that is to be considered as a repetition of the libel; that the party, if it was not true, should say it is not true, and should offer merely his matter in mitigation of damages. On the other hand, if defendant had reasonable ground to believe it was true, it had a right to have that fact inquired into by a jury, and may tender that defense in his answer; and though he may fail, and though he may not justify as to the whole charge, may not say that it is all true, he is at liberty to come in and say a part is true, and as to the whole I published under these circumstances. You are the sole judges of the credibility of all the witnesses. It is not my province to say that any witness has or has not told the truth. Many of them you have seen; heard from their lips their story; seen their appearance on the stand. The others have spoken to you through their depositions, after examination and cross-examination, and you have heard their story with their contradictions, if any, and it is for you to say how much credence you will give to any and all. I believe, gentlemen, that is all I need to say to you. I commend this case to you, believing that you will do what is right, and justice between this plaintiff and defendant. It is, of course, not the idea of libel suits that the plaintiff is to make money and speculate out of her reputation. What a libel suit means, in cases where there is no willful misconduct, is that the plaintiff shall be compensated for the damages which her or his character may have suffered. Here is this case; it is for you, as 12 sensible, intelligent men to say by your verdict how much this plaintiff's character and reputation has been in fact damaged by the publication of this article in the Times. When that amount is found you will name it in your verdict. The form of your verdict will be this: "We, the jury, find for the plaintiffs, and assess their damages," (because husband and wife join as plaintiffs,) "at the sum," which you will name, and which you all agree upon as a fair compensation to her.

The jury found for the plaintiff in the sum $500.

HASTINGS & D. RY. CO. *v.* ST. PAUL, S. & T. F. RY. CO.

(*Circuit Court, D. Minnesota.* December 12, 1887.)

1. PUBLIC LANDS—RAILROAD GRANTS—WHEN TITLE VESTS.
   Lands in controversy between two railroad companies, grantees under acts of congress,—complainant under act of 1866, and defendant under acts of 1857 and 1865,—were within the place limits of complainant's road, and within the indemnity limits of the road of defendant. Complainant's definite location was made before any selection by defendant. The lands in dispute were conveyed to defendant in 1871 and 1872. Complainant's road along these lands was finished in 1879, and application made for entry in 1883, which being refused, complainant brought suit in 1886. As against the holding of the United States supreme court that no title passes to indemnity lands until selection, and that as to place lands the title vests on completion, and relates back to the date of grant, and is specifically fixed by the definite location of the road upon the tracts of the place limits, defendant urged the administration of these grants by the land department, both in Minnesota and in Washington, as a construction and determination of the law. *Held*, that there is no reason why, both parties being donees, either may not insist as against the other upon the full measure of the rights given it by the grants.
2. SAME—RAILROAD GRANTS—WHEN TITLE VESTS—LIMITATION OF ACTIONS.
   In such a case, neither party can set up the statute of limitations as a defense until it begins to run.

Bill by complainant, the Hastings & Dakota Railway Company, for possession of lands held adversely by defendant, the St. Paul, Stillwater & Taylor's Falls Railway Company.

Gordon E. Cole, for complainant.

Thomas Wilson, for defendant.

BREWER, J. These two companies above named are land-grant companies. The acts of congress under which the defendant claims are those of 1857 and 1865, while the complainant claims under the act of 1866. The lands in controversy are lands within the place limits of the complainant's road, and within the indemnity limits of the road of the defendant. The supreme court of the United States has in several cases within the last six or seven years affirmed these two propositions: That no title passes to indemnity lands until selection; and that, on the other hand, in the case of place lands, the title vests on the completion of the road, but relates back to the date of the grant, and is specifically fixed by the definite location of the road upon the tracts within the place limits. In other words, if the road is finished, then the lands in place, not already otherwise appropriated at the time of the definite location, become the property of the company that has done the work, the donees of the grant, and the title takes effect and dates back to the date of the grant.

In this case the definite location of the complainant's road was made before any selection was made by the defendant. Applying these two propositions affirmed and reaffirmed by the supreme court, there would seem to be no chance for dispute upon the legal proposition that the title to these lands was in the complainant, rather than in the defendant.

But as against that proposition the defendant has very strenuously urged that there was an uniform construction of the land department, both in this state and in Washington, in the administration of these grants, which has the effect of law,—is itself both a construction and a determination of the law. It is also contended that the complainant has slept upon its rights, and that its claim is stale. It is true that the lands were conveyed to defendant in 1871 and 1872; but on the other hand it is also true that the complainant's road was not finished along these lands until 1879, and this bill was filed in 1886. There is some testimony showing that in 1883 complainant made application for an entry of these lands, which was refused. Whatever force there may be, and I am not prepared to say that there would not be force, in these defenses, if interposed on behalf of a *bona fide* purchaser, some one who had parted with value for the property, yet the question here is presented simply between the two railroad companies,—no grantee, no mortgagee, no *bona fide* purchaser, or third party, being interested in this case, and in this question. Both of these parties were beneficiaries of a grant; neither one bought the land, neither paid any money. The United States government simply made a donation of these lands, and as between two parties, each of whom claims a right to the benefit of the gift, I think that until the statute of limitations runs,—and there is no pretense in this case that it has run,—neither party can interpose the staleness of the claim as a defense. The United States government by its congress donated these lands, and there is no reason why, under such circumstances, either party may not insist as against the other upon the full measure of the rights given it by the grants.

For these reasons the decree will go in favor of the complainant. Ordered accordingly.

MARINE CITY STAVE CO. *v.* HERRESHOFF MANUF'G CO.

(*Circuit Court, D. Rhode Island.* November 7, 1887.)

1. EXCEPTIONS, BILL OF—WAIVER OF—REFUSAL TO SIGN.

The trial, which resulted in a verdict for plaintiff, came to an end February 18, 1887. Defendant secured an extension of time to file a motion for a new trial, stating that he did not intend to proceed under his exceptions. The time was further extended on an *ex parte* application. The motion was then filed and argued before both the district and the circuit judges. A new trial was refused, and defendant, at the next term, and eight months after the trial, moved for signature of his bill of exceptions, and petitioned for a writ of error founded thereon. *Held*, that the motion should be overruled, and the writ refused, the exceptions having been waived, both expressly and by implication, and the bill being presented for signature neither within the term, nor within a reasonable time.[1]

[1] Bills of exceptions must be prepared and settled before the end of the term at which the cause was tried, Sweet v. Perkins, 24 Fed. Rep. 777; or within such time as the parties by their agreement, made part of the record, may stipulate; or within the time allowed by the court in its order to that effect, made in term-time and appearing in the record, Hake v. Strubel, (Ill.) 12 N. E. Rep. 676. A distinction is to be observed in this respect between the settling and allowance of a bill, which is an act judicial in its nat-

2. SAME—INSUFFICIENCY IN LAW—REFUSAL TO SIGN.
Although the absence of good legal ground for the exceptions is not a sufficient reason for refusing to sign the bill when properly presented, it may yet be taken into consideration, when the bill is presented for signature under such circumstances, that to sign it would be a departure from the usual and proper practice.

At Law. On motion that bill of exceptions be signed, etc.
Walter B. Vincent, for plaintiffs.
Amasa M. Eaton and *Benj. F. Thurston*, for defendants.

CARPENTER, J. This is a motion that a bill of exceptions be signed, and also a petition for a writ of error founded on such bill of exceptions. The circumstances are so unusual that I think it convenient to state the grounds of my decision.

This case was tried before me with a jury, February 15, 17, and 18, 1887, in the November term of this court. The plaintiffs offered proof tending to show that they purchased from the defendants, for about $13,000, a coil boiler and engine manufactured by the defendants; that the same were put by the servants of the defendants, and with their knowledge, but at the expense of the plaintiffs, in a steam-boat called "The Mary," on the St. Clair river; that the boiler and engine were constructed in a manner so negligent and unworkmanlike that the engine and shaft broke, and the boiler repeatedly collapsed or exploded, causing expense and detention of the boat from her business. The defendants called as a witness John B. Herreshoff, president of the defendant company, who stated that he first saw McElroy, the president of the plaintiff company, through whom the contract in question was made, on December 1, 1881, and testified as follows:

"He came there by an appointment made by telegraph between us, to see about a boat. After he arrived there, we found that he wanted only the machinery. * * * After a short interview, wherein he explained what he wanted, *i. e.*, a boat that would beat others *in that same business in that vicinity*,—or 'all others,' I think was his phrase,—we recommended our largest machinery in a boat 120 or 130 feet long. * * *"

He then further testified as to the dimensions and model of the boat which he recommended, and as to the dimensions and model of the boat in which the machinery was actually put, and as to the difference between them in respect to the power required to drive them. In cross-examination the plaintiffs' counsel asked the witness the following question:

"Now, Mr. Herreshoff, didn't you understand, as a matter of fact, that this boat for which you were to furnish the machinery was to be used on the St. Clair river for the purpose of doing a passenger and freight business?"

ure, and the act of signing and sealing the bill, which is merely ministerial. Id. In *Alabama*, the bill must be signed during term-time, unless authorized to be signed after adjournment by consent or agreement of counsel. Markland v. Albes, 2 South. Rep. 123. But where one has done all in his power to procure the settlement of and signature to the bill, he cannot be prejudiced by the delay of the judge. Davis v. Patrick, 7 Sup. Ct. Rep. 1102.

To which question the defendants objected, but it was admitted by the court, under notice of exception.

The jury found for the plaintiffs. Within two days after the entry of the verdict (which is the time limited by the rule in this circuit for filing a motion for a new trial) the counsel for the defendants appeared before me, and stated that the defendants would not proceed under their exceptions; and applied for an order extending the time within which they might file a petition for a new trial. I made an order allowing for that purpose two weeks from the entry of the verdict, and afterwards, on another *ex parte* application, extended the time to March 12, 1887. Within this last time the defendants filed their petition praying for a new trial on 10 distinct grounds, and the petition was heard by Judge COLT and myself, and held for advisement. In the mean time the November term came to an end, and the June term, 1887, of the court began. On the twenty-second day of October, 1887, in the June term, the motion for a new trial was denied and dismissed, and judgment was entered on the verdict on the following day. Within a few days after the judgment was entered, the bill of exceptions was presented to me, wherein is set out the fact of the admission in evidence of the above-recited question in cross-examination, against the objection of the defendant. The plaintiffs claim that no bill can now be allowed. I have come to the conclusion that it is not proper for me to sign this bill of exceptions for the following reasons.

1. The defendants have expressly waived their exceptions, and on the strength of such waiver they have obtained time to file a motion for a new trial, and have argued that motion before this court. *U. S.* v. *Jarvis*, 3 Woodb. & M. 217.

2. The defendants have, by implication, waived their exceptions by filing and bringing to a hearing their motion for a new trial. The motion for new trial should not be heard unless the exceptions are waived; and by calling on the motion for hearing, I think the defendants must be taken to have made their election between these two remedies. *Cunningham* v. *Bell*, 5 Mason, 161.

3. The defendants should have presented the bill for signature within the term at which the case was tried. It was early held by the supreme court that the bill must be signed within the term, unless by consent or by special order. *Ex parte Bradstreet*, 4 Pet. 102; *Walton* v. *U. S.*, 9 Wheat. 651; *Turner* v. *Yates*, 16 How. 14. This is a rule not alone for the protection of the judge, lest he should be asked to sign a bill after the recollection of the facts has faded from his mind. It is for the protection of the parties as well, that they may not be burdened with unnecessary delay and expense. I think they are entitled to have the rule enforced. It is suggested that this rule was established at a time when short-hand reports of trials were not usual, and the only dependence for a true statement of the exceptions was on the memory and the notes of the judge, and perhaps of counsel. But I find that the supreme court still consider the rule obligatory on the judges in the performance of this duty. *Muller* v. *Ehlers*, 91 U. S. 249. In that case, indeed, the court

say that, "as early as *Walton* v. *U. S.*, 9 Wheat. 651, the power to reduce exceptions taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not later than the term at which the *judgment was rendered.*" But a reference to the older cases will show, I think, that the term at which the bill must be signed, as meant in these decisions, was the term at which the exceptions were noted on the trial. Usually, of course, the judgment is rendered at the same term with the verdict, and it seems to me that the term "judgment was rendered," as used in the last-named case, must have been understood by the court to signify the term at which the trial was had, inasmuch as the older cases are quoted with approval and followed.

4. I think this bill is not presented within a reasonable time, and ought not to be signed unless the plaintiffs consent. Eight months have expired since the trial; the defendants have filed and argued a motion for a new trial, in the decision of which motion the error in the admission of this question and answer (if any there be) might have been corrected if the defendants had seen fit to allege it in their motion and argue it to the court; the defendants have explicitly waived their exceptions, apparently for the purpose, and certainly with the effect, of obtaining time to file a motion for a new trial and having it argued, for greater certainty, before two judges; and, finally, I am entirely unable to see that the exception as presented to me discloses any ground on which it may reasonably be argued that there was error. In addition, I cannot fail to see, from the transcript of the case which has been before us, that the same fact which is proven by the question and answer to which objection is made, was abundantly proven by witnesses for both plaintiffs and defendants, and was made the basis of instructions to the jury, without objection or exception noted by either party. I cannot see, therefore, how the parties could have been prejudiced by the admission of the question. I do not mean to say that the absence of good legal grounds for the exception is a reason why I should refuse to sign it if properly presented; but, when presented under these circumstances, I think I ought to take that question into consideration in determining whether I will depart from the usual and proper practice in such proceedings. *Greenway* v. *Gaither*, Taney, 227.

I think, therefore, it is unreasonable that this bill should, under the present circumstances, be signed, against the objections of the plaintiffs, and I so decide, and, so far as the decision of this question rests in my discretion, I am clear that I ought to refuse to exercise that discretion in favor of the defendants. *Dredge* v. *Forsyth*, 2 Black, 563; *Kellogg* v. *Forsyth*, Id. 571; *Nicoll* v. *Insurance Co.*, 3 Woodb. & M. 530.

The bill of exceptions will not be signed, and, as I understand the facts stated in the bill are the only ground of error, the petition for a writ of error will be denied.

In re NEWCOMB.

(*District Court, N. D. New York.* November 14, 1887.)

1. BANKRUPTCY—LIABILITY OF ASSIGNEE—INTEREST ON UNDEPOSITED FUNDS.
An assignee in bankruptcy, who disregards the express order of the court in depositing funds, is liable for the interest which the designated depositary would have paid.
2. SAME.
He is liable also, in the absence of all explanation, for legal interest on money collected and not deposited, which remained in his hands through a long period of years.
3. SAME—LIABILITY OF ASSIGNEE—UNCOLLECTED NOTES.
Under the act of congress of June 22, 1874, § 4, it is the duty of the assignee to sell at public auction notes which belonged to the bankrupt; but where he retains them, and suffers them to become outlawed, he is liable only to the extent that they were collectible.
4. SAME.
Notes taken by the assignee in renewal of notes held by the bankrupt, to avoid the statute of limitations, or for some other reason equally good, are a charge against him, when outlawed, only so far as they were collectible.
5. SAME.
An assignee who, without the sanction of the court, sells the effects of the estate on credit, and suffers the notes given for the purchase price to become outlawed, is liable for the loss, whether the makers of the notes were responsible or not.
6. SAME—LIABILITY OF ASSIGNEE—SALE BY ASSIGNEE.
The assignee sold real estate to the bankrupt's wife, and, without the sanction of the court, took a bond, secured by mortgage, for the purchase price. The interest was allowed to accumulate until the security became inadequate. *Held*, that the assignee was liable for the loss, and that, to avoid the delay of foreclosure, the mortgage should be transferred to the assignee upon payment to the estate of the amount due thereon.
7. SAME—LIABILITY OF ASSIGNEE—LIMITATION OF ACTIONS.
A new assignee appointed in the place of former assignees, deceased, and who is seeking to enforce against their estates demands which they permitted to outlaw, should not himself be permitted to set up the statute of limitations as a defense to a note given by him to his predecessors for goods purchased of them.
8. SAME—ASSIGNEE'S COMMISSIONS—FORFEITURE BY MISCONDUCT.
Rev. St. U. S. § 5062, provides that every assignee who shall "fail or neglect to well and faithfully discharge his duties * * * shall forfeit all fees and emoluments," etc. *Held*, in a case where the assignee, a man of high standing to whom no bad faith was imputed, had caused a great loss to the estate by suffering notes, etc., to be outlawed, that the question as to whether or not commissions should be allowed, was for the register in the first instance, and that they would not be disallowed until the assignee had had full opportunity to be heard in explanation.

In Bankruptcy.

Prior to 1872 Alva M. Newcomb was adjudicated a bankrupt and Charles W. Barnes and Ralph Allen were appointed his assignees. In March, 1872, a dividend of 60 per cent. was declared and paid. Though large sums were subsequently collected by the assignees, there has been no dividend since that time. Ralph Allen died in 1881, and Charles W. Barnes died in 1884, both intestate. After the death of Barnes, Frank M. Newcomb was appointed assignee of the bankrupt's estate. In De-

cember, 1885, the representatives of the deceased assignees filed a statement of the transactions of their intestates with the estate of the bankrupt, and prayed that the account might be settled, and the estates of Barnes and Allen discharged. The present assignee and a creditor surcharged and filed objections to this account. It appears by this account that after the dividend was declared in 1872 there was a balance in the hands of the assignees of $1,635.29. Between that time and May, 1880, they collected $6,082.59. During the same period they disbursed $1,665.61. The balance due to the present assignee is stated at $6,052.27. Of this sum $3,163.68 was deposited in the Schuyler County Bank, where it did not draw interest, and in November, 1884, it was turned over to the present assignee. There is now concededly due the estate the sum of $2,788.49. It also appears that there are several notes in the hands of the administrators, given to the bankrupt, which the assignees permitted to outlaw. The account further shows that there are in the hands of the administrators a number of notes taken by the assignees and made payable to them. These notes were also allowed to outlaw. The administrators also hold a bond and mortgage for $3,162.19, dated November 28, 1874, executed by Sarah A. Newcomb to the assignees upon a sale to her of a portion of the bankrupt's real estate. It is alleged that the interest has been allowed to accumulate, until the land is wholly inadequate as security for the amount due.

The present assignee insists that the administrators should pay interest upon the amounts collected by the deceased assignees, and account for the outlawed notes and for the amount lost, by their negligence, upon the Sarah A. Newcomb mortgage. The administrators deny their liability, except to hand over the money, notes, and mortgages in their hands. Upon the issue thus raised, testimony has been taken by the register in charge. This testimony, together with the account and objections thereto, is transmitted to the court, with the request that the rules which should govern the register in taking and stating the account be determined in advance in order to save expense and prevent further delay in closing the estate of the bankrupt.

Charles S. Baker, for present assignee and for a creditor.

O. P. Hurd, for administrators of former assignees.

COXE, J. As this controversy will undoubtedly have to be decided by the court at some stage of the proceedings, it may tend to simplify and hasten the settlement of the bankrupt's estate if it is determined at the outset, although I am aware of no precedent for this practice.

The questions at issue between the parties are: *First.* Should the administrators pay the present assignee interest upon the money collected by the deceased assignees, and deposited by them in the Schuyler County Bank? *Second.* Should they pay interest upon the money collected by the assignees and not deposited? *Third.* Should they account for the notes given to the bankrupt which the deceased assignees permitted to outlaw? *Fourth.* Should they account for the notes taken by the deceased assignees and which they permitted to outlaw? *Fifth.* Should

they account for the loss upon the Sarah A. Newcomb mortgage? *Sixth.* Should commissions be allowed to the deceased assignees?

Upon the question of interest there can be no doubt. The deceased assignees were the trustees of the creditors. Their duty was clear. They were not permitted to use the trust fund for their own benefit or profit in any way by its possession. The earnings of the fund belonged, not to them, but to the creditors. Although the assignees disregarded the express order of the court in depositing funds in the Schuyler County Bank, yet, as they derived no personal benefit therefrom, it is not easy to see why the creditors will not be indemnified when they receive the interest which the designated depository would have paid. I think they will be. *In re Burt*, 27 Fed. Rep. 548; General Order No. 28; Rule 37 of this court; Bankrupt Act, § 5059; *In re Thorp*, 4 N. Y. Leg. Obs. 377.

As to the balance not deposited, the law presumes, in the absence of all explanation, that the assignees, or one of them, had the use of this sum through a long period of years. The legal interest thereon should be paid by their representatives. *Cook* v. *Lowry*, 95 N. Y. 103; *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620; *Insurance Co.* v. *Lynch*, 11 Paige, 520.

Whether or not the administrators should account for the notes, etc., given the bankrupt, which passed by the assignment, depends upon the question whether they were of any value at the time they came into the hands of the assignees. Strictly speaking it was the duty of the assignees to sell this property at public auction within a reasonable time. Section 5062, (Act June 22, 1874, § 4;) Bump, (9th Ed.) 560. By failing to comply with the provisions of the law, they assumed the responsibility of showing that the estate did not suffer by their action. If these notes were at all times worthless, the creditors have lost nothing by the supineness of the assignees. As I understand the proof, it is undisputed, and the present assignee practically concedes that all, or nearly all, of these debtors to the bankrupt are and always were utterly irresponsible. The Wiedman mortgage is an exception, and there seems to be no reason to doubt that it is collectible. But these are questions of fact, which can best be determined by the register. If he is convinced that the estate has suffered by reason of the failure of the assignees to enforce these demands, to that extent there should be restitution.

The notes and mortgages taken by the assignees stand upon a totally different footing. But, until a preliminary question of fact is determined, the law as applicable to this branch of the case can only be stated in the alternative. The counsel for the present assignee asserts that these notes were given to the deceased assignees for property of the bankrupt sold by them. The counsel for the administrators denies this, and insists that there is no proof to support the assertion. He argues that they may have been given in renewal of notes held by the bankrupt to avoid the statute of limitations, or for some other reason equally good. If these notes represent debts due to the bankrupt, they are covered by the rule already suggested as applicable to that class of indebtedness. If, however, the notes were given in payment of property sold by the as-

signees, there can be no doubt as to their liability. And if, as suggested, the parties to whom they sold were irresponsible at the time, the case against them is greatly strengthened. I am familiar with no section of the bankrupt act which permits an assignee, without the sanction of the court, to sell the bankrupt's property on credit, (section 5062, *supra*;) but, having done so, if he makes no demand of payment, and permits the debt to outlaw, there can, it is thought, be no two opinions regarding his responsibility. To hold that an assignee may with impunity dispose of the property in his hands on credit, and make no effort to collect the debt, is, in effect, saying that he may give away the trust fund, or waste it in any manner that he may see fit. To sell on credit to a worthless party would, ordinarily, render an assignee liable; to sell to a responsible party, and permit the debt to outlaw, would, if possible, be even more reprehensible; but where an assignee does both, every avenue of escape from liability is closed.

One of these notes was given by the present assignee. He must, of course, pay the amount due thereon to the estate.

Much that has been said already applies to the Sarah A. Newcomb mortgage. It does not appear whether the sale of the property to her was made pursuant to an order of the court, or how long the mortgage had to run, or whether any payments have been made thereon. No indorsements appear on the bond, but the administrators assert, in the account, that about $929 has been paid thereon at various times. It seems to be conceded that, with the accumulations of interest amounting to over $1,000, the land is inadequate security. If the sale was made without the order of the court, the action of the assignees was wholly unauthorized; but having taken the mortgage, they should have enforced it while the security was sufficient. Probably the simplest manner of disposing of this question is for the present assignee to assign the mortgage to the administrators upon receiving from them the amount due thereon. The assignee should not be required to foreclose this mortgage. Any further delay will be intolerable. It is manifestly his duty to close up the trust in the speediest possible manner, and there should be no impediments placed in his path. But the manner of arriving at the deficiency due the estate may be safely left to the register.

It is undeniable that, by the negligent action of the deceased assignees in these particulars, the creditors have lost a large sum of money to which they are entitled, and for which the estates of the assignees are liable. The question as to whether or not commissions should be allowed the assignees in the settlement of the estate may properly be passed upon in the first instance by the register. It is possible that some proof may be offered by which the court can fairly take this case out of the clause of section 5062, *supra*, which provides that every assignee who shall "fail or neglect to well and faithfully discharge his duties * * * shall forfeit all fees and emoluments," etc. *Cook* v. *Lowry*, *supra*. This is a most extraordinary case. Nothing at all approximating it has come under my observation. The papers do not disclose when the assignees were appointed; but they do show that for over

10 years the assignees delayed without cause the settlement of the estate, and permitted its securities to depreciate and to outlaw. Almost every section of the bankrupt law, applicable to assignees, has been disregarded or directly violated, and all this without a word of explanation. It is conceded by all that the deceased assignees were men of high standing in the community in which they resided, and no bad faith is or can be imputed to them. Their lips are closed. There may be some explanation of their conduct, and all possible opportunity should be given to explain what upon the papers now submitted seems to be a case of unprecedented and unpardonable neglect. An order disallowing commissions will not be made until a full opportunity has been accorded the representatives of the deceased assignees to be heard upon that issue. The court may feel constrained reluctantly to make the order, but it is hoped that the necessity therefor may be averted. Bearing in mind the rules above referred to, it is thought that the register can have no difficulty in correctly stating the account.

THOMPSON and others *v.* DERBY and others.

(*Circuit Court, D. Massachusetts.* December 3, 1887.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—COMBINED CHAIR AND CARRIAGE.
   Letters patent No. 224,293, granted to Joseph W. Kenna for improvements in child's combined chair and carriage, are not anticipated by earlier patents, although limited in scope by them.
2. SAME—INFRINGEMENT—COMBINED CHAIR AND CARRIAGE.
   Chairs made under the two Chichester patents, respectively numbered 259,368 and 260,843, are infringements upon the Kenna patent No. 224,293. The chairs made under the Parker patent, No. 317,668, do not infringe.

In Equity.

James E. Maynadier, for complainants.

Thomas H. Dodge, for defendants.

COLT, J. This is a suit for an injunction, account, and damages, based upon letters patent No. 224,293, dated February 24, 1880, granted to Joseph W. Kenna for improvements in a combined child's chair and carriage. The specification says:

"My invention relates to an article of furniture which, by simple adjustment of the several parts, may be converted from a nursery chair to a child's carriage, and *vice versa*, so that it may be used for either a child's high chair or a carriage, as may be desired. The invention consists in the manner of connecting the chair to its supporting frame and supporting it therein, and also in special devices and combinations of devices."

The first claim of the patent covers some of the special devices described in the specification. The second claim is more general in its character, and is relied upon in this suit. It reads as follows:

"The frame, A, in combination with bail, E, chair-frame, B, pivoted at its lower front corners to the frame, A, and the yielding rest or support, F, substantially as described."

F is also termed in the specification a "Spring Catch," and it is manifest that this is a more correct term than yielding rest. It is used to hold the bail, E, in position when the chair is used as a high chair. The Kenna chair is an improvement on what is called the "Pearl Chair," in that the supporting frame is hinged to the front legs of the chair, instead of being hinged directly to the chair seat. The plaintiffs contend that three chairs made and sold by the defendants infringe the second claim of the Kenna patent. The first of these alleged infringing chairs is found described in the Chichester patent No. 259,368, dated June 13, 1882; the second in the Chichester patent No. 260,843, dated July 11, 1882, and the third in the Parker patent, No. 317,668, dated May 12, 1885.

With respect to the Kenna patent, it is urged that it must receive a narrow construction in view of what took place in the patent-office upon the application for the patent, and in view of the prior state of the art. The office rejected the broad claim made by Kenna to the combination of the supporting frame, chair-frame pivoted thereon, and bail, on the ground that such combination was shown in the prior Pearl chair; and Kenna acquiesced in the decision of the examiner, and directed the claim to be erased from his application. But as to the claim now sued upon, it is found in the original application, and it was allowed, so far as appears, without question, and I am of opinion that it is a valid claim for a combination. Each of the elements may be old, but they were never combined together before, and they produced a new and improved result. Many prior patents for combination chairs have been introduced in evidence, but nowhere do we find described the Kenna chair, or all the features of the Kenna chair, covered by the second claim of the patent. Undoubtedly the Caulier patent, and the Patten patent, and other prior patents, together with the Pearl chair, tend to limit the scope of the Kenna invention, but I do not think any of them are anticipations of that invention.

The question of infringement remains. As to defendants' chairs, made under the two Chichester patents, it seems to me clear that they use all the elements described in the second claim of the Kenna patent. In the Chichester chairs there are found the supporting frame, A, the bail, E, the chair frame, B, pivoted at its lower front corners to the frame, A, and the spring catch or support, F, or what may fairly be considered their equivalents.

With respect to the Parker chair, I find no infringement. There is not found in the Parker chair either the bail or spring catch described in the Kenna patent. The bail is not used for the purpose of supporting the chair, but only for the purpose of pushing when the chair is converted into a carriage, nor is the catch of the Kenna patent present in the Parker chair.

Upon the evidence the plaintiffs contend that the Kenna invention antedates the Pearl chair, but I find the contrary to be the fact. The

effort of the defendants to show that L. A. Chichester invented the Kenna chair is not sustained by sufficient proof. Nor can I agree with defendants that the special devices, such as the slotted bars which are made the subject-matter of the first claim of the Kenna patent, must by implication be incorporated into the second claim. My conclusion is that defendants' chairs made under the Chichester patents infringe the Kenna patent, and that defendants' chairs made under the Parker patent do not infringe, and a decree may be drawn accordingly.

Decree for complainants.

LEARY and others *v.* HOHENSTEIN.

(Circuit Court, S. D. New York. December 2, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.

Letters patent for a shade or globe holder for candles which should descend as the candle burned down, were applied for by Daniel Leary. A part of his claims were rejected as already covered by British patents, whereupon he, on April 25, 1882, obtained a patent on an amended claim in which the modification consisted of two upper rings, which he claimed rendered the hold of the shade upon the candle more secure. *Held*, that the improvement did not exhibit sufficient mechanical skill or ingenuity to warrant the issuance of a preliminary injunction.

H. Aplington, for plaintiffs.
Goepel & Raegener, for defendant.

LACOMBE, J. This is an application for a preliminary injunction to restrain the defendant from making, selling, or using shade or globe holders for candles, described and claimed in letters patent No. 257,027, granted to the plaintiff on April 25, 1882. The shade-holders manufactured respectively by plaintiffs and defendant consist of a light metal ring about three-quarters of an inch in width, with a flange bent inward from its upper edge intended to fit over the top of a candle, and connected by two strips of metal with a heavy ring intended to encircle the candle about three-quarters of an inch below the upper ring or cap. The strips of metal which connect the ring and cap are continued upwards, flaring outwards, and supporting a larger ring at a proper elevation above the candle, upon which upper ring the shade is to be placed. The shade-holder is supposed to descend as the material of the candle is consumed, thus maintaining the shade always at the same elevation above the ignited wick.

From the file wrapper and contents, certified copies of which are presented by the defendant, it appears that in his original application plaintiff claimed substantially all the meritorious features of this apparatus. A part of his claims, however, were rejected as being covered by existing English patents. Thereupon plaintiff modified his claim to the one

allowed in the patent subsequently issued to him, which claim describes an article differing from the samples now made respectively by plaintiffs and defendant in that there are *two* upper rings, one connected with the lower weighted ring, and the other connected with the flaring support of the shade, the latter ring slipping over the former or cap ring. Without the English patents, it is impossible to say what particular exhibition of inventive genius it was which, in the opinion of the patent-office, entitled plaintiff to receive any letters patent at all. On the presentation of his amended claim he requested its allowance for the reason that his shade-holder is superior to that of the English patents, "in that it is not so liable to fall off, owing to the fact that it extends down upon the candle to such a distance that it would be almost impossible to knock it off." When experience shows that a cap intended to fit over a candle and support a shade is liable to be tipped over, it certainly calls for no great exertion of mental power, nor even for any appreciable mechanical experience, to remedy the difficulty by extending the annular cap, or its equivalent, a connected ring, sufficiently far down the candle to insure a proper purchase.

The application for preliminary injunction must be denied. The plaintiff may, if he can, demonstrate the patentability of his invention upon the trial.

THAXTER *v.* BOSTON ELECTRIC CO. and others.

(*Circuit Court, D. Massachusetts.* December 8, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—LOCKS.

Letters patent No. 315,186, dated April 7, 1885, issued to George E. Thaxter for improvement in knob-locking and releasing mechanism for locks, *held* infringed by patent No. 323,918, granted to Crockett & Allen, August 11,1885, for improved locking and unlocking mechanism for electric locks; the difference between the two being that the tumbler in the latter was in the form of a toothed wheel, and for the locking slide engaging with the slot in the tumbler was substituted a pivotal clutch or dog engaging with the toothed wheel, and a swiveled spindle for the solid spindle.

In Equity.

W. A. Macleod, for complainant.

J. E. Abbott, for defendant.

NELSON, J. This suit was brought for the infringement of patent No. 315,186, dated April 7, 1885, granted to the plaintiff for improvements in knob-locking and releasing mechanism for locks. The object of the invention is declared to be the providing of mechanism whereby the latch or lock-bolt of the door of a building occupied by several different tenants, all using the same entrance, may be automatically locked so that it cannot be retracted by the knob or key, and can be released and made capable of movement at the will of a person on any floor of the building by closing an electric current.

The invention, as described in the specification, consists of the following combination: The operative parts of a door-lock, the knob, bolt, tumbler, and other mechanism, by means of which the turning of the knob draws back the bolt and releases the door; a locking slide moved by a spring, and engaging with a slot formed in the tumbler; a lever impelled by a spring, and adapted, when released, to withdraw the locking slide, and lock the tumbler; an electro-magnet; and a device to hold the spring-impelled lever and connect the electro-magnet with the other mechanism. This latter device consists of two pivoted elbow levers, connected together by a notch and pin. One arm of one of these levers, moved by a spring, bears against a lug on the locking slide. To one of the arms of the other lever is secured an armature. The operation of the apparatus is this: The movement of the armature, when attracted by the energized magnet, disengages the notch and pin, the locking slide is forced out of the slot in the tumbler, and, by turning the door-knob on the outside, the bolt is drawn back, and the door unlocked. The turning of the door-knob also serves to reset the lock.

The defendants' lock is constructed according to patent No. 323,918, granted to Crockett & Allen, August 11, 1885, for improved locking and unlocking mechanism for electric locks. It is conceded that the Crockett & Allen lock contains all the essential elements of Thaxter's, with this exception: In the former the tumbler is in the form of a toothed wheel, and for the Thaxter locking slide engaging with the slot in the tumbler is substituted a pivoted clutch or dog engaging with the toothed wheel. In the specification and drawings of the Crockett & Allen patent the dog is forced into the notches of the wheel by a spring, but in the exhibits a weight is substituted for the spring, and performs the same service. There is also this difference: In the Thaxter lock the knob spindle is solid, while in the Crockett & Allen lock it is swiveled.

Upon examining and comparing the two locks, it is very clear that the dog or clutch of the defendants' lock is nothing more than a mechanical equivalent for the locking slide of Thaxter. In this I am confirmed by Mr. Livermore, the expert called by the plaintiff. He says:

"This clutch or dog is, in my judgment, the equivalent of the locking slide used by Thaxter, and mentioned as an element in each of the first three claims of the Thaxter patent, for the reasons that such a dog or device was, at the time of the Thaxter patent, a well-known mechanical substitute for the slide-bar used by Thaxter for the purpose of connecting an actuating part, such, for instance, as the knob, with the part to be actuated by it, so as to make the actuating part operative; or for disconnecting the actuating and actuated parts for the purpose of making the former inoperative for the time-being."

In this I fully concur, and must hold that the two devices are essentially alike, and produce the same result in substantially the same way. As to the swivel-jointed spindle, that can only be regarded as a new device added to the Thaxter combination, and may be dismissed from the case.

It is important to observe that the patent-office seems never to have been called upon to determine whether the Crockett & Allen invention

conflicted with the Thaxter patent, for the reason that all the claims of the Crockett & Allen patent relate to the toothed wheel and dog, and to the swiveled spindle. These are all plainly outside of the Thaxter invention. They may be, and apparently are, patentable improvements on it, and thus protected from adoption in use by him. But this, of course, cannot justify an appropriation of Thaxter's invention.

The defendants also set up the defense of want of novelty, and contend that the plaintiff's invention was anticipated in seven prior patents: Smith's, 98,114; Roosevelt's, 178,382; Chinnock's, 197,826; Lemke's, 234,592; Sullivan's, 277,682; Woehrle's, 297,096; Roosevelt's, 306,179. In regard to this defense, Mr. Livermore says:

"The patents put in evidence by the defendants as representing the state of the art relating to the Thaxter invention, merely show that, prior to the Thaxter patent, locking bolts had in some way been controlled or affected by electro-magnetic devices; but, as I have already stated, none of them show or suggest a contrivance of any kind for the controlling the effect of a door-knob or a door-bolt from a distinct point, and none of them show the combination of devices set forth in the Thaxter patent, or anything resembling such combination in construction or mode of operation."

This testimony is confirmed by a comparison of these patents with Thaxter's. Some of them are not automatic, but require the use of a key to turn back the bolt; and in no one of them is to be found any equivalent for the action of the locking slide with the tumbler.

The defendants' lock, in my judgment, is an infringement of the first three claims of the plaintiff's patent. Decree for the complainant.

CURRAN and others *v.* ST. CHARLES CAR CO.

(*Circuit Court, E. D. Missouri, E. D.* November 15, 1887.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PARTIES—JURISDICTION.
   In an action for an infringement of a patent, a third party asked to be made a party defendant, alleging that it was the manufacturer of the machines which were claimed to be an infringement of plaintiffs' patent; that defendant was its vendee; that it desired to settle the question as to whether or not the machines were an infringement of plaintiffs' patent. Both the complainant and the third party were non-residents. *Held*, that such third party might be made a party defendant, and the court would have jurisdiction to enter a decree as to the question of infringement that would be binding on all parties.
2. SAME—INFRINGEMENT—PARTIES—CROSS-BILL.
   In an action for an infringement of a patent, a third party asked to be made a defendant and be allowed to file a cross-bill, alleging that plaintiffs had sent out circulars to persons who had bought machines of such third party, claiming that the machines were an infringement on plaintiffs' patent, and threatening to sue all who bought or used machines of such third party's manufacture. The cross-bill asked an injunction against plaintiffs to restrain them from so doing until the final decree in the case. The original defendant, being a vendee of only one machine, could not maintain such a cross-bill. *Held*, that a third party cannot be allowed to become a defendant and then file a cross-bill that could not have been maintained by the original defendant.

John J. Curran and others, citizens of Illinois, filed a bill against the St. Charles Car Company, a Missouri corporation, to restrain an alleged infringement of letters patent. Subsequently, the Boston Blower Company, a Massachusetts corporation, filed an application to be made a party defendant in said cause to defend against the alleged infringement. The Boston Blower Company was engaged in the manufacture of the alleged infringing apparatus, and the St. Charles Car Company had purchased and were using one of said machines. Other facts sufficiently appear in the opinion.

Krum & Jonas, for complainants.

Wells W. Leggett, for respondents.

THAYER, J., (*orally.*) In the case of John J. Curran and others against the St. Charles Car Company, I have looked into the application made by the Boston Blower Company to be made a party defendant to that suit. The application of the Boston Blower Company is based upon the ground that the apparatus for drying lumber, which is now being used by the St. Charles Car Company, and which is claimed to be an infringement of the complainants' patent, was purchased of it by the St. Charles Car Company, and that it is under obligations to the St. Charles Car Company to protect that company against all suits for infringement. For that reason it desires leave to be made a party defendant, as it is engaged in the manufacture of such apparatus, in order that there may be a full hearing and determination of the question as to whether its apparatus is an infringement of the claims of any of the patents owned by the complainants.

Under the circumstances it seems to me that it is a reasonable request, and that the Boston Blower Company should be allowed to come in and defend this action, if the court, by permitting it to come in and defend, will acquire such jurisdiction of the parties that the final decree entered in the case will be binding upon the complainants, and also upon the Boston Blower Company. I was disposed to think yesterday morning when the application was made, that it was doubtful, in the event the Boston Blower Company was made a party, whether the final decree in the case would be binding as between it and the complainants, in view of the fact that both are non-residents; but, upon further reflection, as jurisdiction in this class of cases depends upon the subject-matter, and not upon the citizenship of the parties, I am of the opinion that the Boston Blower Company, by coming in and asking to be made a defendant, would thereby submit itself to the jurisdiction of the court in such manner that any decree this court might make on the question of infringement would be binding upon the complainants and upon all of the defendants. Therefore I shall permit the Boston Blower Company to be made a party defendant for the purpose of defending their vendee against the suit of these complainants.

In connection with the application, however, the Boston Blower Company has presented a cross-bill against the complainants, and asked leave to file it. The cross-bill alleges in substance that the complainants, Cur-

ran & Co., have sent out circulars to various persons throughout the country who have bought the apparatus now being manufactured by the Boston Blower Company, wherein they charge that the apparatus manufactured by the Blower Company is an infringement of their patents, and whereby they threaten to bring suits against all persons who buy or use such apparatus. The cross-bill further charges that such action of the complainants very seriously interferes with its business as a manufacturer; and the relief prayed for is that the court will award an injunction against the complainants restraining them from sending out such circulars or making such threats, and also restraining them from bringing suits against any licensees or vendees of the Boston Blower Company, pending the suit, in this jurisdiction.

With respect to petitioner's cross-bill I will say that I have serious doubts whether it states any grounds entitling it to equitable relief, in view of the fact that it does not appear that there has yet been a single adjudication upon the question whether the Boston Blower Company's apparatus is or is not an infringement of the complainant's patents. Ordinarily a patenteee may sue any one who, in his opinion, is guilty of an infringement. I do not find that a cross-petition of this character has been entertained except in the case of *Ide* v. *Engine Co.*, reported in 31 Fed. Rep. 901. In that case, a cross-bill, or motion in the nature of a cross-bill, of the kind involved in this case, was filed, and an interlocutory injunction was awarded against the complainant, but it was filed by one of the original defendants to the bill, that is, by one of the persons whom the complainant had elected at the outset of the litigation to make a defendant to the bill.

In this case it will be observed that the corporation originally made a defendant could not maintain a cross-bill of this nature, because it is merely a vendee of one machine and not entitled to the relief prayed for in the cross-bill. In my judgment, waiving any decision of the question whether the cross-bill presents grounds for equitable relief, the court ought not to permit a third party to come in as a defendant, and then file a cross-bill which the original defendant could not maintain even if it desired to do so. For that reason I shall deny the application of the Boston Blower Company for leave to file the cross-bill in question. I will permit it, however, to come in and be made a party defendant, and to defend the claim that is preferred by Curran & Co. against the St. Charles Car Company. To that extent I think their motion should be granted, and they will have leave to be made a party defendant for that purpose.

SPENCER *v.* KELLEY and another.

(Circuit Court, N. D. Ohio, E. D. February Term, 1887.)

1. ASSAULT AND BATTERY—BY MASTER OF VESSEL—LIABILITY OF OWNER.
In a suit by a seaman against the owner of a vessel, for injuries from assault committed by the master, in order to make the owner liable, it must be shown that, in the infliction of the injury complained of, the master was acting within the scope of his duty, and in the exercise of his control over the plaintiff.
2. SAME.
Where a master of a vessel assaulted a seaman for an act of disobedience, after the emergency had passed, and the act had been done, *held*, that the master was not in the line of his duty, and the owner of the vessel would not be liable to the seaman for any injury he may have received.
3. SAME—BY CAPTAIN—DISOBEDIENCE OF ORDERS.
In a suit for damages by a seaman against the owner of a vessel for injuries inflicted by the captain, where the seaman was in the wheel-house and refused to leave on the order of the captain, or refused to change the wheel at his order, or resisted him when trying to change it, *held*, that the master had the right to use such force as was necessary to remove him from the pilot-house, or to put the wheel in proper position; but that if he used more force than was reasonably necessary, or unnecessarily injured the plaintiff, the owner was liable.
4. SAME.
If the seaman was rightfully in the wheel-house and had not disobeyed orders or resisted the captain, then the latter had no right to assault him.

In October, 1886, the plaintiff, Edward Spencer, shipped on board a vessel called the J. H. Prentiss as a seaman, on board of which vessel, as the master of it, was Captain Gaines. The defendants, John Kelley and D. B. Sanborn, (Kelley alone being served; Sanborn not in court,) were at the time the owners of the vessel. The vessel started from the harbor of Lorain on the evening of the twenty-seventh of October, and the plaintiff says that in the lake, shortly after getting out of the harbor, the master of the vessel, Captain Gaines, brutally, unnecessarily, and improperly assaulted and beat him by striking him repeatedly on the face and on the head, and throwing him down, and bruising and cutting him on the head and face, whereby plaintiff was made senseless, and thereby greatly injured.

F. J. & G. C. Wing, for plaintiff.

H. D. Goulder and *Andrew Squire*, for defendant.

WELKER, J., (*among other things, charged the jury:*) The relations of the seaman, the plaintiff, and the master have something to do with the rights and duties of each of these parties. The defendant was engaged in the maritime business on the lakes. He had to use his vessel through the instrumentality of agents, and, as the commander in chief of his vessel, he employed Captain Gaines, and all of the other employes on board of the vessel were the employes of the defendant as well as Captain Gaines, but they were under the control, direction, and command of the master of the vessel. If this injury had been done by the carelessness of the co-

laborer of this plaintiff, working in the same capacity as plaintiff was, the owner of the vessel would not be liable; but for any negligence, or carelessness, or injury inflicted upon subordinates by the master of a vessel who had the right to control it, the owner of the vessel would be responsible.

You will readily see that in the exercise of the business of transportation on the lakes in vessels, there must be some one who is in supreme command of the vessel. It will not do to divide up the responsibility. The master necessarily has the control of all of the other employés, and it necessarily follows that all of the subordinates are bound to obey the orders and directions of the master in charge of the vessel. He is to be held responsible to the owner for the safety of the property intrusted to him; he is to be held responsible for the security of the property in his charge for transportation; he is responsible, also, for the lives and the health of the persons who may be employed on board of his vessel; and this responsibility being upon the master, it necessarily follows that he must have the control and direction of his subordinates in the performance of duty.

It seems in this case that the plaintiff was shipped as a wheelsman, and that when starting from Lorain he was put in charge, with somebody else, of the wheel, and, after they got out of the harbor at Lorain, steering down the lake, the plaintiff was in the pilot-house or the wheel-house at the time when it is said this occurrence took place. What was done there, what the plaintiff was doing at the time, and what he had done, are questions of fact that you must find out as well as you can. In the next place, what the master of the vessel did on that occasion you are to settle and determine in the light of the proof. And when you have carefully considered all of the evidence and found out exactly how this thing occurred, and what was done by not only the plaintiff, but by the master of the vessel, you will be prepared, then, to apply some general principles of the law, which it is the duty of the court to give you that you may be enabled to determine correctly how the case ought to be decided.

This assault, as it is claimed, took place partly in the pilot-house or wheel-house and partly on deck. What was done in the pilot-house and what was done outside are questions that you must determine from the evidence before you. This defendant, personally, had nothing to do with this transaction, but he is liable for some of the acts of his master on board of the vessel. He is not liable for every act that the master may do on board of his vessel; but I direct you that, to make the defendant liable for the conduct of the master of his vessel, it must be shown that in the infliction of the injury complained of in this case the master was acting within the scope of his duty as such master, and in the exercise of his control over plaintiff on that occasion. If, in the discharge of his duty, or in the exercise of this control over his subordinate, he inflicted the injury complained of, the defendant would be liable, for that class of injuries, to a recovery in this behalf by the plaintiff for damages sustained thereby.

There is another principle: If the plaintiff was wrongfully in the pilot-house and at the wheel, the master had a right to order him away from the wheel, and out of the wheel-house, and if he refused to go out or to leave the wheel, or resisted, he had a right to use such force as might be reasonably necessary to remove him from the pilot-house and prevent him from interfering with the wheel; but if the plaintiff was rightfully in the wheel-house or pilot-house, and did improperly put the wheel in a wrong position so as to endanger the safety of the vessel, it was the duty of the master to direct him to change it, and, if he neglected or refused to do so, the master had the right, and it was his duty, to change it himself, and if the emergency was great, without waiting to direct any other person to do it; and, if the plaintiff resisted the master in so changing the wheel, the master had a right to use such force and means as might be necessary to enable him to put the wheel in its proper position. If he used more force than was reasonably necessary for that purpose and unnecessarily injured the plaintiff, the defendant would be liable for such injury.

In the next place, in ascertaining the amount of force that was necessary, if this plaintiff was improperly doing what it is claimed on the part of the defense he was doing, in the excitement of the occasion and emergencies, you cannot very nicely and minutely measure the amount of force used by a party, whether it is necessary or not at the time; but you must judge, as best you can from the emergency of the situation in which the parties were at the time, the amount of force necessary to be used for the purpose of carrying out the orders of the captain. If, on the other hand, this plaintiff was rightfully in the wheel-house, and had not disobeyed any of the orders, had not resisted or neglected his duty, then the master of the vessel had no right to make an assault upon him.

In the next place the master had no right to punish the plaintiff for disobedience of orders or want of the proper discharge of his duty after the acts had been done. He has no right to take the law in his own hands to punish a party for the disobedience of orders that had passed by. Other remedies must be had. But, if the master did so after the emergency had passed, he was not doing it in the line of his duty, and the defendant would not be responsible for that injury, however responsible and liable the master himself might be. If the acts complained of were done by the master after the necessity to change the wheel, or get him out of the wheel-house had passed, the defendant would not be liable for it, for the reason that it would not be in the scope of the master's duties and in the performance of such duty of the master.

One thing must be considered in reference to this assault, and that is whether the two were connected together so as to be but one assault and battery; part of it may have occurred after he passed out of the pilot-house, but if connected together, then it might be regarded as the same assault and battery as that commenced in the pilot-house, and you cannot very well nicely distinguish the exact time when the first ended and the second commenced. But, if time enough elapsed between the two so as to show that the assault that was made outside on the deck was

made by way of punishment on the part of the master for disobedience occurring before and when there was no necessity for it, I direct you in that respect that, although the master would be liable, yet the owner of the vessel would not be liable for such action and this injury.

Verdict for the defendant.

PEDERSEN *v.* PAGENSTECHER.

(*District Court, S. D. New York.* November 15, 1887.)

1. CHARTER-PARTY — STIPULATION AS TO TIME OF SAILING — RESULT OF NON-COMPLIANCE — RIGHT TO REJECT.
   A stipulation in a charter as to the time of sailing of an absent vessel, to be furnished to the charterer, is a condition precedent, which, if not fulfilled, entitles the charterer to reject the vessel. The vessel under such a stipulation takes upon herself the risks of all causes that may prevent a compliance with the condition.
2. SAME — SAILING — WHAT CONSTITUTES.
   A clause in the charter of the bark A. described her as "now at Bremen, guarantied to sail on or before December 10th." On the fourth of December, her general cargo being in, she was moved, by order of the harbor-master, close to the dock-gate, after which she took on balance of crew and provisions. On the 15th she went out to the roadstead, and sailed on the 20th. *Held*, that her move on the 4th was not a constructive sailing.

Biddle & Ward, for libelant.
Wing, Shoudy & Putnam, for respondents.

BROWN, J. The libelant sues to recover damages for alleged breach of charter-party in not accepting the Danish bark Atalanta when tendered at New York to be loaded. The charter describes her as "now at Bremen, loading for Philadelphia, guarantied to sail on or before December 10, 1886." The respondents refused to accept her because, as they allege, she did not sail from Bremen until after December 10th.

The stipulation as to time of sailing was a condition precedent, which, if not fulfilled, entitled the respondents to reject the vessel. It is not a question of fault or reasonable excuse for not sailing within the time provided. The vessel, under such a stipulation, takes upon herself the risks of all causes that may prevent a compliance with the condition. *Davidson* v. *Von Lingen*, 113 U. S. 40, 49, 5 Sup. Ct. Rep. 346, and cases there cited; *Hore* v. *Whitmore*, Cowp. 784; *Croockewit* v. *Fletcher*, 1 Hurl. & N. 893; *Weisser* v. *Maitland*, 3 Sandf. 318.

The proof shows that in December the vessel was loading within the dock at Bremen. On the fourth December, her general cargo being all, or nearly all, on board, she was ordered by the harbor-master to remove from that part of the dock where she was lying to some other berth. She was thereupon moved as near to the dock gate as she could get, and then took on board the balance of her crew and provisions for the voy-

age. The respondents claim that on the sixth of December she was entirely ready for sea. She did not leave her last berth within the dock, however, nor go out of the dock-gate, until the 15th, when she went into the roadstead outside, where she was detained by contrary winds until the twentieth of December, when she went to sea.

I do not think the whole evidence fairly sustains the claim that she was prepared to sail by the sixth of December. The Friedlander sailed from the same dock on the 11th. The mate of the Atalanta testifies that the Friedlander sailed on "one of the days I was getting ready with her cargo—when we were taking in the last of her cargo." And if the Atalanta was in fact ready to sail on the 6th, no reason appears why she did not sail. The mate's testimony indicates the contrary.

It has been held that similar warranties are complied with if the ship breaks ground and accomplishes some part of the journey, however short, with the *bona fide* intent of prosecuting so much of the voyage, though the master knew that he would be obliged shortly to come to anchor because of contrary winds, and made the start in order to comply with the warranty. *Cochran* v. *Fisher*, 4 Tyrw. 424, 5 Tyrw. 496; *The Francesco Curro*, 4 Phila. Wkly. Notes Cas. 415; *Pittegrew* v. *Pringle*, 3 Barn. & Adol. 514. In the case last cited Lord TENTERDEN says:

"The general principle of the decisions is this, that if a ship quits her moorings and removes, though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is nevertheless a sailing; but it is otherwise if at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea voyage."

The facts of the present case do not bring the Atalanta within the principle of these decisions. The change of berth on the 4th, although it brought her a few lengths nearer the dock-gate, through which she must pass, was not a movement made in the prosecution of any part of her voyage. She was not then ready to sail; neither her crew nor necessary provisions were on board. She changed her berth by the requirement of the harbor-master, and was obliged to stop at some other place within the dock, because she was not ready to proceed to sea. When she was afterwards got ready, whether before or after the 10th, she did not prosecute any part of the voyage until the 15th. Her previous change of place was merely in the preliminary preparation for the voyage, and cannot be held to be a constructive sailing prior to the 10th, so as to defeat the plain intention of her charter. *Pittegrew* v. *Pringle*, 3 Barn. & Adol. 514; *Graham* v. *Barras*, 5 Barn. & Adol. 1011; *Ridsdale* v. *Newnham*, 3 Maule & S. 456; *Nelson* v. *Salvador*, 1 Moody & M. 309.

The libel must therefore be dismissed, with costs.

ELWELL v. THE GEORGIA.[1]

(*District Court, E. D. New York.* October 6, 1887.)

1. BOTTOMRY—VESSEL IN DISTRESS—FAILURE TO NOTIFY OWNER—WHEN JUSTIFIABLE.
   Where no speedy means of communication exist between the place where a vessel is in distress and the place of residence of the owner, it is permissible for the master to raise money on bottomry without first notifying the owner.
2. SAME—TAKING CHARGE OF DISTRESSED VESSEL.
   A sum of money was paid to a bottomry lender, who was master of another vessel, for allowing his mate to take charge of the vessel borrowing on bottomry. On suit brought on the bond, *held*, while allowing the bond, that it should be reduced by the amount so paid.

In Admiralty.

The brig Georgia was in distress in the harbor of Old Providence, her master and some of her crew having died, and the vessel being in need of supplies and without money. Money was advanced to her by libelant's assignor on request of the consul, and a new master was appointed, who executed a bottomry bond for the money so advanced. No notice was given the owner of any intention to raise money on bottomry. The vessel hailed from Nassau, N. P., being under the English flag. All the proof as to the residence of her nominal owner was that the agent in New York had heard more than a year before that he was in Matanzas, Cuba. There is no telegraphic communication between Old Providence and New York, where the owner's agent resided, and a letter sent between the two places arrives in from nine to sixteen days. One hundred dollars was paid to the bottomry lender, who was master of another vessel, for allowing his mate to take charge of the Georgia as master.

Benedict, Taft & Benedict, for libelant.

Sidney Chubb, for claimant.

BENEDICT, J. I am of the opinion that the objection taken to the validity of the bottomry bond sued on, based on the failure to notify the owner of the intention to raise money on bottomry, is not well taken. The circumstances proved are sufficient, in my opinion, to excuse the failure to notify the owner. I am also of the opinion that the bond should be reduced by the sum of $100, being the amount charged as paid to the bottomry lender for his permission to allow his mate to take charge of the brig as master. For the remainder of the bond, with the maritime interest, the libelant may have a decree.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

SMITH *v.* HAVEMEYER and others.[1]

(District Court, S. D. New York. November 18, 1887.)

1. WHARVES — UNUSUAL CONDITION — DAMAGE ARISING THEREFROM — LACK OF CARE AND EXAMINATION—LIABILITY OF OCCUPANT.
   The lessee and occupant of a wharf is liable for damage arising from its unusual and dangerous condition, unless he can show reasonable care and examination in regard to the condition of the wharf and slip.
2. SAME—DAMAGE TO VESSEL—STATEMENT OF CASE.
   Respondents' wharf, instead of being perpendicular below the water line, extended considerably into the slip. From one of the beams a spike projected, which injured the bottom of libelant's vessel when she went there to discharge. *Held*, in the absence of evidence of reasonable care and examination of the condition of the wharf by respondents, they were liable for the damage.

Goodrich, Deady & Goodrich, for libelants.
John E. Parsons, for claimants.

BROWN, J. While the bark Formosa was lying along-side the dock that for many years had been occupied by the defendants for discharging cargo, she got upon a projection from the pier below the water-line, and received some injury. Subsequently examination by a diver showed that the side of the pier where the Forunsa lay, instead of being perpendicular below the water, projected considerably into the slip, the successive layers of crib work forming a kind of stairs. A spike projected from one of the beams about six feet above the bottom, and tore off some of the copper of the vessel.

There is no direct evidence to show whether the side of the wharf was originally built in the manner above stated, or whether it had subsequently got into this condition accidentally. There is but a single statement in evidence that has any bearing on the question, viz., that similar vessels had previously been accustomed to lie there without injury. The libelant, in the course of the trial, propounded a question to a witness which, if answered, might have thrown some light upon the cause of the condition of the pier; but, upon objection by the respondent, the question was withdrawn. It was proved, however, that such a shape of the side of the wharf was improper and unusual, and it was clearly dangerous. Such a wharf was plainly not a proper one, or in a proper condition below the water-line to receive vessels for the discharge of cargo. The defendant, as the lessee and occupant of the wharf, is, therefore, *prima facie* chargeable with negligence. To exonerate himself, it was incumbent upon him to show reasonable care and examination in regard to the condition of the wharf and the slip. No proof on this subject being adduced, the *prima facie* liability must stand, and the respondents held to answer for the damages. A reference may be taken to compute the amount.

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

THE AMERICA.[1]

MILLS *v.* THE AMERICA.

(*District Court, S. D. New York.* November 12, 1887.)

COLLISION—TUGS—RULE OF THE STARBOARD HAND—RIGHT OF WAY—RISK OF COLLISION.

The tug Talisman, on her way from Weehawken to pier 5, New York, saw on her starboard bow the red light of the tug America, bound from Jersey City to Thirty-fifth street, New York. The Talisman attempted to cross the bows of the America, but was struck on her starboard quarter. The America slowed as the vessels approached, giving one whistle twice, and when the tugs were 50 to 100 feet apart gave an alarm signal, and reversed. She did not alter her helm. *Held*, that the Talisman was in fault for not avoiding the America, having the latter on her starboard hand; that the America was in fault, though she had the right of way, for not taking more effectual measures to avoid a collision as soon as she saw by the movement of the Talisman's lights that there was risk of collision; and that the damages should be divided.

Goodrich, Deady & Goodrich, for libelant.
Biddle & Ward, for claimant.

BROWN, J. The collision between the libelant's tug Talisman and the tug America occurred opposite Hoboken, between 11 and 12 o'clock at night, about one-third of the way across the river from the New Jersey shore. Considering that the America was on her way from Jersey City to the foot of Thirty-fifth street, New York, and the Talisman bound from Weehawken to pier 5, North river, I have no doubt that it was the America's red light, and not the green light, that was first seen by the pilot of the Talisman on the latter's starboard bow. The Talisman was, therefore, the one that was bound to keep out of the way of the America, while the latter had the right of way. The Talisman must be held in fault, because there was plenty of room for her to have kept out of the way by porting; and because she undertook to cross the America's bows to starboard, instead of passing port to port; and because the America did nothing to mislead the Talisman, or to thwart her in her duty of keeping out of the way.

As respects the America, the question of fault is less easy to determine. Some of the contradictions in the testimony cannot be reconciled. The greater fault is evidently on the part of the Talisman, for the reasons above stated. The America, according to the account of her captain, gave a signal of one whistle when the boats were, as he estimates, some 300 or 400 yards apart. Both of the Talisman's colored lights were then seen one or two points off the America's port bow. Getting no answer, the pilot ordered the engines slowed, and then repeated the same signal while seeing both of the America's colored lights. Directly after the last signal, he observed the Talisman's red light shut in, leaving her green light visible, which indicated that she was heading to-

[1] Reported by Edward G. Benedict, Esq., of the New York bar.

wards the New York shore, and across the America's bows. Thereafter he gave a danger signal of three short blasts, when the tugs were from 50 to 100 feet apart, and then ordered his engines reversed. He did not shift his helm at all. He also testifies that the Talisman swung about 8 points to port in crossing his bows, but came back somewhat under a port wheel just before the collision. The America's port stem fender struck and broke in the Talisman's starboard quarter; the latter kept on without stopping; and the pilot of the America, which was not injured, told the other to "mind next time how he crossed his bows."

Both tugs were unincumbered. The pilot of the America was unable to give any definite idea of the distance of the Talisman when she shut in her red light, which indicated that she was about to cross his bows. That is the turning point as to the question of the America's fault, because it determines the question of the America's means of avoiding the collision. He thought the distance was upwards of 200 feet, but less than 1,000. When he saw that the Talisman was crossing his bows, although he had the right of way, it was his duty to reverse at once, in order to avoid collision; because he knew that from that moment there was clear risk of collision, and reversal was necessary. Old Rule 21; *The Aurania*, 29 Fed. Rep. 99, 124, and cases there cited. Considering that the Talisman from that time until the collision, according to the testimony of the America, swung 8 points to port, and then somewhat back again, and that during a portion of this time she was going at nearly right angles to the line of the America's course; and considering further that before the second blast of one whistle the America's engines had been slowed, and, as the engineer testifies, her steam wholly shut off, and the tide being also ebb, I feel constrained to find that there must have been sufficient and reasonable opportunity for the America to have avoided a collision had she reversed her engine as soon as the Talisman's red light disappeared; and that the America is in fault for having delayed reversing longer than was justifiable. Had she reversed as soon as the intent of the Talisman was clear, she would have been without fault in this respect. *The Greenpoint*, 31 Fed. Rep. 231. Considering also that the America's bow struck the Talisman aft of amidships, I can hardly doubt that the America could also have avoided the collision had she starboarded her wheel when the Talisman was seen intending to cross her bows, even without reversing her engine.

The damages and costs must therefore be divided.

THE RARITAN.

THE WILLIE.

THE RAMBLER.

THE THOMAS P. BALL.

BERWIND COAL CO. *v.* THE RARITAN and others.

(*District Court, S. D. New York.* November 19, 1887.)

COLLISION—TWO TOWS—NARROW CHANNEL—UNJUSTIFIABLE APPROACH.

The tug R., towing the schooner B., met, in the Arthur Kills, a long tow in charge of two other tugs. The wheelsman of the schooner, who was the only man on deck, could not well see forward, his view being obstructed. The R. passed very near libelant's boat, though the evidence showed that there was from 150 to 300 feet of available water to leeward, and the schooner struck libelant's boat, which was on the port side of the tail of the tow. *Held*, that the schooner was in fault in going through a narrow passage with no lookout and the wheelman's view obstructed; that the tug R. was in fault in passing unjustifiably near the other tow, and for not taking measures to counteract a sheer made by the schooner.

Wilcox, Adams & Macklin, for libelants, Berwind Coal Co.
E. D. McCarty, for the Rambler.
H. G. Ward, for the Willie and the Raritan.
Owen & Gray, for the Thomas P. Ball.

BROWN, J. The collision in this case I find was about a half a mile or a little over beyond Smoking Point in the Arthur Kills, and to the westward of Story's Flats. The evidence indicates that the channel way of available water for all the vessels, viz., a depth of 8 or 10 feet, was at least 500 or 600 feet wide, and the chart would indicate an even greater width. I must find that this gave abundant room for the Rambler with the schooner in her tow on a hawser to have gone safely on either side of the long tow of the Raritan and Willie, had the proper signal been first given to indicate on which side the two would pass each other. No signals, however, were given by either; and the Rambler took the ordinary course to the right. The Willie and the Raritan thereupon ported, and hauled somewhat to the westward. Though the channel, like the shore, was somewhat curvilinear, and the west wind caused the tail of the tow to sag to the eastward, and a little across the channel, the evidence shows that there was undoubtedly from 150 to 300 feet of available water to the eastward of the libelant's boat, which was on the port or leeward side of the tail of the tow, and that the Rambler with the schooner ought to have passed clear of her without difficulty.

The weight of evidence is certainly that there was a decided sheer of the schooner to port, at least from the time she was abreast of the middle of the tow, and I cannot doubt that this was the immediate cause of

the collision. There was no lookout on the schooner, and only the wheelsman was on deck. His view was much obstructed; he was able to see only the flag-staff and the smoke-stack of the tug. Under such circumstances, he could not be expected to steer accurately, or to know whether he was in strict line with the tow or not. The master was below, and did not get on deck until the collision was inevitable. I cannot acquit the schooner of negligence in this regard, while she was going through a narrow passage abreast of the Shady Flats.

A more difficult question relates to the liability of the tug Rambler. As respects her, I think the weight of evidence is that she went unjustifiably near the libelant's boat; not more than 12 feet from it. The witnesses on the libelant's boat so testify, and the pilot of one of the tugs is very positive that she was so near that, as he looked back, it seemed to him that she actually rubbed against the libelant's boat, and passed under her stern as she went by her. This was probably only the effect of perspective in looking against the curved line of the long tow. But considering the fact that a schooner of the size of the Ball upon a hawser of 30 or 40 fathoms is liable to sheer somewhat, even with the best handling, I think the Rambler must be held partly responsible for the accident, both for passing unreasonably and unjustifiably near to the tail of the tow when there was so much more space available to leeward, and also for not sooner observing the sheer of the schooner, and making timely endeavors to counteract it. It has been repeatedly held that steamers are bound to allow a fair margin for the contingencies of navigation when they are able to do so, and liable as for negligence when they do not do so, and accidents have in consequence ensued. *The Virginia Ehrman*, 97 U. S. 309, 316; *The Benefactor*, 14 Blatchf. 254; *The Columbia*, 9 Ben. 254; *The Laura* v. *Rose*, 28 Fed. Rep. 104; *The Fort Lee*, 31 Fed. Rep. 570. This principle is, I think, applicable to the present case.

No fault seems proved against the Willie and the Raritan. I should have held them liable for not sending a helper to the aid of the tow, had it not appeared that, notwithstanding the sagging, there was still left a reasonably sufficient space for passing. The libelant is entitled to a decree against the other two vessels; as to the Willie and Raritan, the libel is dismissed, with costs.

CHICAGO, M. & ST. P. RY. CO. *v.* BECKER and others.

(*Circuit Court, D. Minnesota.* December Term, 1887.)

1. REMOVAL OF CAUSES—PENALTY FOR OBTAINING—CONSTITUTIONAL LAW.
   Minnesota act of March 9, 1885, entitled "An act relating to foreign corporations doing business in this state," provides that in suits or proceedings arising in that state in which a foreign corporation shall be a party, if such corporation shall make application to remove any such suit into a federal court, it shall be liable to certain penalties. *Held*, that the act is repugnant to the constitution of the United States, and void, as being designed to deprive a citizen of another state of the right to sue and be sued in a federal court.
2. CORPORATIONS—DOMESTIC CHARACTER—LAWS MINN. 1881, CH. 221.
   The Chicago, Milwaukee & St. Paul Railway Company, a Wisconsin corporation, is not constituted a domestic corporation by Laws Minn. 1881, *c.* 221, which authorizes that company to construct and operate roads in Minnesota, provided that it shall be deemed a domestic corporation in all procedings upon causes of action arising in that state; following *Mahoney* v. *Railway Co.*, 21 Fed. Rep. 817.
3. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—REGULATION OF SWITCHING CHARGES.
   Railroad service known as "switching" is local, and the charge made for it is not a part of the through rate fixed beforehand, and has no reference to interstate shipment, but may be regulated by a commission appointed under a state act by virtue of the police power of the state.
4. SAME.
   If railroad service known as "switching" be an act of interstate commerce, the price to be charged for it may nevertheless be regulated by a commission appointed under a state act, as such regulation would not refer to the carrying of freight outside the limits of the state.[1]
5. SAME—REGULATION OF SWITCHING CHARGES—COMPULSORY PROCEEDINGS—DUE PROCESS OF LAW.
   The compelling of a railroad company to comply with an order regulating rates made by a commission appointed under the Minnesota act of March 7, 1887, for regulating common carriers, is a due process of law, and in such a case the company cannot be heard to complain that the act of the commissioners operated to take the property of the company for public uses without process of law.

On Motion for an Injunction to restrain defendants, George L. Becker, Horace Austin, and John L. Gibbs, as the railroad and warehouse commission of the state of Minnesota, from enforcing a certain order directed to the complainants, the Chicago, Milwaukee & St. Paul Railway Company, made by said commission for regulating the rates to be charged for switching in the city of Minneapolis.

Flandrau, Squires & Cutcheon, for complainants.

Moses E. Clapp and *Geo. P. Flanery*, for defendant.

NELSON, J. This suit is brought by the complainant against the railroad commissioners of the state of Minnesota, and a motion is made for

[1] As to what is a regulation of commerce between the states, within the constitutional provision reserving the exclusive right to congress to regulate such commerce, see Pearsen v. Distillery, (Iowa,) 34 N. W. Rep. 1, and note.

an injunction on the bill of complaint and supporting affidavits to restrain the defendants from enforcing an order made by them fixing the maximum charge for certain services rendered in the city of Minneapolis called "switching."

The bill of complaint is as follows, in substance: *First*, it alleges that the complainant is a railway corporation created, organized, and existing by and under the laws of the state of Wisconsin. That said defendants compose and are a body politic, created under an act of the legislature of the state of Minnesota, approved March 7, 1887, and entitled "An act to regulate common carriers, and creating the railroad and warehouse commission of the state of Minnesota, and defining the duties of such commission in relation to common carriers," and that said defendants are vested with all the powers granted by said act, and none other. The bill then sets out that the complainant has constructed and owns a railroad from Chicago to Minneapolis, Minnesota, with many other lines running through other states and territories, and is a common carrier of passengers and freight; that at Minneapolis it is compelled, in the ordinary transaction of its duties and business, to receive and deliver many cars from and to shippers of freight, and from and to other railroads, many of which pass through said city, and are also common carriers; that in the receipt and delivery of such cars it is compelled to move them short and long distances, and take them out of the trains of cars, and put them into other trains of cars destined for other points, and to deliver them to consignees of freight, and receive them from shippers of freight, all of which requires many movements of such cars by the aid and use of locomotive engines, and many men engaged in such service; that such work is know as and called "switching," and is usually performed in and about the yards and terminal grounds of complainant, but in many cases requires such cars to be moved and hauled to considerable distances outside of and beyond such yards and terminal grounds, and over other tracks of complainant and of other railroad companies; that to enable this switching to be properly and satisfactorily performed complainant has built many railroad tracks in and about said city of Minneapolis, and provided many locomotives, and employs many crews of men, and has provided and furnished large yards and terminal grounds, and many other instrumentalities necessary, all of which involve and continually necessitate the expenditure of very large sums of money; that for the performance of this switching work the complainant has always charged a reasonable and fair compensation to those for whom said work was done, to-wit, $1.50 per car, and never charged more than a reasonable and fair compensation therefor; that the said defendants on the seventh day of July, 1887, acting as such railroad and warehouse commissioners of the state of Minnesota, in the exercise of a pretended power and authority claimed by them to be conferred upon this commission by the laws of the state of Minnesota, but, as complainant asserts and avers, without any power, right, authority, or jurisdiction whatever, issued an order which is in the words and figures following; that is to say:

"STATE OF MINNESOTA.

"OFFICE OF WAREHOUSE & RAILROAD COMMISSION.

"ST. PAUL, July 7, 1887.

"*To the Chicago, Milwaukee & St. Paul Railway Company:* Whereas, all railroad companies owning and operating terminal and switching facilities at or within the city of Minneapolis within this state, with the exception of the Chicago, Milwaukee & St. Paul Railway Company, pursuant to subdivision 'D' of section 8 of an act entitled 'An act to regulate common carriers, and creating the railroad and warehouse commission of the state of Minnesota, and defining the duties of such commission in relation to common carriers,' approved March 7, 1887, have filed with this commission copies of their several schedules of rates and charges for switching cars on their respective tracks at and within said city; and whereas, it appears from the said schedules that the rates and charges made by said companies vary from 25 cents per car for empty cars to two dollars per car for loaded cars; and whereas, said commission, after due and careful inquiry and consideration, do find that each and every charge in excess of one dollar per car for switching within the limits of said city of Minneapolis is unreasonable and excessive compensation for the service performed: now, therefore, it is ordered and determined by this commission, pursuant to the authority in them vested by the aforesaid legislative act, that all such schedules be changed by striking therefrom all charges or rates in excess of one dollar per car for the switching or transfer thereof, and inserting in room of the words and figures stricken out the words 'one dollar,' or the appropriate sign or figure therefor. It is the object and purpose of this order to establish one dollar as the maximum charge for the switching or transfer of any car at or within the limits of said city, without regard to distance, or the kind of goods or merchandise with which the car so switched or transferred may be loaded.

"By order of the commission."

The complainant further alleges that the defendants claim and insist, and will attempt to enforce their claim against the complainant; and that the charges made and fixed by the defendants for these services are utterly inadequate to compensate the complainant for the performance of such switching services. They further allege that they have procured appliances and instrumentalities for this switching work, and that, if said order were enforced, it would amount to a confiscation and destruction of said tracks, appliances, yards, instrumentalities, so procured for the purposes of switching, and would damage this complainant many thousands of dollars; further, that it would involve complainants in numerous lawsuits, and would hinder and obstruct the complainant in the performance of its duties to the public as a common carrier. They also allege that fully three-fourths of all such switching done by the complainant is of cars to be transported to other states, and that this is an act of interstate commerce, subject to the control of congress alone.

A plea to the jurisdiction of this court is interposed by defendants, and an answer has been filed by the commissioners denying substantially all the allegations in complainant's bill.

The plea to the jurisdiction, alleging as a reason for a dismissal of the bill of complaint that the complainant, by virtue of the act of the Minnesota legislature, (Laws 1881, p. 782,) is a domestic corporation, cannot prevail. This court in the case of *Mahoney* v. *Railway Co.*, 21

Fed. Rep. 817, on a motion to remand, considered the act of the legislature referred to, and held that it did not create a domestic corporation, and "that the C., M. & St. P. Ry. Co., which was a Wisconsin corporation, was still one."

The plea is not sustained. But it is urged on the argument, in opposition to the motion for an injunction, that the complainant is a domestic corporation by virtue of the act of the Minnesota legislature approved March 9, 1885. This act applies to all foreign corporations, and is intended to apply to this complainant. The act is entitled "An act relating to foreign corporations doing business in this state." Section 1:

"Where by the general or special laws of this state relating, or in any way appertaining, to any foreign corporation, it is provided, in substance or effect, that, in suits and proceedings upon causes of action arising in this state in which such corporation shall be a party, such corporation shall be deemed to be a domestic corporation, it is hereby provided that, if such corporation shall make application to remove any such suit or proceeding into the United States circuit or district or federal court, it shall be liable to a penalty of not less than one hundred dollars, nor more than ten thousand dollars, for each application so made, and for each offense committed in making such application."

The second section provides that, in addition to the said penalty, such corporation shall forfeit all right to transact business within this state, and shall be liable to a penalty of not less than $1,000, nor more than $10,000, per day for each and every day that it shall do business within this state after such forfeiture. Sections 3 and 4 provide for the issuance of a certificate or permit upon which business may be done, and provide for penalties to be imposed in case such corporation remove any case from the state to the federal court. This applies also to insurance companies. Section 6 reads as follows:

"No foreign corporation now or hereafter doing business in this state shall have, possess, or exercise any right, privileges, or immunities, not possessed by domestic corporations; but, unless otherwise provided by law, shall in all respects be deemed, if it remain in this state for sixty days next ensuing after the passage of this act, to be a domestic corporation, and entitled to all the rights, privileges, and immunities of domestic corporations, subject to all the laws of this state which are now in force, or may hereafter be enacted."

The next section provides penalties for violation of the preceding section; provides for the forfeiture of any license or certificate that has been given to foreign corporations, if they transact any business thereafter; also provides that no foreign corporation shall seek the federal courts in any suit, under penalty of having its license revoked, and being liable to fine, as contained in section 1.

Previous to the passage of this act, the complainant had for years maintained and operated a railway in the state of Minnesota by license, and it had acquired, by consent of the state, property and franchises of existing railroads, and had been required as early as 1872 to connect in the city of St. Paul two of its roads thus obtained as its road in St. Paul, and other roads traversing westwardly to the state line had been purchased with the sanction of the state, and other vast privileges had

been granted. Its charter is obtained from the state of Wisconsin, and there is no contract between the company and this state by virtue of which it derived corporate rights on condition that it became a domestic corporation. Yet by this legislative act of 1885, after it had operated its railway for years in the state of Minnesota, and invested large amounts of money, not merely by tacit consent, but by express legislative sanction, it is declared to be a domestic corporation, as a penalty for remaining and transacting business in the state. While a corporation is a citizen of the state in which it is created, it is not entitled to recognition, as an absolute right, in any other state, and conditions not inconsistent with the constitution of the United States can be imposed by another state which recognizes it; but its right to sue in the federal court depends alone upon the federal constitution, and no state law can restrict it. This is a constitutional privilege,—an absolute right,—and any state law which would limit it, and which provides that it is unlawful for a foreign corporation to seek the federal court in pursuance of the constitutional privilege, is repugnant to that instrument, and is void. The purpose of this state law of 1885 manifestly is to interfere with the jurisdiction of the federal court, and, as a condition of transacting business in Minnesota, it deprives the foreign corporation of its constitutional privilege by declaring it a domestic corporation if it remains in the state 60 days after the passage of the act. The first section of the act announces its purpose, and penalties are fixed in other sections; indeed, in nearly every part of the act the purpose is distinctly expressed to interfere with the jurisdiction of the federal court. It is not possible to separate the statute into parts, and find a section which does not avow that the purpose and object of the act is to prevent foreign corporations transacting business in the state of Minnesota from exercizing a privilege conferred upon them by the constitution and laws of the United States. The act is an attempt to oust the jurisdiction of the federal court, and to compel a foreign corporation, without an election in fact, to become a citizen of the state, and to force it to abandon the benefit contemplated by the federal constitution. This statute falls within the decisions of the United States supreme court in the cases of *Insurance Co.* v. *Morse*, 20 Wall. 445; *Doyle* v. *Insurance Co.*, 94 U. S. 535; *Barron* v. *Burnside*, 121 U. S. 186, 7 Sup. Ct. Rep. 931. The statute makes the right of a foreign corporation doing business in the state dependent upon its consent to forfeit its constitutional privilege. Such a statute is repugnant to the constitution and laws of the United States, and is void.

This brings me to the principal question involved in this controversy. It is claimed by the complainant that the order of the commission set up in the bill is a regulation of interstate commerce, and imposes no obligation to obey it, and consequently the attempted enforcement should be restrained. The supporting affidavits show that the cars switched by the complainant in the majority of cases are loaded with goods and merchandise destined to points outside the limits of the state of Minnesota. The complainant alleges that three-fourths of the traffic is interstate commerce. If this is so, it is not important. The underlying question pre-

sented is, does the order of the state commission regulate interstate commerce? I find no warrant for the claim advanced that it is an interference with, or regulation of, interstate commerce, and encroaches upon the powers of the federal government. It is true that the loaded cars switched contain freight to be transported to other states, or received from other states, as well as local freight for or from points within the state of Minnesota; but unless the switching service is performed by the complainant, and cars are transferred from a shipper's warehouse or mill to be transported out of the state over a line of railway other than its own, no charge is made. The case presented is this: In order to afford facilities to shippers, the complainant has constructed short lines of road, or side-tracks or switches, so called, from its yard or depot or main lines, running over and across the streets and highways to the various mills and manufacturing establishments in the city of Minneapolis; and its switches are so built as to enable it to take cars from the shippers at the mills, and deliver them to other lines of railway, or deliver cars to consignees received by it from other roads. When this service is performed, and the cars are to be transported from the city of Minneapolis over other roads, and when cars coming into that city over other roads are taken by the complainant over its own switches, and delivered to other roads or to consignees, a charge of one dollar and fifty cents per car is exacted for this switching service rendered, which is claimed to be reasonable and just; but if the cars are to be transported over its own line to the point of destination, or come into the city over complainant's main road, the service is free, and this separate and distinct charge, when made, is only for this local switching. This charge is not a part of the through rate fixed and determined beforehand, and has no reference to interstate shipment. The transportation of cars over the switches from the warehouses or mills to the depot, or from the depot to these mills, can be regulated in many respects by the commissioners, and the rate for performing the service fixed by virtue of the police power of the state, in the same manner as the carriage by dray per load or distance is established for the public good. And I see no difference in the principle to be applied in such cases, although, incidentally, they may be connected with interstate commerce. The service is local, and there is nothing upon the face of the order of the commissioners indicating that it is intended to regulate interstate commerce. Even if it is conceded that this carrying of freight over the switches is an act of interstate commerce, it does not necessarily follow that the order of the commission affecting this traffic is in violation of the constitution of the United States. It is not every act that affects such commerce that amounts to a regulation of it; and this order fixing the price per car for service rendered, and to which the order applies, is not related to the contract for carrying the freight outside the limits of the state of Minnesota, and is not a part of it.

It is urged that the charge fixed by the commission is less than the cost of the service rendered, and that the act of the commissioners is a taking of private property for public use without just compensation, and without due process of law. The act of 1887 provides that when the

rates are fixed by the commission, if the company do not obey it within 10 days, proceedings by *mandamus* can be instituted by the commissioners to compel the railroad company to comply with the provisions of the act in regard to posting in their several depots the prices and rates fixed by the commission; and, if such proceeding is not instituted by the commissioners within 10 days, the corporation feeling itself aggrieved thereby may take an appeal to the district court of the state; and when the appeal is taken, and proceedings are brought in the district, it may be proceeded with as a civil action. This is due process of law. The bill and affidavits introduced by complainant tend to show that the rate fixed by the commission is less than the cost of service, and should not be enforced, but the answer of the defendant denies it. A question is thus presented which I shall not determine upon this motion, but leave it until the final hearing.

The motion for a preliminary injunction is denied, and the restraining order vacated.

The case of the St. Paul, Minneapolis & Omaha Railroad Company against the defendants is substantially the same, and the same order will be entered.

ANDERSON *v.* APPLETON and others.

(*Circuit Court, S. D. New York.* December 1, 1887.)

1. REMOVAL OF CAUSES—PETITION FOR ENTRY OF COPY OF RECORD.
   Plaintiff commenced suit in the New York supreme court to establish a will as a will of real estate. One of the defendants removed the cause into the United States circuit court for the Southern district of New York, but did not enter the record. *Held*, that plaintiff could, without leave, enter a copy of the petition, order, and bond, and move to remand the cause under a rule of this circuit, adopted October 1, 1883, which provides that, when a cause has been removed from a state court, either party may, forthwith, cause a copy of the record to be filed in this court, etc.
2. SAME—MOTION TO REMAND—WHAT CONSIDERED.
   Defendant made the objection to the plaintiff's motion to remand the cause to the state court that, on this motion, only the petition for the removal of the cause to the United States court could be considered. *Held*, that a defendant cannot make his cause removable by merely asserting that it is. If the dispute is not within the jurisdiction of the federal court, the federal court will, on motion, remand the case as soon as it sees the complaint.
3. SAME—CITIZENSHIP—ACT OF MARCH 3, 1887.
   One of the defendants resided in the state of New York. She removed a cause begun in the New York supreme court to the United States circuit court for the Southern district of New York. *Held*, that under the United States statute of March 3, 1887, relating to the removal of causes, which provides that any suit * * * may be removed by the defendant therein, being a non-resident of that state, she was not authorized to remove the suit.
4. SAME—CITIZENSHIP—SEPARABLE CONTROVERSY—ACT OF MARCH 3, 1887.
   In an action to establish a will as a will of real estate, where there were a large number of defendants in different states, one of the defendants removed the cause from the state court to the United States circuit court. *Held*, that an action to establish a will is not a separable, but a single, controversy, and its removal is not authorized by the United States act of 1887, relating to the

removal of causes, which provides that when, in any suit, * * * there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants, actually interested in such controversy, may remove such suit.

On Motion to Remand.

Thomas M. North and *J. Langdon Ward*, for complainant.

Edward C. James, for defendant.

LACOMBE, J. The plaintiff, an heir at law of John Anderson, and the residuary devisee and legatee under his will, is a citizen of Connecticut. The defendant Kate Anderson is the widow of John Anderson, and is a citizen and resident of New York. Laura V. Appleton and five other defendants are heirs at law of said John Anderson, and are citizens and residents of New York. Agnes C. Bryant and Amanda I. Bryant, also defendants, are heirs at law of John Anderson, and citizens of Maryland. John Weber and nine other defendants are citizens and residents of New York; it is alleged in the complaint that they are united in interest with the plaintiff, and were made defendants because their consent to be joined as plaintiffs could not be obtained. Each of these last-named defendants is a grantee, direct or remote, of the plaintiff, and is in possession of, and claims to own in fee, some portion of the real estate of which John Anderson died seized. The action was begun in the supreme court of New York to establish the will of John Anderson, deceased, as a will of real estate. It is brought, as plaintiff claims, under chapter 316 of the Laws of 1879, amending chapter 238 of the Laws of 1853; or, as defendant claims, under section 1866 of the Code of Civil Procedure, which reads as follows:

"The validity, construction, or effect, under the laws of the state, of a testamentary disposition of real property situated within the state, or of an interest in such property which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed, purporting to convey land, may be determined. The judgment in such an action may perpetually enjoin any party from setting up or from impeaching the devisee, or otherwise making any claim in contravention to the determination of the court, as justice requires. But this section does not apply to a case where the question in controversy is determined by the decree of a surrogate's court, duly rendered upon allegations for that purpose, as prescribed in article first of title third of chapter eighteenth of this act, where the plaintiff was duly cited, in the special proceedings in the surrogate's court, before the commencement of the action."

The repealing act, chapter 245 of the Laws of 1880, did not repeal the amending act, chapter 316 of the Laws of 1879, although it did repeal the original act of 1853, and there has been in the state courts no decision of the question whether the Code (section 1866) has superseded the act of 1879. A determination of that question, however, is not necessary to the disposal of the motion now before the court. The action provided for by the Code is of substantially the same character as that provided for by the statute.

On October 19, 1887, before her time to apply expired, the defendant Laura V. Appleton duly filed her petition and bond in the supreme court, and obtained an order removing the cause into this court. She did not, however, enter the record, insisting upon her right to delay doing so until the first day of the next term, April 2, 1888. (Act of March 3, 1887, § 3.) Thereupon the plaintiff's attorney, without leave first obtained, has entered a copy of the petition, order, and bond, with a certificate of the clerk of Westchester county. The complaint, agreeably to a common practice in the state courts, was not filed with the county clerk, and hence was not certified by him. The plaintiff now moves to remand, basing his motion on all the papers, pleadings, and proceedings. To this application the removing defendant interposes two preliminary objections:

First. That the motion is premature, contending that a plaintiff is not allowed to enter the record before the first day of next term, except by leave of the court, and then only for the purpose of moving for a provisional remedy. After removal, however, the state court is without jurisdiction, and if the defendant's objections were sound, she might, by mere inaction, leave the case stranded for six months between the state and federal jurisdictions, and, in the meanwhile, lock her adversary out of both courts. Such a practice would be intolerable, and has been provided against by rule of this circuit, adopted October 1, 1883, and still in force, as follows:

"When a cause has been removed from a state court, either party may forthwith cause a copy of the record to be filed in this court, and thereupon may notice the cause for trial in this court, although the term has commenced, and, upon filing a note of issue, may place the cause upon the calander as of the date when the record was filed. Such cause will not be placed upon the calendar until five days after the filing of the note of issue. When the cause has been duly noticed for trial in the state court before removal, no new notice of trial in this court will be required, but the party filing the note of issue shall, on the day of filing the same, serve notice thereof on the adverse party."

Second. The defendant further objects that the petition only can be considered on this motion; it and the bond being the only papers entered. This is also a dilatory objection. If the plaintiff shows conclusively that the suit is one which, under the acts of congress, does not properly involve a dispute within the jurisdiction of the circuit court, that court will, when it so appears, remand the case to the state court. *Ayres* v. *Wiswall*, 112 U. S. 187, 5 Sup. Ct. Rep. 90. There is no good reason why the time of the litigants and of the court should be wasted in going through the preliminary steps of a litigation, if it is one of which the court will disclaim jurisdiction as soon as it sees the complaint. Moreover, there is here no dispute of fact, such as appeared in the cases cited in support of this objection. The complaint and the petition are in accord, so far as they set forth the facts out of which the controversy arises, and disclose the citizenship of the parties. The authorities which hold that the petition is for the purpose of a motion to remand to be considered as true, do not apply to such averments therein as are merely

conclusions of law. A defendant cannot make his cause removable merely by asserting in his petition that it is. The preliminary objections being thus disposed of, the merits of the motion to remand may be considered.

The plaintiff insists that this is not a removable cause, because it is brought under a special statute, which is part of the probate system of the state of New York; citing *Reed* v. *Reed*, 31 Fed. Rep. 49. He also claims that the defendants Weber and others (plaintiff's grantees) are necessary parties, and must be ranged on his side of the controversy; that when the parties to the suit are so arranged, it will be found that there are citizens of New York state on both sides of the controversy. The first of these points need not be decided; the other is considered incidentally hereafter.

The statute of 1887 has made a material change in the law. It provides that "any suit of a civil nature, other than such as involve a federal question or conflicting grants of two or more states, at law or equity, of which the circuit courts of the United States are given jurisdiction by the preceding [first] section, * * * brought in any state court, may be removed * * * by the defendant or defendants therein, *being non-residents of that state.*" Under the removal act of 1875, the plaintiff or defendant might remove the cause, and irrespective of his individual residence. The removing defendant, Laura V. Appleton, is a citizen and resident of the state of New York, and, under the clause just cited, is not authorized to remove the suit. She claims, however, that by the sentence in the statute of 1887 (section 2) which immediately follows, a different class of litigation is provided for, in which removal by a resident is authorized. The sentence referred to is as follows:

"And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

The defendant contends, as the effect of this sentence, that the only restriction now laid upon the right of removal of separable controversies is that the motion must be made *by a defendant*, and that the restriction as to non-residents does not apply. See *Telegraph Co.* v. *Brown*, *ante*, 337. In other words, that congress has provided that a person sued in the courts of his own state shall not, in the absence of a federal question or conflicting state grants, remove his cause into the circuit court, except when there may chance to be other parties to the action between whom and his adversary there may be some controversy separable from his own. Even if it be conceded that this construction is a sound one, (and this opinion is not to be taken as passing upon that question,) the defendant in this suit cannot avail of its benefits.

The defendant's main reliance is on *Barney* v. *Latham*, 103 U. S. 205, (1880,) in which there was construed a clause similar to the one cited, and known as the second clause of section 2 of the act of 1875, as follows:

"And when in any suit there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit into the circuit court of the United States for the proper district."

The court, in *Barney* v. *Latham*, found that there "was more than one controversy in the suit" before it, and that as to that "entirely separate controversy, * * * with which the defendant in the other controversy had no necessary connection," the citizenship of the parties to it was such as to warrant removal. The facts shown in that case were substantially these, (omitting all mention of minor details, such as changes of interest by death or otherwise:) Latham and six associates built a railroad under an agreement by which, in consideration of its construction, the railroad company engaged to transfer to them the lands which it might receive from time to time as grants from the state. To the expense of construction Latham contributed one thirty-seventh, becoming thus entitled to one thirty-seventh of the land and its proceeds. The five other associates subsequently created a land company, to which the railroad company conveyed the greater part of the lands, and which managed and sold the same. Prior to the creation of the land company, there had been sales of which Latham's five associates received the proceeds. Latham sued the land company, praying to be adjudged the owner of his share of the unsold lands, and to have an accounting for his share of the proceeds of sales already made by the land company. He did not stop there, however, but also sued his five associates for an accounting as to the proceeds of such sales as they had made before the land company was formed. The court held that these were causes of action which, under the settled rules of pleading, *need not* have been united in one suit, and that there was a separable controversy. Since this decision, the second clause of the act, or section 2 of the act of 1872, has been repeatedly before the supreme court. In no cause, however, has that court found the facts such as to warrant the holding that there was a separable controversy in the particular case, while it has affirmed and repeatedly reaffirmed the proposition that, to entitle a party to removal under that clause, there must exist in such suit a separate and distinct cause of action; that the case must be one capable of separation into parts. *Ayers* v. *Chicago*, 101 U. S. 184; *Blake* v. *McKim*, 103 U. S. 336; *Hyde* v. *Ruble*, 104 U. S. 407; *Corbin* v. *Van Brunt*, 105 U. S. 576; *Fraser* v. *Jennison*, 106 U. S. 191, 1 Sup. Ct. Rep. 171; *Winchester* v. *Loud*, 108 U. S. 130, 2 Sup. Ct. Rep. 311; *Shainwald* v. *Lewis*, 108 U. S. 158, 2 Sup. Ct. Rep. 385; *Ayres* v. *Wiswall*, 112 U. S. 187, 5 Sup. Ct. Rep. 90; *Railroad Co.* v. *Ide*, 114 U. S. 52, 5 Sup. Ct. Rep. 735; *Railroad Co.* v. *Wilson*, 114 U. S. 60, 5 Sup. Ct. Rep. 738; *Pirie* v. *Tvedt*, 115 U. S. 41, 5 Sup. Ct. Rep. 1034, 1161; *Crump* v. *Thurber*, 115 U. S. 56, 5 Sup. Ct. Rep. 1154; *Insurance Co.* v. *Huntington*, 117 U. S. 280, 6 Sup. Ct. Rep. 733; *Laidly* v. *Huntington*, 121 U. S. 179, 7 Sup. Ct. Rep. 855; *Hedge Co.* v. *Fuller*, 122 U. S. 535, 7 Sup. Ct. Rep. 1265; *Mining Co.* v. *Canal Co.*, 118 U. S. 264, 6 Sup. Ct. Rep. 1034; *Little* v. *Gibbs*, 118 U. S. 596,

7 Sup. Ct. Rep. 32; *Brooks* v. *Clark*, 119 U. S. 502, 7 Sup. Ct. Rep. 301.

Viewed in the light of these decisions, this suit presents no such distinct and separable causes of action as were found in *Barney* v. *Latham*. There is here but a single controversy, viz.: Is the will of John Anderson valid as a will of real estate? and its character is not changed merely by rearranging the parties to it. It does not become separable into parts because some of the defendants are interested jointly, and others are interested severally, in its determination. There may be a controversy as to its validity between any one of the plaintiff's grantees and the heirs at law; but such controversy is, in all respects, identical with the one between the plaintiff and the heirs at law.

The controversy here is not separable, under the decisions, and the motion to remand is therefore granted.

WELLER *v.* J. B. PACE TOBACCO CO. and others.

(*Circuit Court, S. D. New York.* December 14, 1887.)

1. REMOVAL OF CAUSES—CITIZENSHIP—ACT OF MARCH 3, 1887.
Under the act of congress March 3, 1887, § 2, providing that a suit brought in any state court, wherein the controversy is between citizens of different states, and the amount in dispute exceeds, exclusive of interest and costs, the sum of $2,000, "may be removed to the circuit court of the United States for the proper district by the *defendant or defendants* therein, being non-residents of that state," defendants who are residents of the state in which suit is brought cannot remove the cause, though plaintiff is a resident of another state.

2. SAME—CITIZENSHIP—ACT OF MARCH 3, 1887—SEPARABLE CONTROVERSY.
Action was brought by a non-resident assignee of an insolvent debtor to compel the assignment, by a corporation, of stock belonging to the debtor. Purchasers at a sale on execution levied on the stock subsequent to the debtor's assignment, intervened, were made parties defendant, and asked for a removal of the cause as to them, under act of congress March 3, 1887, § 2, providing that, "when there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants may remove said suit," etc. *Held* that, the cause of intervenors being inseparable from that of the corporation, it could not be removed.

Reynolds & Harrison, for plaintiff.
North, Ward & Wagstaff, for defendants.

LACOMBE, J. The plaintiff, a resident and citizen of California, is, under decree of a California court, the receiver of the late firm of Esberg, Bachman & Co. All the defendants are citizens and residents of New York. The firm of which plaintiff is receiver held and owned 273 shares of stock of the J. B. Pace Tobacco Company. The original certificate of stock is now held by plaintiff, with an assignment and power of attorney from the assignor. He brought this action in the state court against the company, as sole defendant, to compel the transfer of these shares

upon its books, and the issuing of a new certificate to himself as receiver. The assignment was made in October, 1885, and the suit was begun in 1886. After a trial, but before judgment was entered, the defendant Demuth & Co. applied to the court as intervenors, and, on their motion, the trial was set aside, and plaintiff ordered to bring them in. Thereafter he amended his summons and complaint, making Demuth & Co. and Scholle Bros. co-defendants with the company. The relation of these latter defendants to the subject-matter of the controversy is as follows: Subsequently to the assignment to plaintiff, separate attachments were sued out by the defendant firms against two of the plaintiff's assignors, and levied on the stock by filing notices with the company. Demuth & Co. prosecuted their suit to judgment, and bought in the interest of defendants therein when the stock was sold by the sheriff under execution. Subsequently Demuth & Co. brought an action in the supreme court of this state to compel the J. B. Pace Company to transfer the stock to them on the books of the company. They obtained judgment therein, the transfer has been made, and certificates thereof issued to them by the company. The defendants, Demuth & Co., and Scholle Bros. have removed this suit into this court, and a motion is now made by the plaintiff to remand the same.

The case is governed by the act of March, 1887, which was passed before the intervenors appeared. The second clause of the second section of this act (which deals with suits not concerned with federal questions, or the conflicting grants of different states) has materially changed the law permitting removals. The clause is as follows:

"Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, [*i. e.*, in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars,] and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the *defendant or defendants* therein, being *non-residents* of that state."

Prior to the passage of this act, removal could be had in this class of cases by either plaintiff or defendant, and irrespective of residence. As all the defendants in this suit are residents of New York this clause gives them no right to a removal.

It is claimed by them, however, that the defendants other than the company may remove under the next succeeding clause of the act, which is as follows:

"And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

Whether or not the defendant who may move under this clause must be a non-resident of the state in whose court he is sued, need not be determined on this motion. However it may be interpreted, it certainly was never intended to provide for precisely the same class of suits as are

already covered by the second clause of the section. The portion of the section last quoted (which, with a single change, is textually the same as the last clause of section 2 in the removal act of 1875) is in effect a saving clause. When, upon arranging parties to any suit according to their interests, citizens of the same state are found on both sides of a litigation, a removal cannot ordinarily be had, because, under the decisions, the controversy (or controversary) is not between citizens of different states. The effect of the clause last above quoted is to provide that in those cases a defendant or defendants may nevertheless remove, upon showing that there is in the suit a controversy which is wholly between such defendant or defendants on the one side, and citizens of other states on the other. Under the decisions, moreover, this "controversy in a suit" must be separable; that is to say, there must be, in such suit, a separate and distinct cause of action, and the case must be one capable of separation into parts. The clause last quoted has been many times considered by the supreme court, but its decisions will be searched in vain for a single instance where it has been applied to a case in which all the plaintiffs are citizens of one state, and all the defendants citizens of another. *Barney* v. *Latham*, 103 U. S. 205; *Blake* v. *McKim*, Id. 336; *Harter* v. *Kernochan*, Id. 562; *Hyde* v. *Ruble*, 104 U. S. 407; *Corbin* v. *Van Brunt*, 105 U. S. 576. *Fraser* v. *Jennison*, 106 U. S. 191, 1 Sup. Ct. Rep. 171; *Winchester* v. *Loud*, 108 U. S. 130, 2 Sup. Ct. Rep. 311; *Shainwald* v. *Lewis*, 108 U. S. 158, 2 Sup. Ct. Rep. 385; *Cable* v. *Ellis*, 110 U. S. 389, 4 Sup. Ct. Rep. 85; *Ayers* v. *Wiswall*, 112 U. S. 187, 5 Sup. Ct. Rep. 90; *Railroad* v. *Ide*, 114 U. S. 52, 5 Sup. Ct. Rep. 735; *Railroad* v. *Wilson*, 114 U. S. 60, 5 Sup. Ct. Rep. 738; *Pirie* v. *Tvedt*, 115 U. S. 41, 5 Sup. Ct. Rep. 1034, 1161; *Crump* v. *Thurber*, 115 U. S. 56, 5 Sup. Ct. Rep. 1154; *Starin* v. *New York*, 115 U. S. 248, 6 Sup. Ct. Rep. 28; *Sloane* v. *Anderson*, 117 U. S. 275, 6 Sup. Ct. Rep. 730; *Insurance Co.* v. *Huntington*, 117 U. S. 280, 6 Sup. Ct. Rep. 733; *Rand* v. *Walker*, 117 U. S. 340, 6 Sup. Ct. Rep. 769; *Core* v. *Vinal*, 117 U. S. 347, 6 Sup. Ct. Rep. 767; *Mining Co.* v. *Canal Co.*, 118 U. S. 264, 6 Sup. Ct. Rep. 1034; *Little* v. *Gibbs*, 118 U. S. 596, 7 Sup. Ct. Rep. 32; *Brook* v. *Clark*, 119 U. S. 502, 7 Sup. Ct. Rep. 301; *Laidly* v. *Huntington*, 121 U. S. 179, 7 Sup. Ct. Rep. 855; *Transportation Co.* v. *Seeligson*, 122 U. S. 519, 7 Sup. Ct. Rep. 1261; *Hedge Co.* v. *Fuller*, 122 U. S. 535, 7 Sup. Ct Rep. 1265.

The suit in this case is clearly within the class covered by the second clause, as a suit in which there is a controversy between citizens of different states; and, even if the citizenship of the parties were such as to make the provisions of the third clause of the act of 1887 applicable, the suit does not, under the decision, present separate and distinct causes of action, and is not one capable of separation into parts.

DAVIS v. KANSAS CITY, S. & M. R. CO.

(*Circuit Court, W. D. Tennessee.* December 14, 1887.)

JURISDICTION—AMOUNT IN CONTROVERSY—ACT OF MARCH 3, 1887—AMENDMENT OF THE DECLARATION.

In an action for damages to property by a railroad company occupying a street, the *ad damnum* of the writ and declaration was laid at $1,500 in ignorance of the new act of congress of March 3, 1887, increasing the minimum limit of the jurisdiction to $2,000; but, on motion to dismiss, the plaintiff asked leave to amend by increasing the *ad damnum*. *Held*, that the amendment should be allowed, since it did not satisfactorily appear from the nature of the case, and the circumstances shown, that the damages were not in fact larger than the original claim. It is only when the court can plainly see that its jurisdiction is being fraudulently invoked that it will deny the amendment or dismiss the cause.

W. M. Randolph, for plaintiff.
C. H. Trimble, (*J. M. Greer*, with him,) for defendant.

HAMMOND, J. The motion to dismiss for want of jurisdiction is based on the fact that the *ad damnum* in the writ and declaration is less than $2,000, the amount fixed as the minimum limit of our jurisdiction by the act of March 3, 1887, *c.* 373, (24 St. 552,) the suit having been commenced a few days after that act was passed, evidently in ignorance of the changes made by it. The plaintiff moves to amend the writ and declaration by increasing the *ad damnum* to $2,500, but this motion the defendant resists, on the ground that it is manifestly made to give the court a fictitious jurisdiction.

By the Revised Statutes, (sections 948 and 954,) the power and duty of the courts to allow amendments most liberally has been long established, and no practice is more generous in that regard than that of our federal courts. In one case, the *ad damnum* was amended, after verdict, to include damages given by the jury, which were larger than the sum claimed by the writ and declaration. *Elting* v. *Campbell*, 5 Blatchf. 183. If the factitious circumstance of the passing of this new act of congress a few days before the suit was brought did not exist in this case, no resistance to this motion would be thought of by the defendant; and the position that the plaintiff should show, by affidavit or other proof, that he had reasonable grounds for a larger estimate of his damages than he made when the suit was brought, would not be taken, for it is certain that neither in the state practice, nor our own, has that ever been required on a motion to amend the *ad damnum* in a case where the cause of action was like this. The plaintiff has a right to claim what damages he pleases, either when he institutes his suit, or afterwards by amendment, and I cannot think that this adventitious circumstance of a change in the amount of our jurisdiction can at all influence that right. There is a strong suspicion, no doubt, that he wishes to make the change to meet the requirements of the new act of congress; and that may be the fact: yet we do not know that it is a fact, and in the very nature of the case

it may be that his damages are really larger than $2,000, instead of being only $1,500, as he at first laid them in his writ. We cannot judicially know that he is acting fraudulently to give us jurisdiction, rather than that he is acting honestly to correct a former error of judgment, and this is what the contention against the motion means.

Indeed, where our jurisdiction depends on the amount in dispute, and the cause of action is one in which, from its nature, the plaintiff is at liberty to lay what damages he pleases, as in libel, slander, or other injuries to person or property, I am not prepared to say that he may not deliberately overestimate them in order to give a particular court jurisdiction. It has been held that one may deliberately move into another state, and acquire a diverse citizenship, in order to give the United States courts jurisdiction of his cause of action; and I have heard, when at the bar, one eminent circuit judge, now deceased, say from the bench that such conduct might be "an exhibition of both good taste and good judgment" by the party to a suit. And so it might be, if the party's conduct were reversed to give a state court jurisdiction. Rightfully, he has his choice. These courts cannot, at least, treat it as conclusive evidence of a fraudulent intent for a plaintiff to increase his estimate of the damages to his person or property a few hundred dollars, that he may invoke their jurisdiction, where the amount that a jury may give is so uncertain, and the estimate so entirely within his own control. The Revised Statutes, by section 968, which strangely seems not to have been conformed to the new act of congress, provide a remedy against any overestimate by the denial of costs where the recovery is less than $500. I do not see that the courts have power to impose any additional penalties or restrictions by refusing amendments in a case like this.

The cases of *Bowman* v. *Railroad Co.*, 115 U. S. 611, 6 Sup. Ct. Rep. 192, and *Hartog* v. *Memory*, 116 U. S. 588, 6 Sup. Ct. Rep. 521, (cited by defendant's counsel,) have no application here. The first was a suit for damages against a common carrier for refusing to carry 1,000 kegs of beer, and the damages, necessarily limited to the value of the beer, were at first stated to be $1,200 in the writ and declaration; and from the nature of the cause of action, and the facts on which it was based, appearing in the case, it was apparent that the increase by the amendment was colorable, and that the real amount in dispute was less than the jurisdiction. The second only establishes a well-recognized rule that courts will not allow their jurisdiction to be collusively imposed upon, and will direct an inquiry into the facts. So, in *Lee* v. *Watson*, 1 Wall. 337, it appeared, after trial as well as before, that the amendment to the declaration claimed more than the actual amount in dispute, and was therefore colorable; for it is well settled by these and all the cases that where such fact appears the court has no jurisdiction.

The trouble here is that no such showing is made. It is an action for damages to the plaintiff's property for laying a railroad track in the street upon which the property is situated. The measure of damages, as we hold in similar cases, is the difference in value between the property

with the obstructions to plaintiff's right of access to his property, and without the obstructions. The declaration describes the lot by metes and bounds, and its situation in the city of Memphis, but nothing in the averments or elsewhere shows the value of the lot or anything from which it may be fairly inferred or by judicial knowledge fairly determined; nor does any fact appear to show the extent of the injury except alone the original claim that it was the sum of $1,500. On an application to amend this averment, we are asked to hold the plaintiff to that claim, in order to defeat the jurisdiction. If we could see conclusively from the facts showing the cause of action that the damages sustained are less than $2,000, or if we could fairly infer from the original claim in the writ and declaration that they are less, we should refuse this amendment, no doubt. But it certainly does not conclusively appear that the damages are less, and they may be more; nor is it a fair inference from the circumstances that the plaintiff's original estimate was correct, and that it should preclude him from claiming that the damages are more. The difference between the amount of $1,500, which he originally claimed, and the limit of the jurisdiction, is only $500; and in a case of damages to property, like this in controversy, that small sum does not fairly indicate a fraud upon the jurisdiction such as appeared in the adjudicated cases already referred to, and which might be considerably increased by other citations. None of the cases go as far as we are asked to go here in refusing an amendment which is, to say the most of it, suspicious only under circumstances quite extraneous to the plaintiff's case, and not otherwise suspicious at all.

The motion to amend is allowed, and the motion to dismiss for want of jurisdiction is disallowed.

NORTON and others *v.* EUROPEAN & N. A. RY. and others.

(*Circuit Court, D. Maine.* November 8, 1887.)

COURTS—FEDERAL JURISDICTION—CITIZENSHIP—REAL PARTIES IN INTEREST.

F. P., a citizen of Maine, being involved in litigation with a railroad corporation of that state, got control of a large number of its second mortgage bonds by agreeing with the holders to stand the expense of all litigation necessary for their collection, half of what was realized to go to the holders, and, if nothing came of the matter, the bonds to be returned. N., a Massachusetts lawyer, engaged to carry on the suit in his own name on a contingent fee of 50 per cent. if a certain number of the bonds were secured and assigned to him in form, out and out, but really as collateral. F. P. negotiated the purchase of the small number required to make up the necessary amount in the name of his brother, E. P., also a citizen of Massachusetts. The bonds were then all transferred to E. P. absolutely, and he and F. P. closed the indicated arrangement with N. The suit, which was a bill to redeem from the foreclosure of the first mortgage, was brought in Maine in N.'s name, and E. P. subsequently intervened. Pending the suit, E. P., with the consent of his brother, who had in the mean time sold some of the bonds, assumed all liability for future expenses, and settled with N. by a *bona fide* transfer of part of the bonds. *Held*, that F. P. was the real party in interest, the transfers

from him being colorable merely, within the meaning of the act of March 3, 1875, and that the suit should be dismissed, the actual plaintiff and the defendant being both residents of Maine.

In Equity.

Wm. L. Putnam, *C. P. Stetson*, and *Drummond & Drummond*, for respondents.

W. F. Lunt, *Alexander McMichal*, and *H. D. Hadlock*, for Marcus P. Norton.

Warren & Brandeis, for E. B. Pillsbury.

COLT, J. This suit is brought by Marcus P. Norton on behalf of himself and of all other bondholders of the Consolidated European & North American Railway, to redeem the portion of its railroad and property lying within the state of Maine from a foreclosure under a trust deed executed by the European & North American Railway. The European & North American Railway was duly organized under the laws of the state of Maine in 1850, for the purpose of constructing a railroad from the city of Bangor to the eastern boundary of the state, to connect there with a road to be constructed to St. Johns, New Brunswick. For the purpose of raising funds, the company on March 1, 1869, executed a deed of trust of all its property to J. Edgar Thompson and Hannibal Hamlin, to secure an issue of $2,000,000 of its bonds. The property covered by this instrument included the lands which had been granted to the company by the state of Maine.

The New Brunswick Company was organized as a corporation under the laws of the province of New Brunswick in 1864. From the opening of the road for traffic in 1871, until the latter part of 1872, each company operated separately the railroad owned by it. Then by agreement the roads were consolidated under the name of the Consolidated European & North American Railway Company. On December 5, 1872, the consolidated company executed a deed of trust of all its property to Benjamin E. Smith and Samuel F. Hersey, trustees, as a security for a proposed issue of $6,000,000 of bonds. The deed provided that $5,000,000 of the bonds should be set apart for the redemption of the bonds issued by the two companies before their consolidation, and that the remaining $1,000,000 should be used by the consolidated company for equipment and improvement of the road, and to pay the floating debt. None of the $5,000,000 of bonds were issued, but the remaining $1,000,000 were duly issued and sold or pledged by the consolidated company. The consolidated company failed in June, 1875, and the interest on its bonds was defaulted. In October, 1875, Benjamin E. Smith, surviving trustee for the holders of these bonds, took possession of the company and operated the railroad. On October 2, 1876, Smith surrendered possession of the road to Hannibal Hamlin and William B. Hayford, trustees under the prior mortgage; Hayford having been appointed trustee on the death of J. Edgar Thompson. These trustees remained in possession until October, 1880, when the bondholders under this mortgage claiming that the foreclosure was perfected under the state

statute, a new corporation was organized, and assumed the name of the European & North American Railway, and operated the road until September, 1882, when it was leased to the Maine Central Railroad. In November, 1882, this suit was brought by Marcus P. Norton, a citizen of Massachusetts, on behalf of himself and other bondholders of the consolidated company, against the Consolidated European & North American Railway Company, the European & North American Railway, Hannibal Hamlin and William B. Hayford, trustees, the Maine Central Railroad Company, Edward Cushing, trustee, and Noah Woods, citizens of Maine, and Benjamin E. Smith, trustee, a citizen of Ohio.

The bill prays (1) that the lease to the Maine Central Railroad Company be set aside; (2) that the organization of the European & North American Railway be declared null and void; (3) that the complainant, on behalf of himself and other bondholders of the consolidated company, be allowed to redeem the property from the pretended foreclosure by Hannibal Hamlin and Hayford; and for incidental relief.

The complainant Norton alleges, as a reason for bringing the suit in his own name, that Smith has so conducted himself in the administration of the trust as to make a request upon him both nugatory and dangerous, and that Edward Cushing, his co-trustee, though duly requested to institute proceedings, has declined to do so, or to allow his name to be used for the purpose.

On December 17, 1883, after the cause was at issue, but before any testimony had been taken, Edward B. Pillsbury, a citizen of Massachusetts, was permitted to intervene and become a party complainant. Pillsbury claims to be the owner of a large number of the bonds of the consolidated company, and he has deposited 125 bonds in court. He contends that the consolidated company are entitled to redeem from the foreclosure of Hamlin and Hayford, trustees, on two grounds: (1) Because the statutory provisions for the foreclosure of railroad mortgages which were pursued by the trustees are inapplicable to the deed of trust under which they acted, and hence the proceedings are void; (2) because even if the foreclosure proceedings were regular and lawful, still in equity they are not binding upon the bondholders of the consolidated company by reason of the collusion between Benjamin E. Smith, trustee, and Hamlin and Hayford, trustees.

The bill was taken *pro confesso* as against the consolidated company, Edward Cushing and Benjamin E. Smith. The other respondents deny that the provisions of the Maine statute were inapplicable; deny the alleged collusion between Smith, trustee, and Hamlin and Hayford, trustees; deny the validity of the consolidation of the Maine and New Brunswick companies, and of the mortgage of the consolidated company; deny that Smith's conduct has been such as to dispense with the necessity of applying to him before commencing proceedings. They further assert that the complainants have been guilty of laches, and they question the right of complainants to bring this suit.

The first question that arises upon the state of facts disclosed by the evidence is whether this court has jurisdiction to entertain this suit.

The complainant Norton alleges in the bill that he has purchased for a valuable consideration, and now owns, 400 consolidated bonds. Edward B. Pillsbury alleges in his petition that at the time of the institution of this suit he was the owner of 125 of these bonds. Let us examine the evidence in support of these allegations. F. A. H. Pillsbury, an elder brother of Edward, was, in June, 1875, a member of the firm of Haynes & Pillsbury, hardware merchants of Bangor, Maine. At this time the consolidated company owed the firm $3,000 for railway supplies, and in the early part of 1877 they brought suit against the company and attached certain rolling stock. Subsequently Hamlin and Hayford, trustees, replevied part of the stock, and brought suit against the sheriff for the balance of the property not replevied. Smith, the trustee of the consolidated company, also brought suit against the sheriff for this stock. These last suits were likewise defended by Pillsbury. He testifies that he commenced, under the advice of his counsel in the replevin suits, to buy the bonds of the consolidated company in February, 1878. The first contract for the purchase of bonds appears to have been made February 20, 1878, and is as follows:

"Whereas, John J. Haley is the owner of one hundred and eighty-nine bonds of the Consolidated European & North American Railway Company, of one thousand dollars each; and whereas, a suit in equity is pending at Bangor, in the state of Maine, from which it is supposed that the holders of the bonds of said consolidated company may derive some portion of the amount due thereon; and whereas, James H. Haynes and Frederick A. Pillsbury, partners, under the firm name of Haynes & Pillsbury, propose to purchase and hold a large number of said bonds, and to endeavor to collect the same: and whereas, they have purchased said bonds of said Haley in the manner and for the purposes hereinafter set forth, and have paid him the sum of one thousand dollars: now, therefore, the said Haynes & Pillsbury, in consideration of the premises, further agree with said Haley as follows, viz.: They will make every reasonable effort to procure the payment of the bonds of said consolidated railroad company in said suit, or by other proceedings in court or otherwise, and they will employ Henry W. Paine, or other equally good counsel, to prosecute such suits, and will pay all the expenses of such suits or other proceedings, so that no part thereof shall be chargeable to said Haley; and out of the first proceeds of such suits or other proceedings, or negotiations applicable to the payment of bonds of said consolidated railroad, held or owned by said Haynes & Pillsbury, they hereby covenant and agree to pay said Haley the further sum of six thousand ($6,000) dollars, if said proceeds shall amount to so much, or if not then they agree to pay to said Haley the whole of said proceeds; meaning to give to said Haley the right to six thousand dollars, in preference to any other claims upon proceeds of all bonds of said Consolidated European & North American Railway Company, held or owned by said Haynes & Pillsbury. If said Haynes & Pillsbury fail to collect anything on account of said consolidated railroad bonds, then the said one hundred and eighty-nine bonds are to be returned to said Haley, unless it shall have been necessary, in the reasonable and proper prosecution of such suits or other proceedings for the collection of such bonds, to put said one hundred and eighty-nine bonds beyond the control of said Haynes & Pillsbury. If the said Haynes & Pillsbury shall negligently or willfully fail to prosecute such suits and proceedings for the collection of said bonds, then the said one hundred and eighty-nine bonds are to be returned to said Haley, except as provided in the foregoing paragraph, and said Haynes & Pillsbury are also to pay to said Haley the sum

of twenty-five hundred dollars, as liquidated damages for their breach of this agreement, and not as a penalty.

"And we, J. O. B. Darling and I. S. Johnson, of Bangor, Penobscot county, Maine, for the consideration aforesaid, and in consideration of one dollar to us paid by said Haley, do hereby join in this agreement as sureties for the faithful performance thereof by said Haynes & Pillsbury.

"Witness our hands and seals this twentieth day of February, A. D. 1878.

[Signed] "HAYNES & PILLSBURY,
"J. O. B. BAILEY,
"I. S. JOHNSON."

Another contract was made February 19, 1879, of the following tenor:

"Whereas, James Murray Kay, of St. John, N. B., is the representative of the owners of two hundred and fifty (250) Consolidated European & North American Railway Mortgage Bonds of one thousand ($1,000) dollars each; and whereas, Haynes, Pillsbury & Co., of Bangor, Me., have this day purchased of said James Murray Kay the said two hundred and fifty (250) Consolidated E. & N. A. Ry. Bonds (schedule of the numbers of which are below) in the manner and for the purpose hereinafter set forth, and have this day paid said Kay the sum of two hundred and fifty (250) dollars for the same: Now, therefore, the said Haynes, Pillsbury & Co., in consideration of the premises, further agree with the said Kay as follows: Haynes, Pillsbury & Co. to use their best efforts and employ the best of counsel to collect upon said bonds, by suit or other proceedings in court, and of the amount so collected thereon one-half of the same to be paid by them to said Kay; said Kay not to be a party to the record, or his name in any way to be publicly connected with the matter, nor responsible therefor. And we, J. O. B. Darling and I. S. Johnson, of Bangor, Me., do hereby jointly and severally join in this agreement, as sureties for the payment to said Kay of the money collected as above stated.

"*Bangor, Me., February* 19, 1879.

"Signed, sealed, and delivered in presence of

"T. W. VOSE to H. P. & Co. HAYNES, PILLSBURY & Co.
"HENRY R. SNOW to J. O. B. D. I. S. JOHNSON.
"WM. E. HOWARD to I. S. J. J. O. B. DARLING."

"BANGOR, ME., February 19, 1879.

"*J. Murray Kay*—SIR: (In sale, $250,000 Consolidated E. & N. A. Ry. Mortgage Bonds.) Referring to the agreement made with you this day in the above matter, we desire hereby to state that, in explanation and in amplification of the wording of said mentioned agreement, we thereby and hereby undertake to hold you individually, and as agent for your principals, harmless from all loss, damage, or expense in any way which may, directly or indirectly, arise out of the aforesaid mentioned agreement, to-wit, as to or from legal proceedings hitherto made and taken, or which may be undertaken, in regard to the foreclosure, or other steps taken in recovering under the said mortgage of which the above referred to bonds form part.

"Yrs., faithfully, HAYNES, PILLSBURY & Co."

The other bonds acquired by F. A. H. Pillsbury were under agreements of similar character, except the purchase of 40 bonds from one Burrell. These bonds, (exclusive of the Burrell purchase,) 700 in number, were retained by him until the summer of 1882. In April, 1882, through negotiations carried on by him, his brother Edward, who now intervenes in this suit, acquired 50 bonds of the Imperial Bank of London, under the following contract:

"Whereas, the Imperial Bank (Limited) of London, England, being the owner of fifty (50) Consolidated E. & N. A. Ry. Mort. Bonds of ($1,000) one thousand dollars each; and whereas, Edward B. Pillsbury, of Boston, Mass., U. S. A., has this day purchased of said Imperial Bank (Limited) of London, England, the said fifty (50) Consolidated E. &. N. A. Ry. Mortgage Bonds (of the numbers per schedule attached below in the manner and for the purposes hereinafter set forth,) and has this day paid said Imperial Bank (Limited) of London, England, the sum of fifty dollars for the same: Now, therefore, the said E. B. Pillsbury, in consideration of the premises, further agrees with the said Imperial Bank as follows: Said Pillsbury to use his best efforts, and employ the best of counsel, to collect upon said bonds, by suit or other proceedings, in court or otherwise; and of the gross amount so collected thereon, one-half of the same to be paid by him to said Imperial Bank, said Imperial Bank not to be a party to the record, or its name in any way to be connected with the matter, nor responsible therefor. And we, Haynes, Pillsbury & Co., of Bangor, Me., Edward Cushing, of Camden, Me., and I. S. Johnson, of Bangor, Me., do hereby jointly and severally join in this agreement as parties for the payment to said Imperial Bank (Limited) of the money collected as above stated.

"*Boston, Mass., April* 24, 1882.

"The words 'Limited' and 'gross' interlined before signing.

"Signed, sealed, and delivered in presence of

"W. M. SMITH to	EDWARD B. PILLSBURY.
"W. B. AYER to	HAYNES, PILLSBURY & CO.
"W. B. AYER to	EDWARD CUSHING.
"C. L. BATCHELDER to	I. S. JOHNSON.

"Schedule of numbers of said bonds as follows: 951 to 1,000, inclusive, with coupons attached. EDW. B. PILLSBURY."

It will be observed that this agreement is similar to the one F. A. H. Pillsbury made with Kay. It was about this time that the complainant Norton appears upon the scene. Edward B. Pillsbury testifies:

"About the first of June, 1882, I learned from Haynes & Pillsbury that Marcus P. Norton, now one of the plaintiffs in these causes, had made a proposition to them that he would undertake, at his own expense, to bring suits on the consolidated bonds, provided they would deposit 750 or 800 of the bonds in Boston, as a basis of such suits. They did not possess that number, and proposed to me that I pool my 50 bonds with theirs, which should all be deposited in Boston, and an agreement made with Norton as above outlined. I assented, and we stood ready to make such an agreement and arrangement. Norton was dilatory in the matter, and nothing further was done by me until the latter part of July, when F. A. H. Pillsbury began preparations to remove permanently to California for domestic and other reasons. Haynes & Pillsbury offered to sell all their bonds to me at what I considered a reasonable sum, and on reasonable terms, so that I might, if possible, make an arrangement with Norton. And this proposition I accepted. It should be understood that neither Haynes & Pillsbury nor myself possessed a sufficient number of bonds to make an independent arrangement with Norton on the terms he required."

In order that the proposition made by Norton might be carried out, F. A. H. Pillsbury sold to his brother 700 bonds, under the following agreement:

"BOSTON, MASS., July 29, 1882.

"For and in consideration of seven hundred (700) Consolidated E. & N. A. Ry. Co. mortgage bonds of $1,000 each, with coupons attached, delivered and

sold to me this day by and through F. A. H. Pillsbury, of Bangor, Me., I hereby promise and agree to pay to him the sum of one thousand ($1,000) dollars, within six months from date, with interest. For value received.

"EDWARD B. PILLSBURY."

Indorsed as follows:

"Pay to Haynes & Pillsbury. F. A. H. PILLSBURY.

"February 1, 1883. Rec'd two hundred (200) dollars on the within."

"BOSTON, July 29, 1882.

"*To Haynes & Pillsbury, Bangor, Me.:* Referring to the seven hundred (700) Consolidated E. & N. A. Ry. Co. mortgage bonds of $1,000 each, purchased of you this day, by and with my note of this date, on six months, for ($1,000) one thousand dollars, I hereby further promise and agree, in consideration of the premises, to assume and pay, and do hereby assume and agree to pay, any and all expenses, salaries, etc., now due and incurred or hereafter incurred in the premises of the trusteeship (of said bonds) of co-trustee Cushing, of Camden, Maine, and of his authorized agents, Haynes & Pillsbury, of Bangor, Me., so soon as I shall be in funds from and by the successful termination of any suit or suits on said bonds, or otherwise.

"EDWARD B. PILLSBURY."

Indorsed as follows:

"November 4, '82. Rec'd two thousand (2,000) dollars from E. B. Pillsbury, to be paid and applied as within stated, for him, in part liquidation of his within agreement.

"February 1, 1883. Rec'd eight hundred (800) dollars from E. B. Pillsbury, for the purposes within stated, and to be paid and applied therefor, for him, in part liquidation of his within agreement."

The following is the agreement with Norton which led to the transfer of the 700 bonds from F. A. H. Pillsbury to his brother:

"MEMORANDUM PROPOSITION.

"BOSTON, MASS., June 5, 1882.

"In the matter of the Consolidated European & North American Railway Company's 'Bonds,' issued under and by the authority of the act of the legislature of the state of Maine, and by the act of the legislature of the dominion of Canada, consolidated into one and a new company, (the old company known as the 'Maine Company,' also that known as the 'Brunswick Company,') I am willing, and I will undertake, at my own expense, in the money required, in carrying on any suit or suits, also for the services of proper counsel, say General B. F. Butler and Hon. B. Wadleigh, of Boston, to enforce payment of the said consolidated bonds, in full, including interest due, or that may be due, if there be sufficient property for that purpose, contained in that property named in the mortgage, by which said bonds are secured in Maine or [New] Brunswick; and for said expenses, labor, professional services for myself, also for said counsel, and all other necessary expenses requiring the payment of money, will accept one-half of said bonds in case at least $750,000 or $800,000 thereof shall be set apart for payment as aforesaid, and will make no other or further charge for said expenses and professional work of myself or other said counsel. Said business to go into operation in the courts, if necessary, at once, or as soon thereafter as the arrangement shall be made, and the same shall be pushed ahead without delay, as fast as the courts will allow the same to be done; of course all papers relating to the matter here to be furnished me if in the power of the other party so to do. No compromise to be entered into unless all the parties hereto agree to the same and in writing. Said bonds to be held in the vaults of a responsible safe deposit company in Boston, and not

to be delivered to either party until the same shall be agreed upon in writing under the agreement. In case nothing is recovered by the suit or other proceedings by said Norton, all of said bonds to be delivered to said Pillsbury.

[Signed] "MARCUS P. NORTON.

"*Dated this fifth day of June*, 1882."

Subsequently, just before Norton brought this suit, which was begun November 20, 1882, this additional agreement was entered into:

"This article of an agreement made on this seventh day of November, A. D. 1882, by and between Marcus P. Norton, trustee, of the city of Boston, in the commonwealth of Massachusetts, party of the first part, and Fred. A. H. Pillsbury, of the city of Bangor, in the state of Maine, and his brother Edward B. Pillsbury, of said city of Boston, party of the second part, witnesseth: that whereas, on the fifth day of June, A. D. 1882, and at said city of Boston, the said Marcus P. Norton, trustee, and said Fred. A. H. Pillsbury, made and entered into a memorandum agreement in writing, dated on or about the said fifth day of June, A. D. 1882, a copy of which is hereto annexed, marked 'A,' and made a part hereof, while each of said persons hold an original in *duplicate*; now, therefore, in consideration of the sum of one dollar paid to and received to the full satisfaction of said Norton, trustee, and said Pillsbury, and in further and other valuable considerations herein and hereby duly acknowledged by the parties hereto, the following is now and here made addition to said memorandum agreement in writing, that is to say:

"The said Fred. A. H. Pillsbury, and his brother Edward B. Pillsbury, and the said Norton, trustee, have this seventh day of November, A. D. 1882, duly deposited in a safe in the vault of 'The Security Safe Vaults,' Equitable Building, corner of Milk and Devonshire streets, in the said city of Boston, for the rental of which the said Norton, trustee, holds a receipt of the company owning said 'Security Safe Vaults,' dated Boston, November 6, 1882, (750) seven hundred and fifty bonds of the Consolidated European & North American Railway Company of ($1,000) one thousand dollars each, with coupons attached, and which are the first mortgage bonds of said railway company, and duly issued and delivered by said company as by law provided at the time of the date thereof, reference to which is hereby had for a more full description of the same and of each thereof.

"The said Marcus P. Norton, trustee, is now preparing and is to bring and institute one, two, or more suits, if the same, in his judgment, shall become necessary, in order to carry out the said contract and agreement, using his name in the manner and form affixed hereto, in any of the courts of the United States of America having jurisdiction to enforce and compel the payment of said bonds and coupons thereto attached; and he, the said Marcus P. Norton, trustee, for himself, trustee, his heirs and lawful representatives, have agreed in said 'Memorandum Agreement' of the date aforesaid, and also now and hereby agree and contract, to commence, carry on, and to prosecute any and all of said suits to be so commenced on said bonds for their payment, together with all the coupons thereon, to a final decision and determination and conclusion in the said courts, and as speedily and vigorously as is possible for him and his attorneys, and of counsel under his instruction, to do, in the exercise of good faith and sound discretion and judgment to exercise,—all of which is to be done at his own cost and expense, and of his said heirs and lawful representatives, in case of his decease before the finishing of said suit or suits, as the case may be; good counsel being employed by him for said suits, etc., and at his own expense as aforesaid, the same being also mentioned in said agreement of June 5, A. D. 1882.

"The said Marcus P. Norton, trustee aforesaid, has paid for, and he is to continue to pay for, the use of said safe in said deposit vaults, No. 1,328, for

the safe-keeping of each of said bonds during the pendency of said suit or suits, as the case may be.

"Except only for 'conditions broken' on the part of said Norton, trustee, the said (750) seven hundred and fifty bonds herein mentioned are to remain and continue to remain in said safe No. 1,328 until the final completion of and final adjustment of said suit or suits, as the case may be, unless upon the mutual consent of said Marcus P. Norton, trustee, by order in writing, and of the said Fred. A. H. Pillsbury and his said brother Edward B. Pillsbury, by order in writing, duly obtained and given in the presence of one or more witnesses.

"Upon the completion of said suit or suits, one-half ($\frac{1}{2}$) of the gross sum or amount adjudged, declared, or decreed as belonging to said (750) seven hundred and fifty bonds and coupons, or otherwise recovered on the same, is to be paid to said Pillsbury and his said brother, or their written order, and one-half ($\frac{1}{2}$) of the gross sum or amount so adjudged, declared, or decreed, of said bonds and coupons, is to be paid to said Marcus P. Norton, trustee, or his written order, as herein contracted and agreed to.

"If nothing shall be thus recovered in said suit or suits, and upon completion and termination thereof by said Norton, trustee, or his heirs or legal representatives in case of his decease, all of said bonds and coupons are to be delivered to said Pillsbury and his said brother, or their written order, without claim or any hindrance thereafter.

"For and only upon hereinbefore stated 'conditions broken,' it is hereby agreed by said Marcus P. Norton, trustee, that immediately thereafter the said Fred. A. H. Pillsbury and his said brother shall be entitled to have and to know the combination of said safe No. 1,328, so as to enable said bonds, under said supposed circumstances, to be at once delivered to said Pillsbury and his said brother, together with said coupons, otherwise said bonds and coupons are to remain as herein provided; and at the final termination of any and all suits mentioned herein, if successful, on the part and in behalf of the said Marcus P. Norton, trustee, or any one lawfully representing him, then the said bonds and coupons are at once to be divided by and between the said parties hereto in the manner herein provided.

"The foregoing articles of agreement are, on the day first above written, to-wit, this seventh day of November, A. D. 1882, made, signed, sealed, executed, and delivered to the parties herein named, respectively, in duplicate, and upon comparison by Mr. Fred. A. H. Pillsbury, one of the parties hereto, and Joseph P. Day, in the office of said Marcus P. Norton.

"In testimony whereof we have on this seventh day of November, A. D, 1882, hereto set our hands and seals, in the presence of two witnesses, namely:

"MARCUS P. NORTON, Trustee. [Seal.]
"FRED. A. H. PILLSBURY. [Seal.]
"EDWARD B. PILLSBURY. [Seal.]

"JAMES H. RICE.
"LEWIS C. LILLIE."

On December 17, 1883, Edward B. Pillsbury petitioned to be allowed to join as plaintiff in this suit, which was granted. On January 3, 1884, Norton released to Edward B. Pillsbury all interest in said bonds, except in 100, of which he took possession that day; and Pillsbury, with the assent of his brother, released to Norton all interest in said 100 bonds, and agreed, among other things, to pay all expenses which shall hereafter be incurred in the prosecution of the Norton suits. It further appears that several sales of the bonds in the possession of Edward B. Pillsbury took place to outside parties, beginning November 4, 1882. These

sales were negotiated by F. A. H. Pillsbury, and the money in the first instance was paid over to him, and the indorsements on his brother's note of $1,000 were made by him. Such are the leading facts bearing upon the standing of the complainant Norton, and the subsequent complainant Pillsbury, in this case.

From a careful reading of the whole evidence, and especially that of a documentary character, I am satisfied that the principal if not the only real party in interest in this suit is F. A. H. Pillsbury, a citizen of the state of Maine; and that the transfer of bonds to his brother, and the agreements with Norton, were made for the purpose of giving this court jurisdiction over the controversy. At the time of the foreclosure proceedings under the so-called land grant mortgage, which it is now sought to set aside, neither the elder Pillsbury nor his brother nor Norton were the owner of a single bond of the consolidated company. It was the indebtedness of the consolidated company to the firm of Haynes & Pillsbury, and the lawsuits which resulted, that led to the purchase of these bonds by the elder Pillsbury. Having acquired a large number of the bonds, the next step was to bring suit. It is evident that the elder Pillsbury did not wish to bring suit in the state court, because he could have done so at any time in his own name, but, manifestly desiring to try the case in the federal courts, he plans accordingly. His brother Edward was a young man about 25 years of age, residing in Boston, in the employ of the Bankers' & Merchants' Telegraph Company, at a salary of $1,200 a year, and with no property, as he testifies, except some household goods and a few hundred dollars. Marcus P. Norton was a lawyer residing in Boston, and interested in railroad matters. It was through these instrumentalities that the elder Pillsbury hoped to carry on a successful litigation in the federal courts. Whatever apparent transfers or agreements were made respecting these bonds, it will be observed throughout these transactions that everything seems to emanate from and to be controlled by the elder Pillsbury. He purchased all the bonds, except the 50 bought by his brother from the Imperial Bank, the sale of which he negotiated. It was owing to information received from him about a proposition from Norton that Edward B. Pillsbury had an interview with Norton, which resulted in the agreement of June 5, 1882, in which, for a consideration of one-half of at least 750,000 bonds, Norton agreed to carry on suits at his own expense. This was followed July 29, 1882, by a transfer of 700 bonds from him to his brother upon his giving a note for $1,000 and the agreement attached thereto. After this so-called sale, he was still one of the principal parties in the Norton agreement of November 7, 1882. Subsequent sales of bonds to third parties appear to have been made by him, and he seems to have had the disposition of the proceeds, and he has always taken the most active interest in the prosecution of this suit. He was bound by his contract with his vendors to account to them for at least one-half of what was realized from these bonds, as the result of suits to be brought, but this he could not do if the transfer to his brother was valid. Further, the testimony of Edward B. Pillsbury, that in consideration of his becoming a

party to the arrangement with Norton, Haynes and Pillsbury should furnish the whole consideration to Norton from their bonds, is inconsistent with the fact of a sale of these same bonds to him.

From the whole evidence, I am forced to the conclusion that the real party in interest in respect to these 700 bonds is F. A. H. Pillsbury, that the sale to his brother Edward was not *bona fide*, and that this pretended transfer and the agreements with Norton were the means employed through which Norton might bring suit in this court. Whatever interest Norton had at the beginning of this suit in the bonds deposited under his agreement was derived from F. A. H. Pillsbury, a resident of Maine, and was obtained by collusion between F. A. H. Pillsbury and himself, assisted by Edward B. Pillsbury, for the purpose of giving jurisdiction to this court; and therefore under the act of March 3, 1875, (18 St. 470,) this court is without jurisdiction, and the bill should be dismissed. *Farmington* v. *Pillsbury*, 114 U. S. 138, 5 Sup. Ct. Rep. 807.

But it is said that E. B. Pillsbury was the *bona fide* owner of 50 bonds purchased from the Imperial Bank of London before the commencement of this suit, that 40 of these bonds have been deposited in court, and that, therefore, the court should entertain jurisdiction as to him. It was through F. A. H. Pillsbury that these bonds were purchased in April, 1882, about the time negotiations began with Norton. The contract E. B. Pillsbury made with the bank was like those his brother had made with Kay and others. Considering this, and the condition and position of the younger Pillsbury in this whole matter, I cannot but suspect that the real party in interest in this transaction was F. A. H. Pillsbury, whatever form the transaction may assume on paper.

But admitting that E. B. Pillsbury owns these bonds, the question arises whether this court should allow him to intervene more than a year after a suit was brought which was collusive in its origin, and which the statute declares must be dismissed, because the transfer to the complainant was colorable merely, and made for the purpose of giving this court jurisdiction, while the real party in interest was a citizen of the same state with the defendants. Under these circumstances I do not think this court should retain this bill, because a subsequent intervenor may have a standing here. A bill in equity may be amended by the addition of a new party as plaintiff, when the new party is a necessary party to the case made by the bill; but this is quite different from the allowance of an amendment making a new party to the bill, and at the same time making a new case for such party in the bill. Pillsbury comes in to assist in the prosecution of the original bill; but if the original bill ought to be dismissed, it is difficult to see on what ground to base his right to intervene. Further, Norton is still a complainant in this suit with Pillsbury. And we now have joined together in the same bill two complainants, over one of whom the court has jurisdiction, while over the other it has none, because Norton really stands in this suit for F. A. H. Pillsbury, a resident of Maine. We think this court may well say that the condition of parties is the same in this case as if F. A. H. Pillsbury were actually before the court in place of Norton, and that, therefore, the rule

should be applied which was first laid down by Chief Justice MARSHALL in *New Orleans* v. *Winter*, 1 Wheat. 91, and recently in *Iron Co.* v. *Stone*, 121 U. S. 631, 7 Sup. Ct. Rep. 1010, and the case dismissed for want of jurisdiction.

STEIN, Ex'r, *v.* BIENVILLE WATER SUPPLY CO.

(*Circuit Court, S. D. Alabama.* December 2, 1887.)

1. INJUNCTION—WHEN GRANTED—INCONVENIENCE RESULTING.
   In 1840, the city of Mobile granted to plaintiff's testator the exclusive right to supply the city with water for 20 years, or until the city should redeem his works built for that purpose. In 1883, defendant company was chartered, and began supplying the city with water. Plaintiff filed a bill to enforce the monopoly granted his testator, and applied for an injunction *pendente lite* restraining defendant from supplying water. *Held*, that the injunction must be refused, as liable to cause harm of serious character to the people of the city, and the plaintiff will have leave to renew the application on final hearing of the bill.
2. SAME—INFRINGEMENT OF FRANCHISE—INTERFERENCE WITH WORKS.
   In such case, however, the court will grant an injunction restraining the defendant from injuring, or in any way interfering with, any pipes, conduits, or mains constructed pursuant to the agreement between the city and the plaintiff's testator.

On Application for Injunction *pendente lite*.

The bill in this cause was filed April 25, 1887, by Louis Stein, as executor of Albert Stein, deceased, and sought to enjoin the defendant from laying mains and pipes in the streets of Mobile, and from conducting water to that city and supplying the inhabitants therewith.

Beginning with 1820, several attempts were made by public and private enterprises to supply the city of Mobile with water, but these met with little success. The first attempts went little further than the definite selection of the head of Three-Mile creek, near Mobile, as the source of supply, and the laying of bored logs with three and six-inch holes. The privileges granted were in each case limited as to time, and, on the failure of the different plans, the rights of the promoters were by the legislature vested in the city of Mobile. December 26, 1840, an agreement was entered into by the city and Albert Stein, (confirmed January 7, 1841, by the legislature of Alabama,) whereby the city granted him "the sole privilege of supplying the city of Mobile with water from the Three-Mile creek for twenty years," and agreed at such time to redeem the water-works from him at a valuation to be fixed by arbitration. The agreement continues: "During the said term of twenty years, or any further time until said works are redeemed as above stipulated, said Stein shall have the exclusive privilege of supplying to the citizens and inhabitants of the city of Mobile water from the water-works aforesaid," at certain rates, and have quiet possession of the said works. Stein, on his side, agreed to construct the water-works within two years, "so that the said city of Mobile, and the inhabitants thereof, may at all times

be supplied with such a quantity of water as may be procured through the said pipes as far as they are laid." He constructed his system of water-works, and, through eight and ten inch mains, introduced into the city water of excellent character. No attempt has ever been made by the city to redeem these works before or after Stein's death, in 1874. On February 19, 1883, the legislature, reciting the necessity for a more adequate supply of water for Mobile, incorporated the defendant company. This company, after some delay, organized, and, selecting Clear creek, some miles more distant than Three-Mile creek, rapidly constructed extensive dams and reservoirs, laid mains of 24-inch caliber to Mobile, and soon had the city honey-combed with its pipes.

The bill was filed to enforce a monopoly claimed by Stein. May 10, 1887, Stein applied to Hon. DON. A. PARDEE, circuit judge, Fifth circuit, for an injunction *pendente lite*, and on June 6, 1887, the application was refused, but with leave to renew the application before Mr. Justice HARLAN, circuit justice. The application was made October 12, 1887, to said circuit justice at Washington, by agreement of counsel, and resisted on answer and affidavits, claiming that, if there was any monopoly, it was the monopoly of the supply from Three-Mile creek, with which the defendant had not in the least interfered; that Stein never had conformed to his contract; that the city had outgrown his works and ability; and that the public health and protection from fires required a larger and better distributed water supply, such as only the defendant could furnish. The answer admits that there had been unavoidably some slight but unintentional injury to Stein's pipes in laying the new and larger ones, but insists that all such damage had been immediately repaired. At the time of the application to Judge PARDEE the Bienville Company was engaged in laying its pipes, but by the time the renewed application was made to Justice HARLAN that work was complete, and the company was supplying many citizens and industries with water and motive power. At the time of this application the defendant had already demurred to the bill, but the complainant had never set the demurrers down for argument at any definite time.

L. H. Faith and *W. Hallett Phillips*, for complainant.

M. Hamilton and *Overall & Beator*, for respondent.

HARLAN, Justice. This case is before me upon complainant's application for an injunction, pending the suit, to restrain the defendant, its officers, agents, servants, and employes, from digging trenches and laying mains and pipes in the streets and public ways of Mobile, for the purpose of bringing and conducting water into that city; from supplying such water to the city and its inhabitants; and from hindering and molesting complainant in supplying that city and its people with water under the agreement of December 26, 1840, and the act of January 7, 1841.

The application ought not to be granted in the form asked by the complainant. I do not, at this time, make any ruling as to the true construction of the agreement of 1840 and the act of 1841; for there is sufficient ground, apart from the merits of the case, for my refusal to

grant a preliminary injunction to the full extent asked. The affidavits filed by the parties render it doubtful, to say the least, whether the city and people of Mobile have such a supply of water by the Stein works as is demanded by the public health and the public safety. The discretion which the court always has in granting or refusing preliminary injunctions ought to be exercised so as to avoid possible harm of a serious character to the general public. An injunction might do an injury to the public not easily to be repaired. But the complainant is entitled to an injunction restraining the defendant from interfering with or injuring any pipes, mains, or conduits already constructed, or to be hereafter constructed, under the agreement of 1840, confirmed by the act of 1841.

It is therefore ordered that the application of complainant for a preliminary injunction restraining the defendant from supplying the city and inhabitants of Mobile with water by means of pipes, mains, and conduits constructed by it be denied; but this order is without prejudice to his right, on the hearing of the demurrer to the bill, or at the final hearing, to renew his application for an injunction against the defendant as prayed for in his bill. It is further ordered that an injunction be awarded restraining the defendant, its officers, servants, agents, and employes, from molesting, interfering with, or injuring the mains, pipes, conduits, or other contrivances now constructed, or hereafter to be constructed, for the purpose of supplying the city and its inhabitants with water, pursuant to the agreement of December 26, 1840, between said city and Albert Stein.

MORAN *v.* PITTSBURGH, C. & ST. L. RY. CO. and others.

(*Circuit Court, S. D. Ohio, E. D.* November 24, 1887.)

1. MORTGAGE—SUBSEQUENT LEASE—RIGHTS OF MORTGAGEE.
   Where a lease is executed by a mortgagor subsequent to the mortgage, and there is no privity of estate or contract thereby created between the mortgagee and lessee, and there is no attornment by lessee to mortgagee, the mortgagee cannot, either before or after the mortgagor's default, demand the benefits of the lease without the consent of the lessee.
2. SAME—AFTER-ACQUIRED PROPERTY—RAILROAD LEASE.
   A railway company gave a mortgage to secure its coupon bonds, conveying all the property which it then possessed, or should thereafter acquire, and subsequently executed a lease, to which the mortgagee was not a party, whereby the lessee agreed to pay the coupons at maturity, in the event the net earnings of the demised road should not be sufficient to protect the interest on the bonds. In a suit to foreclose the mortgage, *held*, that the lease was not "after-acquired property," within the meaning of the mortgage.

In Equity. Suit for foreclosure of mortgage.

Geo. Hoadly, for complainant.

Harrison, Olds & Marsh and *T. M. Estep*, for defendants.

JACKSON, J. Under proper authority of law and resolutions of the corporation, the Cincinnati & Muskingum Valley Railway Company

(hereinafter, for brevity, called the "Valley Railway Company") on September 1, 1870, executed to Charles Moran and I. Edgar Thomson, as joint trustees, a conveyance of its property, to secure certain bonds of the company to the amount of $1,500,000, dated September 1, 1870, and payable January 1, 1901, with interest coupons attached, and payable semi-annually in the city of New York. The company's line of road at the date of this mortgage was constructed from Morrow to Zanesville, Ohio, but was to be extended to Dresden, Ohio. In pursuance of the resolution of the board of directors, this mortgage conveys to said trustees, or to the survivor, *in fee-simple*, all the right, title, and interest of said Valley Railway Company in and to its line of railroad from Morrow to Dresden, "with the appurtenances now completed, or to be hereafter constructed, together with all the lands, tenements, hereditaments, fixtures, buildings, cars, engines, tools and machinery, franchises, privileges, interest, and estate of the first party appertaining thereto, which the party of the first part now possesses or owns, or may hereafter acquire," in "trust for the equal benefit and security of the bond and coupon holders; with the provision that, until default shall be made in respect to something herein to be done or kept by the party of the first part, it shall be suffered and permitted to possess and operate, manage and enjoy, its said railway, with its appurtenances and appendages, and to take and use the rents, income, profits, and issues thereof, in the same manner and with the same effect as if this deed had not been made."

It further provides that, after 90 days' default by the company in the payment of interest or principal of said bonds, the trustees, or the survivor of them, on request of the holders of the one-third of the outstanding bonds, may *and shall* enter into and take possession of the mortgaged premises, hold, use, manage, and employ the same, making all needful repairs, alterations, and additions, and, after the payment of all expenses incident thereto, apply the proceeds thence arising to the "*pro rata*" payment of all principal and interest remaining due and unpaid on said bonds. It likewise contains a power of sale to be exercised by the trustees, or the survivor, at the request of one-half in amount of the bondholders, and in the event of a sale the trustees are empowered to execute a good and sufficient deed of conveyance in *fee-simple* to the purchaser of the property, and distribute the proceeds, after paying the expenses of the sale, among those entitled to the same. Then follows this provision: "And the said party of the first part hereby covenants to execute and deliver any further *suitable* conveyances that may be requisite for carrying into effect the object of those presents; *particularly* for the more *perfect assurance* of any *property* hereafter acquired by the party of the first part, and *included in the description in this deed.*"

After the execution and due registration of this mortgage, the mortgagor, said Valley Railway Company, leased and demised to the Pittsburg, Cincinnati & St. Louis Railway Company, (hereafter called, as it is most familiary known, the "Pan-Handle Company,") for the term of 99 years from January 1, 1873, its entire line of road constructed, and to be constructed, together with all the depots, station buildings,

appurtenances, and property, real and personal, thereunto belonging and appertaining. This lease appears to have been ratified or approved by the majority stockholders of the two companies at meetings held by them, respectively, for that purpose. The lessor covenants and agrees "that the party of the second part (the lessee) shall, at all times during the term aforesaid, have full and exclusive power, right, and authority to use, manage, and work the said railway of the said party of the first part, and shall have the right to fix the tolls thereon, (but not at a higher rate than is authorized by the charter of the party of the first part.) And, further, said party of the second part shall have full, free, and exclusive right to charge and collect all of said tolls on, and freight charges and dues to accrue from, said road during said term, and to appropriate the same in the manner hereinafter mentioned, and shall have, use, exercise, and enjoy all the rights, powers, and authority aforesaid, and all other lawful powers and privileges which can or may be lawfully exercised and enjoyed, in or about the said demised railway and property, as exclusively, amply, fully, and entirely *as the same might or could have been used, exercised, and enjoyed by said party of the first part had this lease and contract not been made, and as exclusively, fully, amply, and entirely as said party of the first part have authority by law to grant the same.*"

The lessee company covenants that it will, "at all times during the hereby demised term, work, use, manage, maintain, operate, and keep in public use the railway of the party of the first part, with its appurtenances, etc., and will so work and operate said railway and appurtenances, with its equipment, as shall, in the judgment of the lessee, reasonably be required for and properly adapted to promptly and fully accommodate the business thereof, and shall and will collect and receive all of the said tolls, freight charges, and dues which shall accrue as aforesaid, and apply and appropriate the same in the way and manner following, to-wit: *First*, to maintain and repair the railway and property, and pay operating expenses, including 8 per cent. on the engines of the lessee company used on the road, and the usual charge for its cars employed thereon, premiums on insurance, and all taxes assessed against the road and property by the state or United States." Then follow these clauses:

"It being distinctly understood that certain work yet to be done, and required to perfect and completely finish the said road hereby demised, as well as such additions and improvements thereto as the parties of the second part shall determine to be necessary, from time to time, for the prompt and economical movement of the traffic on and over said road, *shall be done by and at the expense of the said first party. Second.* To pay the surplus, if any thereafter remain, to the treasurer of the party of the first part: *provided, however, that, in the event of the net earnings of the line of road hereby demised not being sufficient to protect the interest on the existing first mortgage bonds of the party of first part as it matures, the party of the second part shall advance the needful means to pay the coupons at maturity; charging any such advance over net earnings in open account, to be returned out of the sub sequent earnings, and not otherwise.*"

The other general provisions of the lease, such as the requirement to keep the demised railway and property in repair, the keeping of accurate

accounts by the lessee, etc., need not be especially noticed, as they have no bearing upon the questions presented for determination. The considerations which led to this lease, the motives prompting its promoters, and the purposes sought to be accomplished by it, as disclosed in the record, need not be set out in detail. They form a curious and interesting chapter in the history of the railroad management. The means by which its ratification and confirmation was procured may be briefly referred to, as bearing upon one of the questions revived in the case.

It appears that the Pennsylvania Railway Company, a corporation of the state of Pennsylvania, in its own name, and in the name of the Pennsylvania Company, another corporation of said state, wholly in the interest of and controlled by the Pennsylvania Railway Company, *held and owned a large majority of the stock of both said lessor and lessee companies;* that said Pennsylvania Railway Company also held and owned $752,000, or a majority in value, of said $1,500,000 first mortgage bonds of said Cincinnati & Muskingum Valley Railroad Company; that the president of said Valley Railway Company was both a director and the general counsel of the Pittsburgh, Cincinnati & St. Louis Railway Company, (the lessee;) that in June, 1872, the directors of the last-named company adopted a resolution authorizing its president to execute a lease of the Valley Railway Company to said Pittsburgh, Cincinnati & St. Louis Railway Company, in such terms and conditions as might be prepared by its *general counsel*, who was also the president of said Valley Railway Company. The lease was accordingly prepared and executed, as already set forth, and its ratification and confirmation on the part of both the lessor and lessee companies was procured by the controlling interest and influence of the Pennsylvania Railway Company, in connection and with the aid and assistance of Moran and others, who were large holders of the first mortgage bonds of said Valley Railway Company, as well as stockholders therein. The primary object and purpose of this lease, as disclosed by the whole transaction, was to obtain from the lessee, as *an advance to the lessor* over and above the net earnings of the demised railroad, the *means* with which to pay the semi-annual interest on said first mortgage bonds of the lessor, held and owned by the promoters of the scheme.

The Pan-Handle Company, (the lessee,) after taking possession of the demised road and property under the lease thus made and confirmed, expended for betterments and improvements which the lessor company agreed to make, but failed and neglected to do, the sum of $140,969, which the lessor has never refunded, and which, by reason of *its insolvency* it *is unable* to repay. It further appears that from the first of January, 1873, when the lease took effect, to the first of January, 1886, the net earnings of the demised premises, after paying operating expenses as provided by the lease, were not sufficient to protect the interest in said first mortgage bonds of the Valley Railway Company, and that the lessee, between said dates, under and in compliance with the time of clause 2, also quoted, made *advances* out of its own *means* to the lessor company of more than $1,000,000, to enable the latter to pay the inter-

est coupons of its bonds as they matured. This large advance by the lessee to the lessor over the net earnings of the road, by the terms of the lease, is "*to be returned out of the subsequent earnings*, [of the demised railroad,] *and not otherwise.*" It has not been refunded to the lessee, and cannot be, either from that source or other assets of the lessor; the latter being insolvent, and the leased road being unable to earn such an amount after paying operating expenses and keeping the railway in repair.

In this condition of affairs, with the means of the lessee company being constantly diverted in making advances to the lessor, to enable the latter to meet the interest on its bonds, to the serious injury and detriment of the lessee and its stockholders, certain stockholders of the Pan-Handle Company, representing about 6,870 shares of the capital stock of said company, in April or May, 1885, made a written request and application to the president and directors of the said Pittsburgh, Cincinnati & St. Louis Railway Company (the lessee company) to take steps by legal proceedings or otherwise to cancel and terminate said lease.

Said board of directors, by formal resolution, refused to comply with this request and demand. Thereupon said stockholders, consisting of Samuel Jeans and the trustees of several Ohio townships and city of Steubenville, on the twentieth day of June, 1885, filed their bill or petition in the court of common pleas of Jefferson county, Ohio, against said Pittsburgh, Cincinnati & St. Louis Railway Company and the Cincinnati & Muskingum Valley Company, (the lessor and lessee in said lease,) praying, on behalf of themselves and other minority stockholders in interest with petitioners, that said lease and agreement may be declared null and void, and canceled, and all further operation thereunder, by either party, enjoined; and especially that the Pittsburgh, Cincinnati & St. Louis Railway Company be perpetually restrained from using the funds of said company to make any further advances for interest on the bonds of the lessor, for the operation and maintenance of said leased road or otherwise, under said lease, and that the Cincinnati & Muskingum Valley Company be enjoined from attempting to enforce said lease, etc.

The general grounds on which petitioners asked this relief were that said contract of lease, in its terms and operation, was a hard, oppressive, and unconscionable agreement, and a fraud upon the rights of plaintiffs; that the lessee could derive no profit therefrom, in any event, as the net earnings were to be turned over to the lessor company, which left the lessee's agreement to advance the means needed to pay the lessor's interest wholly without consideration; that the earnings of the road were entirely insufficient to supply the funds required to meet that interest; that the lessee company had already paid out large sums for improvements which the lessee was bound to make, and in the way of advancements to the lessor to pay the interest on its bonds, which the lessor could not reimburse; that the lessor could not comply with its covenants, which formed the consideration of the lessee's undertakings; that the influence and means by which said lease was brought about, executed, and accepted constituted a fraud upon plaintiffs and other minority stockholders in said lessee company; that the Pennsylvania Railway Company, in

connection with the Pennsylvania Company, which it controlled, owned a large majority of the stock in both said lessee and lessor companies, and with this controlling interest and influence, was able to ratify said lease; that it had been requested to cancel and annul said lease, but refused to take any steps in that direction; that the plaintiff Samuel Jeans, when the lease was submitted to the stockholders of the lessee company for approval, had entered his written protest against its execution, but had no knowledge of the adverse interest so controlling and causing said lease to be executed until about April 1, 1885; and that the other plaintiffs had never approved said lease, and had no knowledge or information of the circumstances under which it was executed, or of the adverse interests so controlling and causing it to be executed, until April, 1885. The lease was made an exhibit to the bill.

The defendants were regularly served with process. On the seventeenth day of July, 1885, the Cincinnati & Muskingum Valley Railway Company appeared by counsel, and *demurred* to the petition. The other defendants, the Pittsburgh, Cincinnati & St. Louis Railway Company, appeared August 17, 1885, and answered the petition. On the twenty-fourth November, 1885, the demurrer of the Valley Railway Company was overruled by the court, to which said defendants excepted, and, failing to plead further, the cause was further heard, and submitted to the court "*upon the pleadings and evidence, and the court, being fully advised in the premises,*" found the allegations of the petition were true, and that plaintiffs were entitled to the relief prayed for, and thereupon adjudged and decreed that said lease be vacated, set aside, and declared null and void. It was further decreed "that on or before January 1, 1886, the said Pittsburgh, Cincinnati & St. Louis Railway Company surrender and deliver up to the Cincinnati & Muskingum Valley Railway Company the said demised railway and property in as good order and repair as when received by the lessee. Said lessee company was perpetually enjoined and restrained from operating said leased road under said lease, and the lessor company, the Cincinnati & Muskingum Valley Railway Company, was also perpetually enjoined from enforcing, or attempting to enforce, said lease and contract against said lessee, who was, however, directed by the decree to pay or advance the sum of $52,500, the amount needed by the lessor to meet the interest on its bonds falling due July 1, 1885. From this decree neither of said defendants appealed.

On the tenth December, 1885, during said term of the court at which said decree was rendered, one Evan J. Henry was, upon his motion, made a party defendant in said cause, and allowed to file his answer therein, which he *did for himself* and other stockholders of the Cincinnati & Muskingum Valley Railway Company who might unite with him in the defense of said suit. In his answer, Henry insisted upon the validity of the lease. No action appears to have been taken thereon, nor was any new decree entered in the cause. But on the fourteenth day of December, 1885, said Henry filed an appeal-bond in the case, the condition of which recited "that whereas, the said Evan J. Henry has taken an *appeal from a certain judgment and decree rendered against him, in favor of the said Pitts-*

burgh, Cincinnati & St. Louis Railway Co., and others interested, in the court of common pleas, within and for the county of Jefferson, in the state of Ohio, at the October term of A. D. 1885, to the circuit court within and for the county aforesaid," etc. At the May term, 1886, of *said circuit court* said appeal was, on motion, dismissed; whereupon said Henry tendered his bill of exceptions, which being allowed, he presented his petition in error to the supreme court of Ohio, where the same is now pending.

In pursuance of said decree, the Pittsburgh, Cincinnati & St. Louis Railway Company, as lessee as aforesaid, on the first day of January, 1886, surrendered and delivered up the possession of said demised railway and property to the lessor, the said Cincinnati & Muskingum Valley Railway Company, which has since had full control of the same.

Charles Moran, the surviving trustee of the mortgage made by the Cincinnati & Muskingum Valley Railway Company, to secure its first mortgage bonds, knew of the pendency of this suit of Samuel Jeans *et al.* to annul said lease, but took no steps to intervene therein or defend the same.

The Cincinnati & Muskingum Valley Railway Company having made default in the payment of the interest on the bonds falling due July 1, 1885, and the aforesaid suit of "Samuel Jeans *et al.*" being then pending in the state court to cancel and annul said lease, the said Charles Moran, as surviving trustee under the aforesaid mortgage, on September 9, 1885, filed his bill in this court against the said Valley Railway Company, the mortgagor, the Pittsburgh, Cincinnati & St. Louis Railway Company, and the several plaintiffs in the action brought in the Jefferson common pleas, alleging that, as mortgagee, he was entitled to have said mortgage of September 1, 1870, foreclosed; that he was entitled to have the aforesaid lease, with the covenants therein contained, enforced against the lessee company for the use and benefit of the bondholders of the lessor company; and that said suit of Samuel Jeans *et al.* against said two railway companies was a collusive scheme, instigated and put in force by the lessee company, etc., to terminate said lease, and thus defeat the rights of the lessor's bondholders whom he, as trustee under the mortgage, represented, etc. The complainant then prays "for the appointment of a receiver to take possession of and collect the rental aforesaid, payable by the Pittsburgh, Cincinnati & St. Louis Ry. Co. to the Cincinnati & Muskingum Valley Railway Company, under and by virtue of the provisions of said lease, during the pendency of this suit, and that *upon final decree it may be held and established*, notwithstanding said collusive suit, and anything done therein; *that the said lease and contract in equity belong and appertain to the holders of said mortgage bonds*, and to this plaintiff, as their trustee, *as a muniment and part of their title; and that said lease and contract are valid; and that said holders and this complainant are entitled to enforce the same, and collect said rents as security for said bonds; and that all the estate and reversion of the lessor in said railway property, with the benefit of the lease aforesaid, and the right to receive the rents accruing upon said lease, and to enforce the performance of its covenants, may be sold and dis-*

posed of by a master commissioner to be appointed by this court, but without dispossessing the said lessee company of its possession, or any of its rights under said lease; and for such other and further relief as in equity complainant may prove to be entitled to."

The mortgagor having made default in the payment of the interest falling due January 1, 1886, the complainant filed an amended and supplemental bill, asking for a decree therein; and after non-payment of the interest maturing July 1, 1886, and January 1, 1887, he filed a second amended and supplemental bill, asking that these might be included in his decree; with the further prayer in both said bills "that the defendant, the Pittsburgh, Cincinnati & St. Louis Railway Co., in addition to the relief prayed against it in the original bill, may be restrained and enjoined from asserting or pleading the pendency of the said suit in Jefferson common pleas, or the granting of the judgment therein, or any judgment that may hereafter be rendered therein, by way of defense in any action at law which may be brought upon said coupon or interest warrants, or to enforce the performance of any legal duty entered into between said railway companies;" and for general relief.

The Cincinnati & Muskingum Valley Railway Company has failed to answer, and is in default. The other defendants have separately answered both the original and supplemental bills. They set up and rely, by way of defense, upon the pendency of the action and the judgment in said Jefferson common pleas annulling said lease. They deny that said suit was collusive, or in any way fraudulent, as to complainant. They insist that said lease was procured by such fraudulent devices and breaches of trust as rendered it void or voidable by the minority stockholders of the lessee company, whose rights and interests it injuriously affected; but, whether valid or invalid, they claim that complainant has no interest in said lease, and has no right to enforce its provisions, etc. No receiver was ever appointed.

There is no question or dispute as to the right of the complainant to a decree for the foreclosure of said mortgage by the sale of the mortgagor's equity of redemption in and to the property and interests covered by the mortgage. The main ground of controversy between the litigant parties relates to the *lease*. The real and avowed purpose of this suit was to continue this lease in force against the lessee company, in favor of the bondholders or purchasers under the sale herein asked for, to the end that he or they may have and secure the benefit of the *lessee's covenants to make advances* beyond the net earnings of the road *sufficient to pay* the interest on the bonds as it matures, *and look alone to the earnings of the demised railway for its reimbursement of such advances.*

This relief is sought, while at the same time the court is asked to sell, and thereby terminate the estate of the lessor, (which supports the lease.) Can these two things, as rights or remedies, co-exist? The trust created by the mortgage will be fully executed when the foreclosure is completed as against the mortgagors. The purchaser of the mortgaged property will not hold the same either *as bondholders, or for the benefit of bondholders, who can look alone* to the proceeds of sale. Can the court sell and as-

sign and cause to be transferred to such purchaser at foreclosure sale, and to be held for his own benefit, this *covenant* of the lessee to make advances of sums sufficient to pay interest on a debt which has ceased by foreclosure to be *a trust* against the property? Can the court compel the lessee company to advance to the purchaser under foreclosure sale, semi-annually, sums equal in amount to the interest on the bonds, when by the act of foreclosure the mortgagor has *become legally extinct*, or when its right to exist and exercise corporate franchises has not only ceased, but, by decree, has passed to another? In other words, when there will no longer be any mortgagor, any lessor, any bondholder, as such; when the trust on the property in favor of such bondholder, will have ceased,—can this court keep alive for 99 years, in favor of the purchaser under its foreclosure decree, the lessee's covenant to make *advances* semi-annually of interest on a debt that has either become extinct, or never passed to such purchaser? But, ahead of these difficulties, there is presented the question whether the complainant can, under the mortgage to him or otherwise, assert any right in or under said lease, or is entitled to have its existence maintained, and its provisions enforced for the benefit of the bondholders whom he represents. In other words, can that lease be brought within the description of the property, rights, and interests then existing or after-acquired, which were embraced in or covered by the mortgage executed to complainants? These questions have been elaborately and most ingeniously argued by the distinguished counsel for complainant. It is not deemed necessary to review that argument in detail. It has been fully and carefully examined by the court, in connection with the able briefs submitted on the part of the counsel for defendants. And as the result of its investigation the court's conclusions are as follows, viz.:

1. That, said lease having been executed *subsequent* to the mortgage, no *privity of estate or contract was thereby created* between the mortgagee and lessee. It is the well-settled rule in this country and in England that, inasmuch as *no reversion* vests in the mortgagee under such circumstances, he cannot distrain or bring an action, either at law or in equity, for the rents payable by the tenant, nor is he entitled to enforce the covenants and provisions of the lease. He has no election, either before or after the mortgagor's default, to adopt and demand the benefits of the lease without the consent of the lessee. His remedy is to foreclose upon default of the mortgagor, or to take possession of the premises, and thereby place himself in position to obtain the future profits. Either step operates as an eviction of the tenant by title paramount, and leaves him at liberty to terminate the lease and quit. See *Teal* v. *Walker*, 111 U. S. 242, 4 Sup. Ct. Rep. 420, and cases cited; *Thompson* v. *Somerville*, 16 Barb. 469; *Simers* v. *Saltus*, 3 Denio, 214; *Lane* v. *King*, 8 Wend. 584; *Burr* v. *Stanton*, 52 Barb. 377; *Austin* v. *Ahearne*, 61 N. Y. 6; *Magill* v. *Hinsdale*, 6 Conn. 469; Hil. Mortg. 207; Cook, Mortg. 402; Jones, Mortg. (3d Ed.) §§ 776–778; Tayl. Landl. & Ten. §§ 121–125; *Rogers* v. *Humphreys*, 4 Adol. & E. 299–313; *Partington* v. *Woodcock*, 6 Adol. & E. 690; Rawle, Cov. (3d Ed.) 265; *McKircher* v. *Hawley*, 16 Johns. 289; *Price* v. *Smith*, 1 Green, Ch. 516.

2. That under the facts of this case there has been no attornment, actual or constructive, nor any "equitable equivalent" therefor, by the lessee to the mortgagee, so as to change the above rule; and this court has no power to compel such an attornment by the lessee, either to the mortgagee or the purchaser under the foreclosure proceedings. The relation of landlord and tenant, as between the mortgagee and lessee, can only arise by the mutual agreement and consent of the parties. See authorities above cited.

3. The lease in question does not come within the description of the property, rights, or franchise covered by the mortgage, nor is it in any sense "after-acquired property," within the meaning of these terms as used in said mortgage. Even if the income, rents, and profits of the road had been covered by the mortgage, the personal covenant of the lessee to make "*advances*" as provided in the lease could not be treated as "income" of the road, or as a part of the "purchase" of the mortgage. The subject of "after-acquired property," under mortgages containing similar provisions and clauses as the present, has often been before the supreme court, but no case yet decided has gone to the extent of holding that personal contracts or covenants entered into with the mortgagor, and under which no new estate is acquired by the mortgagor, come within these terms. See *Railway Co.* v. *U. S.*, 112 U. S. 733, 5 Sup. Ct. Rep. 366; *Shaw* v. *Bill*, 95 U. S. 110; *State* v. *McCullough*, 104 U. S. 25; *Calhoun* v. *Railroad Co.*, 2 Flip. 442.

4. But if the lease were otherwise free from objection, if it were still in force as between lessor and lessee, and if it came within the description of the property, rights, and franchises covered by the mortgage, so that complainant had precisely the same right to claim the benefit of its provisions which the mortgagor had, (and certainly his rights could in no event rise higher than the mortgagors,) still this court would not compel the lessee to specifically perform the provisions of said lease, or enforce the lessee's covenant to make advances, beyond the net earnings of the demised road, sufficient to pay the interest on the lessor's bonds, and leave it to look alone to the future earnings of an insolvent road for its reimbursement; *because* the enforcement of that agreement would be grossly inequitable, unreasonable, hard, and oppressive on the lessee, and without any equivalent consideration, past, present, or prospective; and *because* the lessor, to whose rights the complainant claims to have succeeded, *is in default for large sums due the* lessee, and which the complainant makes no offer to pay. The mortgagee not being a party to, or interested in, or entitled to, the benefits of said lease, and the covenants therein contained; and the lessee, having never attorned to him, was not a necessary party to the suit of Samuel Jeans *et al.* in Jefferson common pleas for the cancellation and annulment of said lease. The decree in that suit is conclusive on the parties to the lease, the lessor and lessee, and it is wholly immaterial whether it was instituted at their suggestion or not. The lessor and lessee could themselves have vacated and terminated said lease by mutual agreement at any time.

Other questions, such as fraud in procuring the execution and ratifi-

cation of said lease, and want of authority or power on the part of the lessee company to enter into any binding agreement to make *advances* from its own funds to the lessor, to enable the lessor to meet the the interest on its bonds, have been discussed by counsel, but their determination is not necessary, in view of the conclusions which the court has reached on the foregoing points.

The case of *Railway Co.* v. *Railway Co.*, 8 Biss. 456, on which complainant's counsel relies with much confidence, does not, when carefully examined and analyzed, support the complainant's claim, or conflict with the conclusion here reached.

The complainant being entitled to *no* relief in respect to said lease, his original and amended and supplemental bills, as against the Pittsburgh, Cincinnati & St. Louis Railway Company, Samuel Jeans, and all defendants other than the Cincinnati & Muskingum Valley Railway Company, should be dismissed with costs, and it is accordingly so ordered and decreed. The complainant being entitled to a decree of foreclosure and sale as against the mortgagor, the Cincinnati & Muskingum Valley Railway Company, such a decree is accordingly ordered on the usual terms.

WIETZ and others *v.* POTTER and another.

(*Circuit Court, D. South Carolina.* November Term, 1887.)

1. CHATTEL MORTGAGES—VALIDITY—INSOLVENCY.
   A chattel mortgage was made and taken in good faith to secure a debt due to the mortgagee from the mortgagor, but at the date of its execution the mortgagor was hopelessly insolvent, though the fact of insolvency was not known to either of the parties. Gen. St. S. C. § 2015, enacts that preferential assignments of a part of an insolvent's property shall be void if made within 90 days of a general assignment. *Held*, that the mortgage could not be set aside, as no general assignment had been made, and the transaction was in good faith.[1]
2. SAME.
   Knowledge of an agent of the insolvency of his principal will not make a transfer of property void for fraud, if it was made by the principal in good faith, without knowledge of his insolvency.

E. W. Moise and *Lord & Hyde*, for complainants.
Mitchell & Smith and *Geo. Westmoreland*, for defendants.

SIMONTON, J. This is a bill by creditors of Edwina C. Potter to set aside as fraudulent and void a mortgage executed by her in March, 1886, to her co-defendant, Elisa M. De Choiseul.

[1] In the absence of statutory prohibition, a debtor, though known to be in failing circumstances, and contemplating an assignment, may pay or secure one or more of his creditors, though the effect of such action is to render him unable to pay or secure other claims equally meritorious. Gilbert v. McCorkle, (Ind.) 11 N. E. Rep. 296. See Woonsocket Rubber Co. v. Falley, 30 Fed. Rep. 803, and note.

The facts as developed in the testimony of complainants are these: Mrs. Potter, the defendant, was the principal in a business conducted at Greenville by and under the name of I. M. Dickson, agent. Dickson had the entire management, Mrs. Potter taking no active part in it. She, on several occasions between 1880 and 1884, borrowed money from the other defendant, Miss De Choiseul, giving her notes under seal therefor. A friend of the latter advising her to get security for her loans, she asked Mrs. Potter for such security, and obtained the mortgage in question, which covered all the stock of merchandise in the store conducted under the name of I. M. Dickson, agent. The mortgage was executed by Mrs. Potter, and by Dickson, agent, and is in the usual form, securing the notes, which at its date were all past due. At that time Miss De Choiseul had no suspicion that Mrs. Potter was insolvent, nor did Mrs. Potter herself have any doubt whatever as to her own solvency. Besides the property mortgaged she had other property, consisting of a plantation in Beaufort county, and notes and other choses in action of value. In fact, and the fact was known to her agent, Dickson, she was hopelessly insolvent. The plaintiffs, in July, 1886, attempted to get a second mortgage of the stock. Failing in this, they began suit by attachment, and seized the goods.

It is evident from this statement that there was no actual, conscious fraud in this transaction of the mortgage. Is it void under the statute law of South Carolina, or under the statute of Elizabeth? Section 2014, Gen. St. S. C., declares that if a person in insolvent circumstances attempts by any instrument, a deed, mortgage, assignment, or otherwise, to dispose of his property,—clearly his whole property,— so as to give a preference to one or more of his creditors, such an attempt is null and void. *Wilks* v. *Walker*, 22 S. C. 108; *Stewart* v. *Kerrison*, 3 S. C. 266; *Austin* v. *Morris*, 23 S. C. 405. If, however, although he be in insolvent circumstances, he conveys, assigns, incumbers, or makes payment out of a part of his property to any one or more of his creditors, such conveyance, deed, incumbrance, or payment is good, unless the debtor shall execute a general assignment within 90 days from the date of such preference. Gen. St. S. C. § 2015; *Magovern* v. *Richard*, 3 S. E. Rep. 340. In this case the defendant Potter mortgaged or transferred a part of her property to secure a valid debt. She has made no general assignment. There is nothing in this statute law of South Carolina which invalidates the mortgage, nor is it void under the statute of Elizabeth.

Both the mortgagor and the mortgagee, called as witnesses for complainant, testify to the perfect good faith of the transaction. The mortgagee did not know of the existence of other creditors of her mortgagor, and did not doubt her solvency. The mortgagor believed herself to be perfectly solvent. The fact that her agent knew that this was not true, cannot make her a party to the fraud, because it does not appear that he ever communicated it to her. Let an order be entered in accordance with this opinion.

BOND, J., concurred.

ROGERS *v.* UNITED STATES.

(*Circuit Court, S. D. New York.* November 21, 1887.)

BONDS—OFFICIAL—RECITALS.

An obligor in a bond given to the United States—reciting that the person for whom the security was given had been "assigned to duty as a property and disbursing officer, signal service, U. S. A.," and conditioned that the incumbent should faithfully expend and account for all public moneys, etc.—is bound by such obligation, and will be held to answer for a loss occurring by the incumbent's default, even though there be in fact no such office, and consequently the incumbent be not strictly an officer, but an agent or employe of the government.

Roger M. Sherman, for plaintiff.
Abram J. Rose, for defendant.

WALLACE, J. The plaintiff in error is an obligor in a bond to the United States of America, which recited that one Howgate had been "assigned to duty as a property and disbursing officer, signal service, U. S. A.," and had accepted said assignment, and was conditioned that Howgate should at all times thereafter during his holding and remaining in said office carefully discharge the duties thereof, and faithfully expend and account for all public money coming into his hands. He has brought this writ of error to review a judgment of the district court, recovered against him on the bond for moneys embezzled by Howgate while acting under the assignment to duty mentioned in the bond.

Error is assigned that there is no liability upon the bond because Howgate was not an officer, consequently there was no breach of the condition that he would faithfully expend and account for public money coming into his hands "during his holding and remaining in said office." It is insisted that there was no such office as "property and disbursing officer, signal service," created or authorized by statute; also, that Howgate was assigned to duty by the chief signal officer, and was not appointed by the president or the head of a department, and, therefore, could not be an officer.

It is well settled that a bond not prescribed by law, but voluntarily given to the United States, is a valid obligation; that the United States have a right to enter into a contract not prohibited by law, and appropriate to the just exercise of their powers; and that a bond to secure the government for public moneys intrusted to an agent, or protect it against loss in the transaction of its legitimate business, is such a contract. *U. S.* v. *Tingey*, 5 Pet. 115; *U.S.* v. *Bradley*, 10 Pet. 343; *Tyler* v. *Hand*, 7 How. 573; *U. S.* v. *Hodson*, 10 Wall. 395; *U. S.* v. *Mora*, 97 U. S. 413; *Jessup* v. *U. S.*, 106 U. S. 147, 1 Sup. Ct. Rep. 74; *Match Co.* v. *U. S.*, 31 Fed. Rep. 271. Hence, there being no question that the bond in suit was a voluntary one, the obligor is liable if it was taken to indemnify the government against the miscarriage of an officer, or of an agent or employe who was to be intrusted with money or property in the

course of a lawful employment, and the terms of the bond are adequate, and a breach has been shown.

It may be conceded, as is asserted for the plaintiff in error, that, when the bond was given, there was no such office under the government as that described in the bond; in other words, that no such office had been specifically created by act of congress, and no act had been passed authorizing the president or the head of a department to appoint an incumbent, and, therefore, within the decision of *U. S.* v. *Germaine*, 99 U. S. 508, Howgate was not an "officer," and did not hold an office while the bond was in force. Assuming this, the bond must be treated as a contract to secure the government against loss from the unfaithfulness of an employe in the signal service, who was about to be intrusted with public money in the course of his employment. The obligor, as well as the obligee, is presumed to have known the law. He knew that Howgate could not have been appointed to an office, and that what was termed an "office" in the bond described merely an employment. The recitals and the condition evince unequivocally an intention on the part of the government to exact, and of the obligor to give, indemnity, whereby the obligor was to pay not exceeding the penalty of the bond in case Howgate should not faithfully expend and account for the money coming into his hands while discharging the duties to which he had been assigned. As is said by the court in *U. S.* v. *Germaine*, nine-tenths of the persons rendering service are agents or employes working for the government, and paid by it without thereby becoming its officers. When the plaintiff in error undertook to become responsible for the fidelity of one of these employes, "during his holding and remaining in said office," he must have understood that his responsibility extended to a miscarriage of the employe while exercising the duties to which he had been assigned. These duties were characterized with sufficient accuracy, for practical purposes, in the bond as those of a property and disbursing officer.

There is no error, and the judgment of the district court is affirmed, with costs.

BUTTERFIELD *v.* TOWN OF ONTARIO.

(*Circuit Court, N. D. New York.* November 16, 1887.)

NEGOTIABLE INSTRUMENTS—PURCHASE FROM BONA FIDE HOLDER—KNOWLEDGE OF EQUITIES.

The purchaser of negotiable paper with knowledge of the equities existing against it, can recover the full amount of the face value thereof, and is not limited to a recovery of the amount paid or advanced by him for the paper, when he purchases of one who acquired it before maturity, for value, and without notice of any infirmity or defense.[1]

[1] The purchaser of a negotiable instrument from a bona fide holder for value, acquires as good a title as the innocent holder had, and may recover thereon, although he may have had notice of infirmities in the note when he took it. Bodley v. Bank, (Kan.) 16 Pac. Rep. —.

Rhodes, Coon & Higgins, for plaintiff.
S. D. Bentley, for defendant.

WALLACE, J. The defendant insists that, because, when the plaintiff bought the negotiable paper in suit, he was aware that the defendant claimed that it had been made and put into circulation without authority, by persons who assumed to be its agent, the plaintiff can only recover what he paid for the paper, although he purchased it from a holder who acquired it before maturity, for value, without notice of any infirmity, or ground of defense, and under circumstances that estopped the defendant from asserting that there was any defense. The law of commercial paper does not recognize any principle upon which this contention can be maintained. The rule is familiar and elementary, that a purchaser of such paper acquires the title of his vendor, and all the right of his vendor, to enforce it for the full amount of the promise, against the maker; and although the purchaser has knowledge of equities existing between the original parties to the paper, which his vendor did not have when he became the owner, the purchaser is not affected by such equities, but stands upon the title of the prior owner, and his title is intact. It is entirely clear that if any previous owner of the bonds and coupons in suit was a *bona fide* holder for value, the plaintiff, upon showing that he himself paid value, can avail himself of the position of such previous holder.

There is a class of cases in which a purchaser of negotiable paper before maturity, who acquires knowledge that his vendor was not a *bona fide* holder of the paper, and that the paper was subject to a defense in his hands, is permitted to recover only what he has advanced upon purchasing the paper, before he acquired such knowledge. These are cases in which there was no *bona fide* holder previous to the plaintiff. The principle is that the plaintiff was only a *bona fide* purchaser *pro tanto*, and, therefore, entitled to recover to that extent only. *Dresser* v. *Construction Co.*, 93 U. S. 92; *Harger* v. *Wilson*, 63 Barb. 237; *Holcomb* v. *Wyckoff*, 35 N. J. Law, 38; *Allaire* v. *Hartshorn*, 21 N. J. Law, 665; *Campbell* v. *Nichols*, 33 N. J. Law, 88. These cases have no application to the present case.

The motion for a new trial is denied.

EASTON and others v. HOUSTON & T. C. RY. Co. and others,[1] (MARTIN, Intervenor.)

(Circuit Court, E. D. Texas. November, 1887.)

1. MASTER AND SERVANT—NEGLIGENCE—FELLOW-SERVANT.
The petitioner was a section hand in the employ of a receiver of a railroad, and, while returning to a section-house on a hand-car, it was run into by a train in charge of an engineer in the employ of the receiver, and petitioner was injured. *Held*, that as the petitioner at the time of the injury was running a car on the track, he was brought into direct relations with the employes running the train, and they were fellow-servants, respectively charged with the ordinary risks of each other's negligent acts.[2]

2. NEGLIGENCE—ACTION IN FEDERAL COURT—LAW GOVERNING.
Petitioner sought to recover damages for injuries in the United States court against a receiver of a railroad appointed by the court. *Held*, that the laws of the state where the action arose would govern as to defendant's liability.
SABIN, J., dissents.

On Exceptions to Master's Report.

Henry Martin was allowed to intervene in this case to claim damages from the receivers for injuries inflicted by a collision upon their railway. The receivers demur and deny, and the matter was referred to a master, who reported that he found that petitioner at the time of the accident was in the employ of the receivers as a day-laborer or section hand; that between 7 and 8 o'clock on the morning of the fourteenth of July, 1886, the petitioner, with three other section hands and the master in charge of his section, in due course of employment, were traveling on a hand car over said section, returning to the section-house of said section from the city of Austin; that when about 200 yards distant from said section-house, approaching it, the hand car upon which they were traveling collided with a locomotive running in the opposite direction, and on its way to said Austin, and then being operated by the employes of said receivers, likewise in due course of employment; that the point where said collision occurred was in a curve of said railway; that the view of the track between the hand car and the locomotive was obstructed by a growth of trees near the track, and upon the inner side of the curve, so that those upon the hand car could not see the approaching locomotive until it was within 400 or 480 feet of them, and those operating the locomotive could not see the hand car until within a distance of about 100 yards; that the section master saw the smoke-stack of the approaching locomotive when distant 400 or 480 feet from it, and when the hand car was moving down grade at a speed of between six and eight miles an hour, when he called to and signaled the hands who were operating the the car to stop; that the car was struck by the locomotive before it was

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

[2] Upon the question of who are fellow-servants within the meaning of the rule exempting the master from liability for injuries resulting to an employe through the negligence of a co-servant, see Reddon v. Railroad Co., (Utah,) 15 Pac. Rep. 262, and note. Theleman v. Moeller, (Iowa,) 34 N. W. Rep. 765; Railroad Co. v. De Armond, (Tenn.) 5 S. W. Rep. 600.

stopped; that when the engineer on the locomotive first saw the car, about 300 feet distant, the locomotive was running at a speed exceeding 18 miles per hour; that the engineer at once applied the air-brakes, and used all means to stop the locomotive, but was unable to do so, but did reduce its speed before it came in contact with the car; that at the time of the collision the section master was sitting on the front of the car, while petitioner and his fellow-workmen were "pumping" the lever by which the car was propelled, petitioner and one other workman being at the rear end of the lever, his face in the direction in which the car was moving, the other two section hands being at the forward end of the lever; that when the section master gave the alarm the men upon the car, except petitioner, jumped therefrom to save themselves; that almost immediately the collision occurred; so quickly that, as one witness testifies, the tools carried upon the car were thrown in the air by the force of the collision about the time he reached the ground; that the whistle of the locomotive was several times sounded as it crossed highways within a mile of the section house, the last time about 400 yards from the point of collision; that the whistle was not sounded when the car was discovered, as the fireman from his position on the locomotive could not reach the whistle lever, and both hands of the engineer were engaged in applying the checking apparatus of the locomotive, but that the fireman rang the locomotive bell; that the wind was blowing from the car towards the locomotive, and those upon the car did not hear the bell or any of the whistle alarms; that petitioner did not see the locomotive, did not hear the call of the section master or see his signal to stop, did not see the men jump from the car,—in fact, did not see or become aware of any of the occurrences aforesaid; that when the car was struck, petitioner was thrown a distance of about 40 feet, and about as high as the smoke-stack of the locomotive. and did not "know anything" until he found himself lying several hours thereafter upon the gallery of the section-house aforesaid; that the engineer in charge of the locomotive which collided with the hand car as aforesaid was guilty of negligence in running the locomotive at the rate of speed aforesaid around said curve, in violation of rule 12, limiting the speed in that place to six miles an hour, and that, but for such negligence, the accident by which petitioner received his injuries would not have occurred; and that, under the federal authorities as the master construed them, the negligence of the said engineer was not that of a fellow-servant with petitioner in that sense which would exonerate the defendants, as the common master, from liability therefor, but that his said negligence was, in legal contemplation, the negligence of the defendants; that under the decisions of the appellate courts of Texas the defendants would not be liable to petitioner for the consequences of such negligence; that the negligence of the engineer in running his locomotive at a speed exceeding 18 miles an hour, under the circumstances hereinbefore detailed, was the proximate cause of petitioner's injuries, and that the failure of the petitioner to see the approaching locomotive, considering the position which he occupied upon the hand car and the short space of time which transpired between

the time when the locomotive could first be discovered and the moment when the collision occurred, is not sufficient to charge him with negligence efficiently or substantially contributing to his injuries, and that therefore petitioner is entitled to recover in this action, and that the said receivers are officially liable to him for the payment of such damages as may be adjudged him as compensation for his injuries.

Campbell & Dunham, for intervenor.

O. T. Holt, for receivers.

PARDEE, J. According to the report of the special master, the petitioner, a section hand in the employment of the receivers, while operating a hand car on the railway, was injured through the negligence of another employe of the receivers then operating a locomotive on the same tracks. The duties of the petitioner as a section hand are not specifically set forth by the master, but the report does state that at the time of the injury complained of the petitioner, with other section hands and the section foreman, "in due course of employment, were traveling on a hand car over said section," and the petitioner and his fellow-workmen were pumping the lever by which the car was propelled. There is no question but that the engineer in charge of the locomotive was in the line of his duty. It follows that the duties of the two employed and paid by the same master brought them to work at the same place at the same time, so that the negligence of the one in doing his work injured the other in doing his work. Their separate services had an immediate common relation, to-wit, the use of the same tracks. Neither worked under the control or orders of the other.

The master says in his report "that under the federal authorities, as I construe them, the negligence of said engineer was not that of a fellow-servant with petitioner in that sense which would exonerate the defendants as the common master from liability therefor, but that his said negligence was, in legal contemplation, the negligence of the defendants. I am of the opinion that under the decisions of the appellate courts of Texas the defendants would not be liable to petitioner for the consequences of such negligence."

It seems to be conceded as to the Texas decisions the master is correct.

The case here is one arising in Texas, and under the laws of Texas, and Texas law ought to control as to the defendants' liability. There is no other law to govern it. As federal authorities sustaining the finding of the master, I have been referred to the case of *Railroad* v. *Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, which holds that "a conductor of a railroad train, who has the right to command the movements of the train, and to control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow-servant to the engineer and other employes of the corporation on the train;" and to the later case of *Railroad Co.* v. *Herbert*, 116 U. S. 648, 6 Sup. Ct. Rep. 590, where it was held that a brakeman and the officer or agent of the company charged with the duty of keeping the cars in repair were not fellow-servants within the common-law rule. These cases

were decided by a divided court. In the *Case of Ross*, the vice-principal doctrine is recognized, and in the *Case of Herbert*, the fellow-servant negligence rule is modified by limiting the application of the rule to employes in the same department of service, and under this latter authority I can well see how the master might conclude in this case that, as the section hand and the locomotive engineer are in separate departments, they are not fellow-servants assuming the risks of each other's negligent acts. I am, however, of the opinion that neither of these cases is applicable to the facts of the present case. Whatever may be as a general rule the duties of the section hand, as distinguished from the duties of those railroad employes running trains and locomotives, at the time of complainant's injury he was running a car on the road, and his duty and employment brought him in direct connection and relation with the employes running the special train causing the injury. Both were using the tracks of the railway at the same time, and so near to each other that the conduct of the one necessarily affected the comfort and safety of the other. At that time it seems to me they were fellow-servants in the same general department, governed by the same rules, and respectively charged with the ordinary risks of each other's negligent acts.

The case of *Randall* v. *Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, by a unanimous court, seems to me to be directly in point. In that case a brakeman of one train, while attending a switch on one track in a railroad yard, was injured by the negligence of an engineer of another train on another track. They were held to be fellow-servants, within the rule, and the rule was illustrated as follows:

"They are employed and paid by the same master. The duties of the two bring them to work at the same place, at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object,—the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation, their common master."

This illustration fits this case as though made especially for it.

As the Texas authorities are conceded to be against the intervenor, it is not necessary to go further with this case. An order will be entered sustaining the defendants' exceptions to the master's report, and dismissing the intervention of Henry Martin, with costs.

SABIN, J., dissenting from the opinion of the circuit judge, the matter was allowed to lie over, to be heard by the circuit justice, or for the division to be certified, as counsel may elect.

EASTON and others v. HOUSTON & T. C. RY. Co. and others.[1] (FIREBAUGH & Co., Intervenors.)

(*Circuit Court, E. D. Texas.* November 19, 1887.)

CARRIERS—REDUCED RATES—LIMITATION OF TIME.

On January 28, 1887, petitioner entered into a contract with the agent of a receiver of a railroad for shipment of goods from New York to Texas at cut freight rates. The steamer at New York refused to receive the goods, and February 12, 1887, the receiver guarantied the contract, and the goods were shipped March 1st. On March 4th the petitioner was informed that the time had expired, and the former rates restored. Petitioner testified nothing was said to him as to limitation of time of shipment; the agent of the receiver was under the *impression* he had mentioned it. *Held*, that the direct testimony of the petitioner and the conduct of the parties showed that no immediate shipment was contemplated.

On Exceptions to Master's Report.

W. H. Firebaugh & Co. were allowed to intervene in this case, to claim an amount paid by them for freight in excess of amount contracted for with the agent of the receivers, and the matter was referred to a special master, who reported as follows:

I find that on the twenty-eighth of January, 1887, H. D. Patrick, local agent for the defendant receivers in the city of Austin, offered to W. H. Firebaugh & Co., the petitioners, who then were, and for some years had been, merchants in said city, a special or "cut" rate of fifty cents per one hundred pounds upon freight from New York city to Austin if shipped in quantity of not less than twenty thousand pounds in one shipment, and that such offer was for freight for immediate shipment by "the Morgan" line of steamers from New York. That immediately thereafter petitioners sent an order to their correspondents in New York, C. M. Biddle & Co., to ship to them at Austin, via the "Morgan" line of steamers, a quantity of freight consisting of tin, iron, and white lead, weighing more than twenty thousand pounds, and in said order stated the special rate aforesaid. That on the tenth of the following month the said Biddle & Co. notified petitioners that the said Morgan line refused to receive the freight at the special rate named; that immediately, on said tenth of February, petitioners consulted the said agent, Patrick, and stated to him the refusal of the Morgan line to receive the freight at the "cut" rate; that thereupon the said agent communicated the facts to the general freight agent of the defendants, who replied, guarantying to petitioners the special rate offered on the twenty-eighth of January, whereupon petitioners directed their New York correspondent by telegraph as follows: "Ship the goods as soon as possible; we have guaranty;" that on the first of March the said Biddle & Co. delivered the goods ordered on the twenty-eighth of January, and referred to in the above quoted telegram, to the said Morgan line in New York city, consigned to petitioners at Austin, and received therefor *eight* bills of lading, the aggregate weight of the freights so delivered being twenty-six thousand and sixty-nine pounds. I find that the amount of freight charges for transportation of said freight from New York to Austin, at the rate of 50 cents per hundred pounds, would be $130.35, and 95 cents insurance—$131.30; that, upon the arrival of the freight at Austin, about the twenty-first of March, the said agent of the receivers at that station demanded and received of petitioners as freight money on said shipment,

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

$298.51. It is for the difference between the amount so paid and the aforesaid sum of $131.30, to-wit, $167.21, that petitioners sue, claiming that such excess was an overcharge under the contract of January 28th, and the guaranty of February 12th. The defendants contend that, under the contract of January 28th, the goods were to have been made in *one shipment*, and under *one* bill of lading, and that the delay of the shipment until March 1st was not such "immediate" shipment as was contemplated by the parties under the January contract, and the subsequent arrangement of February 12th.

I find that the steam-ships of the Morgan line, over the route by which the freight was mutually contemplated should be shipped during the month of February, sailed from the port of New York on Tuesday, Thursday, and Saturday of each week, and that under these appointments six steam-ships presumably sailed from said port over said route after the twelfth of February, and before the first of March. I find that the delivery of the freight by Biddle & Co. to the Morgan line in New York in one day was *one shipment* under the terms of the January agreement between petitioners and defendants' agent; and the fact that the Morgan line issued, and said Biddle & Co. accepted, more than *one bill of lading*, did not alter that feature of the transaction. I find that the "immediate" shipment, contemplated in the proposition of January 28th, meant that the freights should be shipped within a reasonable time after January 28th, and that this limitation was carried into the arrangement of February 12th, and that the shipment of the freight by plaintiffs' New York agents, Biddle & Co., on the first of March, was not, under the facts and circumstances of the case, a shipment within a reasonable time after February 12th, and that such delay relieved the defendants of any liability under their guaranty of February 12th to protect the cut or special rate offered on the twenty-eighth of January.

I find, it not otherwise appearing, that the freight money paid by plaintiffs, as aforesaid, was in conformity with the regular tariff rates charged on the first of March for transportation of freight of the character of plaintiffs' from New York to Austin over the Morgan line, and that the defendants had the right to collect the same from the plaintiffs.

The premises considered, I am of the opinion, and so find, that petitioners are not entitled to recover in this action, and I recommend that a decree be entered accordingly.

R. G. West, for intervenors.

J. H. Davenport, Jr., for receivers.

PARDEE, J. The issue in the case is whether the contract between the intervenors and the receivers for a cut rate from New York to Austin was limited to immediate shipments.

The evidence of W. H. Firebaugh, who made the contract with Patrick, agent of the receivers, is that at the time of making of the contract there was nothing said about a limit of time. "There was no limit then as to a certain time of shipment."

Mr. Patrick testifies: "My instructions were for immediate shipment. My *impression* is, I so stated it to Mr. Firebaugh at the time, that they were for immediate shipment. It was a cut in rates, and I did not know how long it would last." Fourteen days after the contract, on February 12th, on the refusal of the Morgan line being communicated, the receivers guarantied the contract, and Mr. Patrick is not positive that then he said anything about immediate shipment. The shipment was made on March 1st, and on March 4th, as Mr. Firebaugh testifies, Mr. Patrick

notified him "that the time had expired, and that the usual rates had been restored," and in this testimony Mr. Firebaugh is not contradicted by either the impression or the recollection of Mr. Patrick.

This is practically the material evidence on the point of limitation as to time of shipment under the contract. The defendants set up the limitation, and they fail to establish it by direct evidence; the impressions of their agent cannot overcome the positive testimony of the intervenors.

The conduct of the parties in relation to the shipment shows that neither intended or looked to what is now claimed as to immediate shipment. This appears by the fact that 14 days elapsed before the guaranty was given, and 16 more before the shipment was made, and by the significant fact that March 4th, three days after the shipment, the defendants' agents notified intervenors that the time had expired, and that the usual rates had been restored.

The exceptions to the master's report should be sustained, and the intervenors should have a decree for the return to them by the defendants of the sum of $167.21, and for costs of intervention.

DENNY v. DODSON.

(Circuit Court, D. Oregon. November 28, 1887.)

1. PUBLIC LANDS—RAILROAD GRANT—NORTHERN PACIFIC—EFFECT OF.
   The congressional grant of the odd-numbered sections of the public land on the line of the Northern Pacific Railway to that corporation is a present one, and passes the legal title to the grantee; but the corporation is not authorized to dispose of or incumber the land without the consent of congress, except the earned portions lying opposite to any 25-mile section of the road, after the construction thereof, and the acceptance of the same by the United States.
2. SAME.
   No entry could be made of any land in an odd-numbered section within the limits of the grant, under the town-site, homestead, or pre-emption act after August 13, 1870, when the railway company filed its map of general route with the secretary of the interior, in the office of the commissioner of the general land-office.
3. SAME.
   The location of the line of the road in a state or territory determines the width of the grant,—whether of 10 or 20 alternate sections,—without reference to the fact of whether the grant includes lands within the limits of a state or not.
4. SAME.
   The condition attached to the grant to the railway company, that the road shall be completed by a day named, is a condition subsequent, for a breach of which no one but the government, the grantor, can claim a forfeiture; and the title of the company, though defeasible in the mean time, is still the legal one, on which it may maintain ejectment against any intruder or trespasser.

Action to Recover Possession of Real Property.

This is an action of ejectment to recover possession of certain lots in the town of Arlington, Gilliam county, Oregon, being portions of section

21, in township 3 N., of range 21 E. of the Willamette meridian, in that state.

The plaintiff claims title to them under the grant made to the Northern Pacific Railroad Company, by the act of congress of July 2, 1864. The complaint alleges that he is the owner in fee of the premises; that the defendant is in possession thereof, and wrongfully withholds the possession from him to his damage of $200. In order to show that the action arises under a law of the United States, so as to bring it within the jurisdiction of the circuit court, the complaint refers to the act of July 2, 1864, "granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and to acts and joint resolutions supplementary thereto and amendatory thereof, and alleges that the plaintiff derives title to the lands in controversy, and holds them under those acts and resolutions, and by a deed from the Northern Pacific Railroad Company. The complaint then sets forth, that, under these acts and resolutions, there was granted to that company, its successors and assigns, for the purpose of aiding in the construction of the railroad and telegraph line mentioned, every alternate section of public land designated by odd numbers, to the amount of 20 alternate sections per mile, on each side of the railroad line, as the same should be adopted by the company, through the territories of the United States; that the general route of the railroad through the territory of Washington, and opposite to the premises in controversy, which are within the boundary of the grant, was fixed by the company, on or about the thirteenth day of August, 1870, and a map and plat thereof were, on that day, filed with the secretary of the interior, in the office of the commissioner of the general land-office; that thereupon all lands included within the grant opposite to the general route of the road, as thus fixed, including the lands in controversy, were, by order duly made and promulgated, withdrawn from sale, entry, and pre-emption, as in the act provided, and that this order has ever since been and now is in full force and effect; that on the twenty-ninth day of June, 1883, the line of the road was definitely fixed and located through the territory of Washington, opposite to the premises, and a map, showing the definite location of the line of the road, was on that day filed with the secretary of the interior, in the office of the commissioner of the general land-office; that the road was fully constructed on the line thus definitely located by the company, opposite to the premises, on or about the twenty-first day of December, 1884, and that the same was approved and accepted by the president of the United States on the seventeenth day of January, 1885; that the company has duly selected the premises in controversy, in accordance with the regulations of the department of the interior, and has paid to the government the cost of surveying the same; that on said thirteenth day of August, 1870, upon the withdrawal of the lands within the grant, as mentioned, the premises in controversy were public lands, not mineral, and not reserved, sold, granted, or occupied by homestead or other settlers, nor otherwise disposed of or located upon, and were free from pre-emption or other claims

or rights, and to them the United States had full title, not appropriated otherwise than by the said act of congress, and the acts and joint resolutions supplemental thereto and amendatory thereof; and that said lands thenceforth were reserved to, and thereupon became the property of the Northern Pacific Railroad Company; that on or about the third day of December, 1885, the company, for a valuable consideration, conveyed the premises to the plaintiff, who has since been and now is the owner, seized in fee and entitled to the possession thereof. The complaint concludes with a prayer that the plaintiff have judgment against the defendant for the possession of the premises, and for the sum of $200 damages for wrongfully withholding the possession from him. To the complaint the defendant demurred, upon the ground that it did not state a sufficient cause of action; and upon this demurrer the cause was heard.

Cyrus A. Dolph and *Ralph M. Dement*, for plaintiff.

Alfred S. Bennett and *J. Q. Adams*, for defendant.

Before FIELD, circuit justice, and DEADY, district judge.

FIELD, Circuit Justice. As the complaint avers that the premises in controversy were a part of the land granted to the Northern Pacific Railroad Company by the act of congress of July 2, 1864, and that they were free from any claims which would defeat their vesting in the company, at the time the general route of its railroad was designated, and a map thereof filed with the commissioner of the general land-office, and the lands opposite to such route were withdrawn from sale, entry, and preemption, the only objections that can be raised upon the demurrer must go to the sufficiency of the title granted to maintain ejectment, or to the omission of the complaint to aver that the lands were as free from any other claims when the route became definitely fixed as when the general route was designated, and a map thereof filed; and such is the purport of the argument of the defendant.

As to the title, his contention is that the grant contained in the act of July 2, 1864, "was not a grant of title *in præsenti*, but only of an inchoate interest" in the lands described; that the building of each 25-mile section was, by the terms of the act, a condition precedent to the vesting of title to lands coterminous to such section; and that, upon the failure of the company to complete the entire road within the time designated in the act, the title to all lands not then earned remained in the United States, and could not pass to the company without affirmative action on the part of congress. By "an inchoate interest," as here used, is probably meant an interest which might afterwards be enlarged into a title as the construction of the road proceeded. To determine the weight of these objections, a careful examination of the language and object of the act of July 2, 1864, is necessary. 13 St. *c.* 217, p. 365.

By the first section the Northern Pacific Railroad Company was incorporated, and authorized to lay out, construct, and maintain a continuous railroad, and telegraph line, with the appurtenances, from a point on Lake Superior, in the state of Minnesota or Wisconsin, and thence westerly by the most eligible route, as should be determined by the com-

pany, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget sound, with a branch by the valley of the Columbia river to a point at or near Portland, in the state of Oregon. The company was also invested with all the powers, privileges, and immunities necessary to carry into effect the purposes of the act.

By the third section a grant of land was made to the company. Its language is:

"*That there be, and hereby is, granted* to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any state, and wherever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office. And whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

By the fourth section it was enacted:

"That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, *confirming to said company the right and title to said lands*, situated opposite to and coterminous with said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company, conveying the additional sections of land as aforesaid."

By the sixth section it was enacted:

"That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, *after the general route shall be fixed*, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed except by said company, as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and

the same are hereby, extended to all other lands, on the line of said road, when surveyed, excepting those hereby granted to said company."

The act also declared that the grants were made, and the rights and privileges were conferred upon and accepted by the company, on the condition that it should commence work on the road within two years from the approval of the act by the president, and complete and equip the whole road by the fourth of July, 1876; and upon the further condition that, if the company should make any breach of the conditions of the grants, and allow the same to continue for upwards of one year, then at any time thereafter the United States might "do any and all acts and things" needful and necessary to insure a speedy completion of the road. By a subsequent act, the time for the commencement of the road was extended to July 2, 1868, and for its completion to July 4, 1878. 14 St. 355.

The terms in which the land is granted do not support the contention of the defendant. They import the transfer of a present title, and not one to arise in the future. They are "that there be, and hereby is, granted" to the company every alternate section of the lands designated. There is nothing in them to indicate that only a partial or limited interest is intended. The lands themselves, described by the sections named, are granted; and, of course, whatever interest the United States possessed in such lands passed, unless the import of the terms be qualified by subsequent provisions of the act; and whether such is the case we shall presently consider. Similar terms are employed in a large number of congressional grants of land, and notably so in those made to aid in the construction of railroads. They have been considered by the supreme court in many instances, and in all of them have received the same interpretation; which is that unless restricted by other clauses of the act, they import a grant *in præsenti*, conveying at once the interest of the United States to the lands described, whatever that may be.

As the sections granted are to be along the line of the railroad, they cannot be located until the line of the road is fixed. The grant is therefore in the nature of a float; and the title does not become definitely attached to specific sections until they are capable of identification. But when they are once identified, the title attaches as of the date of the grant, except as to such parcels as in the mean time by the terms of the act have been otherwise appropriated. It is in this sense that the grant is termed a grant *in præsenti*. The cases of *Schulenberg* v. *Harriman*, 21 Wall. 44, 65; *Railroad Co.* v. *U. S.*, 92 U. S. 733; *Railway Co.* v. *Railway Co.*, 97 U. S. 491; and *Railroad Co.* v. *Baldwin*, 103 U. S. 426,—may be examined for further illustration of this subject, and the construction by the supreme court of similar terms of grant. In the *Leavenworth Case*, that court said:

"'There be and is hereby granted' are words of absolute donation, and import a grant *in præsenti*. This court has held that they can have no other meaning, and the land department, on this interpretation of them, has uniformly administered every previous similar grant. They vest a present title in the state of Kansas, [the grantee named,] though a survey of the lands and

a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels, as if it had specifically described them." 92 U. S. 741.

The *present title* here mentioned is a legal title, as distinguished from an equitable or inchoate interest arising upon a contract or promise of the government. The words "there be and is hereby granted" are not words of contract or promise, but, as said in the citation, are words of absolute donation; that is, they transfer a present legal right to the sections designated, which becomes attached to them specifically whenever they are identified.

The defendant contends that the natural import of the granting terms is qualified and restricted by the fourth section of the act, which provides that whenever 25 miles of the road are completed in a good, substantial, and workmanlike manner, and commissioners appointed to examine the same have made a report to that effect to the president, patents shall be issued "confirming to the company the right and title to said lands situate opposite to and coterminous with the said completed section of the road." Why, it is asked, is there a necessity of such patents, if the title passed by the act itself? There are many reasons why patents should be issued upon the completion of portions of the road. They would identify the lands which are coterminous with the road completed; they would be evidence that the grantee, in the construction of that portion of the road, had fully complied with the conditions of the grant, and to that extent the grant was relieved of possibility of forfeiture for breach of its conditions; and they would obviate the necessity of any other evidence of the grantees' title to the lands embraced in them. They would thus be deeds of further assurance confirmatory of the grantees' title, and so be invaluable to them as a source of quiet and peace in their possessions. The word "confirming" is applied to such patents in section four. Words of sale and transfer, if used, would not change the character and operation of the patents. There are many instances in the reports where such effect—that is, as deeds of further assurance, or as evidence of the grantees' previous title—has been given to patents authorized or directed to be issued to parties, notwithstanding a previous legislative grant of the premises to them, or a confirmation to them of a previously existing title. The case of *Langdeau* v. *Hanes*, reported in 21 Wall. 521, is an instance of the latter kind. The supreme court there said:

"In the legislation of congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey, but, where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government."

See, also, *Wright* v. *Roseberry*, 121 U. S. 488, 497, 7 Sup. Ct. Rep. 985.

The case of *Rutherford* v. *Greene's Heirs*, 2 Wheat. 196, is also instructive on this point, as well as on the character of the title conveyed. In

1782 the state of North Carolina passed an act providing "that twenty-five thousand acres of land shall be allotted for and given to Major General Nathaniel Greene," within the bounds of a tract reserved for the use of the army, to be laid off by commissioners designated in the act, as a mark of the high sense the state entertained of "the extraordinary services of that brave and gallant officer." The commissioners alloted the twenty-five thousand acres, and in 1783 caused a survey of them to be made and returned to the proper office; and the suit brought by Rutherford, who claimed, under a subsequent entry, five thousand acres of the same tract, turned upon the validity of Greene's title, and the date at which it commenced. It was contended by Rutherford's counsel that the words of the act gave nothing; that they were in the future, not in the present tense, and indicated an intention to give in future, but created no present obligation on the state, nor present interest in Gen. Greene. But the court, speaking by Chief Justice MARSHALL, answered that it thought differently; that the words were words of absolute donation, not, indeed, of any specific land, but of 25,000 acres in the territory reserved for the officers and soldiers; that, as the act of setting apart that quantity to Gen. Greene was to be performed in the future, the words directing it were necessarily in the future tense; but that nothing could be more apparent than the intention of the legislature to order the commissioners to make the allotment, and to give the land when allotted to Gen. Greene. And the court held that the general gift of 25,000 acres, lying in the reserved territory, became by the survey a particular gift of that quantity contained in the survey, and concluded an elaborate examination of the title by stating that it was the clear and unanimous opinion of the court that the act of 1782 vested a title in Gen. Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made and returned in pursuance of that act gave precision to that title and attached it to the land surveyed.

On the argument of the case it was also urged against the title of Gen. Greene, that, by the constitution of North Carolina, there should be a seal of the state, to be kept by the governor, and affixed to all grants; and that the legislative act could not amount to a grant, since it wanted a formality required by the constitution. But the court answered that the provision of the constitution was intended for the completion and authentication of an instrument attesting a title previously created by law, which instrument was merely the evidence of prior legal appropriation, and not the act of original appropriation itself. And the court said that this was so obvious that it would certainly have thought it unnecessary to advert to it, had not the argument been urged repeatedly, and with much earnestness, by counsel of the highest respectability.

While a legal title to the sections described, as distinguished from a merely equitable or an inchoate interest, passed to the railroad company by the act of July 2, 1864, it was not a title which could be disposed of by the company without the consent of congress, except as each 25-mile section of the road was completed and accepted by the president, so as

to cut off the right of the United States to compel the application of the lands to the purposes for which they were granted, or to prevent their forfeiture in case of the company's failure to perform the conditions of the grant. The lands were granted to aid in the construction of the road and telegraph line, and, as is evident from different provisions of the act, congress designed to secure this application of them. But such application would not, of itself, operate to transfer the title; there is nothing translative of title in work performed. It would merely remove the restriction upon the use and sale of the title already granted. In that way it would not only give the grantee the right to a patent, but would render him free to sell and transfer that right to purchasers. But, in advance of the construction of the road and telegraph line, or of particular portions, the lands could not be used without the permission of congress, so as to cut off the rights of the United States mentioned above. Such permission was given when, on the thirty-first of May, 1870, by the joint resolution of the two houses, congress authorized the company to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and description, real, personal, and mixed, including its franchise as a corporation. In the property mentioned, the lands granted to the company are included. It can hardly be supposed that congress would have allowed this mortgage, if the company had no legal title to the lands which could be held as security for the moneys advanced on the bonds and transferred by sale upon foreclosure, in case default should be made in their payment. To suppose that congress would sanction such a proceeding would be to impute to it complicity in a fraud, which cannot be entertained for a moment. The conclusion follows that it allowed the execution of the mortgage, because it had transferred to the company a title to the lands covered by its grant, which could in this way be made available to raise funds for the work.

This interpretation of the granting terms of the act, as qualified by subsequent provisions, not only secures the application of the property for the construction of the road and telegraph line, but it also secures the company against its alienation by the government to other parties. The legal title to the sections having passed, the government could not grant the land to others, when no forfeiture had been previously decreed.

My attention has been called to the case of *U. S.* v. *Childers*, 8 Sawy. 171, 12 Fed, Rep. 586, in which the district judge of this district holds that the act of July 2, 1864, does not operate as a present grant to the Northern Pacific Railroad Company of the lands described, but is merely an agreement or provision that the lands shall be conveyed to it absolutely when, and as fast as, any 25-mile section of the road is constructed and accepted by the United States; and that, in the mean time, the title to the unearned and unpatented sections remains in the United States. This conclusion is founded upon the provision mentioned, that, notwithstanding the act contains words of present grant, a patent is to issue to the company for the coterminous odd sections, upon the completion of every 25-mile section of the road and its acceptance by the president;

and upon its supposed necessity to secure the application of the lands for the construction of the road, and enable the United States to apply the unearned and unpatented portion of them in case the company should fail to complete the road as rapidly as provided. The case of *Rice* v. *Railroad Co.*, 1 Black, 358, is cited in support of this conclusion, where, in an act of congress, words of present grant of land to the territory of Minnesota, to aid in the construction of a railroad, are held to be controlled by other clauses of the act. But those clauses declared that *no title should vest in the territory*, until a continuous line of 20 miles of the road was completed,—words to which no force could be given except as a limitation upon the terms of present grant, a circumstance which materially distinguishes that case from the present one. For the reasons already given, I am not able to accept the conclusion of the learned judge, who is so generally right in his decisions that one may well hesitate to dissent from his judgment.

It is not necessary to a recovery by the plaintiff that he should show that a perfect and indefeasible title to the lands granted immediately passed to the company, or anything more than a defeasible title, which would become perfect and indefeasible to coterminous lands as the road was completed. The road opposite to the premises in controversy having been completed and accepted, the title, however imperfect whilst incumbered, if it may be so termed, by the uses to which the lands were to be applied, has become perfect and indefeasible; and the costs of surveying, selecting, and conveying the lands having been paid into the treasury of the United States, the only remaining obstacle to their sale or other disposition by the company has been removed. During the construction of the road, no one could do anything to defeat the ultimate acquisition of a complete title by the company, however imperfect it may originally have been, except in one of the ways designated in the act; that is, by purchase, entry, or pre-emption, before the route of the road became definitely fixed.

The contention of the defendant against this view is that, upon failure of the company to complete the entire road within the period fixed by the act, or the supplementary act, the title to the land not then earned failed, and could be restored to the company only by affirmative action on the part of congress; in other words, that the completion of the entire road within the time designated was a condition precedent to the vesting of title to all lands not previously earned by the construction of a road coterminous with them. For this position we find no warrant in any provision of the act. The conditions attached to the grant are conditions subsequent, and not precedent. The object of the grant was to aid in the construction of the road. The title granted is therefore made to attach to the sections designated as soon as the location of the route of the road is definitely fixed, and a map thereof filed in the office of the secretary of the interior, and is not in a state of suspense until the road, or a part of it, is constructed, although not subject to be disposed of by the company, without the consent of congress, except as each 25-mile section is completed and accepted. The conditions as to the con-

struction and equipment of the road and telegraph line being subsequent, and not precedent, no one but the government, the grantor, can claim a forfeiture for breach of them. This is but common learning. As was said by the supreme court in *Schulenberg* v. *Harriman*, 21 Wall. 62:

"It is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee but the grantor, or his heirs, or the successors of the grantor, if the grant proceed from an artificial person; and if they do not see fit to assert this right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way, from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed."

The case of *Railroad Co.* v. *Traill County*, 115 U. S. 601, 6 Sup. Ct. Rep. 201, is seemingly in conflict with the views expressed as to the character of the title granted to the company. On the fifteenth of July, 1870, in an act making appropriations for sundry civil expenses, and, among other things, for the survey of public lands within the limits of the land grant to the Northern Pacific Railroad Company, congress provided "that, before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest." 16 St. 305, 306. In the case cited, the supreme court had this provision before it, and in its opinion there is an expression to the effect that the legal title to the lands granted remained in the United States until their conveyance was executed, that is, until their patent was issued. The question for judgment was, whether the lands of the company could be taxed by the county, under the laws of the territory of Dakota, before the patents issued. The court held that they could not be thus taxed; for, if taxed, they might be sold, and the government be thus deprived of the costs incurred in surveying, selecting, and conveying the lands. The government had, therefore, determined to withhold, until such payment, the issue of its conveyances, that is, its patents, which, as muniments of title, would, as already mentioned, be of great value to the company. By the act as originally passed, the title granted was not disposable, as already stated, without the consent of congress, so as to cut off the rights of the United States upon breach of the conditions of the grant. Under the reservation clause of the act, the power to amend, alter, or repeal its provisions was possessed by congress, and, before the construction of the road and telegraph line was commenced, it imposed a new condition on the disposition of the title; and that was that the company should pay the cost of surveying, selecting, and conveying the lands,—expenses incurred for its benefit,—and that the patents record evidence of the company's title, and of its absolute power to dispose of the lands, should not issue until such payment. The law was therefore, in its effect, an assertion of a lien upon the title papers, and upon the lands, for expenses necessarily incurred for their identification and survey, and in the preparation of con-

veyances by the government; and the decision of the court was, in substance, that such lien could be made available against any taxation or sales thereunder by the territory. Notwithstanding the expression referred to, it is not believed that the court intended to hold that a legal title to the lands had not passed by the grant to the company, and thus overrule or qualify a long line of decisions, announced after the most mature consideration, and discredit the security which, only a few weeks before, congress had authorized by mortgage on the lands to raise funds to construct the road, but only to declare that the power of disposition by the grantee was stayed until the payment of the cost mentioned was made, and that the right of the government to enforce such payment could not be defeated by the tax laws of the territory. As thus construed, the decision is in harmony with other decisions of that court upon similar grants of the United States.

It remains to consider the effect of the withdrawal of the lands opposite the general route of the road, by virtue of the sixth section of the act and the direction of the secretary of the interior, upon the rights of the company. The complaint, as is seen, alleges that, at that time, the lands in controversy were public lands, not mineral, and not reserved, sold, granted, occupied by homestead or other settlers, nor otherwise disposed of or located upon, and were free from pre-emption or other claims or rights, and to them the United States had full title, not appropriated otherwise than by said act of congress, and the acts supplementary to and amendatory thereof. The act excepts from the grant such lands as are reserved, sold, granted, or otherwise appropriated at the time the line of road is definitely fixed and a plat thereof is filed in the office of the commissioner of the general land-office. The complaint makes no allegation as to the condition of the premises in controversy at that time; and hence it is contended that the complaint is defective, in not showing that the lands in controversy were then free from any town-site pre-emption or entry, the lands being within the town of Arlington, and, presumably, held under its pre-emption claim. There would be some force in this position, if the withdrawal, under the sixth section did not preclude any town-site pre-emption or entry after that date. This section declares that, after the general route of the road shall be fixed, the president shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line, as fast as may be required for the construction of the road, and that the odd sections of land granted "shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act." The law thus withdraws the land granted from sale, entry, or pre-emption from the time the general route is fixed; and the action of the secretary of the interior, in formally announcing that they are thus withdrawn, is giving publicity only to what the law itself declares. The object of the law and of the official withdrawal is to preserve the land unincumbered until the completion and acceptance of the road, when patents are to be issued to the company. As was said by the supreme court in a recent case, speaking of the grant now under consideration:

"Although the act does not require the officers of the land department to give notice to the local land-officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land-officers as may serve to guide aright those seeking settlements on the public lands, and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless." *Buttz* v. *Railroad Co.*, 119 U. S. 55, 72, 7 Sup. Ct. Rep. 100.

The term "entry" covers a homestead and town-site entry as well as a private entry made by a settler after the close of the public sales. It is used to designate the initiatory proceeding taken for the acquisition of a portion of the lands of the United States which are open to private sale; or, as said in *Chotard* v. *Pope*, 12 Wheat. 588, "it means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country," by filing his claim in the appropriate local land-office.

No interest in the lands granted against the rights of the company can be acquired after such withdrawal, nor, indeed, in the absence of its announcement, after the general route is fixed. As was said in the case of *Buttz* v. *Railroad Co.*:

"The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country, or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the land department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the general land-office, or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side." *Wolsey* v. *Chapman*, 101 U. S. 755; *Dubuque, etc.*, v. *Des Moines, etc.*, 109 U. S. 329, 3 Sup. Ct. Rep. 188.

In the brief of counsel, argument is presented as to the lateral extent of the grant, the road passing through the territory of Washington, and, as represented, being located near the boundary line of Oregon. There is nothing in the complaint which indicates the distance between the line of the road and the premises in controversy. Its allegation is that the plaintiff derives title to them through the grant to the Northern Pacific Railroad Company, and that they are opposite to the route of the road as definitely fixed. These allegations may be taken as equivalent to direct averments that the premises are covered by the grant. But, independently of this consideration, there does not appear to be any serious question as to the lateral extent of the grant. The act of congress makes that depend upon the location of the road, whether in a territory or in a state. If in the former, the grant has twice the extent that it has when located in the latter. It is the place of location which determines this matter. The nearness of the line to any other territory or state has noth-

ing to do with it. Such, we understand, has been the uniform ruling of the land department, and that mode of determining the lateral extent of the grant is the only practicable one.

It follows from the views expressed that the demurrer to the complaint must be overruled, and the defendant required to answer; and it is so ordered.

DEADY, J., (*concurring.*) I concur in the conclusion of the learned circuit justice that, on the facts stated in the complaint, the plaintiff is the owner of the premises, and entitled to the possession thereof, for the reason that his grantor, the Northern Pacific Railway Company, at and before the date of the conveyance to him, had constructed the section of its road opposite to the premises, and the same had been accepted by the United States.

After such construction and acceptance, whether the grant to the Northern Pacific is construed as an agreement to convey the land, or a grant to take effect when and as fast as any 25 miles of the road is completed, or as a present grant of the legal title, coupled with a restraint on the power of alienation of the land, until the same is earned by construction, the legal title was in the plaintiff's grantor, and the patent to which it was entitled may be deemed to have issued.

As was said by me in *U. S.* v. *Ordway*, 30 Fed. Rep. 35:

"When the right to any odd section within the limits of the grant has finally vested in the corporation, by reason of the construction and acceptance of any portion of the road, the same will relate back to the time of filing the map of general route,—the initiative step in the process of complying with the act; and the patent to which the corporation is then entitled may, for all practical purposes, be deemed to have issued."

As to all the other points covered by the opinion of the court, I fully concur in both the conclusions and the reasons given in support of them.

Ex parte COY.

(*District Court, W. D. Texas.* November 30, 1887.)

1. EXTRADITION—TRIAL FOR DIFFERENT OFFENSE—HABEAS CORPUS.
In application for a writ of *habeas corpus* on the ground of illegal detention, relator stated that he was extradited from the republic of Mexico on the charge of the murder of S. L. Elder and Bud Elder, and on no other charge; that in those cases he had been admitted to bail, but that he was now held in confinement by the sheriff of Bexar county, Texas, on the charge of the murder of one James Jackson; and that, by the provisions of the extradition treaty, he is protected from arrest on any other charge than the one upon which he was extradited. *Held*, that relator has the right to claim exemption from trial upon any other charge than those mentioned in the extradition proceedings.[1]

[1] See note at end of case.

2. SAME—ARREST ON DIFFERENT CHARGE—WAIVER OF PRIVILEGE.
A person illegally tried for another crime than that for which he was extradited, cannot waive his privilege of exemption under the provisions of the extradition treaty.

3. SAME — ARREST ON DIFFERENT CHARGE — HABEAS CORPUS — CONCURRENT JURISDICTION OF STATE AND FEDERAL COURTS.
The state courts have concurrent jurisdiction with the United States courts in cases where a person is illegally tried for another offense than that for which he was extradited, and where there is no reason to doubt the intention of the state court to respect the provisions of an extradition treaty the United States court will refer petitions for *habeas corpus* under the extradition treaty to the action of the state courts.[1]

Petition for Writ of *Habeas Corpus*.

The following is the petition as filed:

To the Hon. E. B. Turner, Judge of the United States District Court for the Western District of Texas, Sitting in Open Session at San Antonio, Texas: Your petitioner, Juan Coy, would respectfully represent that he is illegally restrained of his liberty by Nat Lewis, sheriff of Bexar county, Texas, by virtue of an order of commitment issued out of the district court of Wilson county, Texas, the Hon. GEORGE MCCORMICK presiding, at the June term of said court, A. D. 1887, a copy of which order is hereto attached and made a part hereof, and marked "Exhibit B;" wherefore he prays for your honor's most gracious writ of *habeas corpus*, that the cause of his detention may be inquired into, and that he may be discharged from said restraint, as he is in law entitled to.

Your petitioner represents that on or about the sixth day of October, 1886, when petitioner was a resident of the republic of Mexico, and not a resident of the state of Texas, nor of the United States of America, and while petitioner was pursuing his daily avocations and business in said republic of Mexico, he was by force and arms arrested under and by virtue of an extradition warrant issued by the authorities of the republic of Mexico, which extradition was based upon the requisition of the extradition agent in and for the county of Webb and state of Texas, in the United States of America, for all such purposes, and with all such powers, as are conferred on him by law, and which said requisition bears date on or about the second day of October, 1886; that, being so arrested by virtue of said extradition warrant, petitioner was forcibly removed from the republic of Mexico, and against his will transported into the said county of Webb and state of Texas, where he was delivered to the sheriff of said Webb county, who transported petitioner to Bexar county, Texas; that he has ever since been held in close confinement, a part of the time in Karnes county, a part of the time in Wilson county, and the balance of the time in Bexar county, where he is now held.

That the requisition upon which he was extradited as aforesaid was based upon the allegation that petitioner was charged before D. B. BULLER, a justice of the peace of said Karnes county, Texas, with the murder of one J. L. Elder and Bud Elder; that the said affidavit, charging this petitioner with the murder of J. L. Elder and Bud Elder, was made and sworn to by I. R. Graves, who was then and there county attorney of Karnes county, Texas, and petitioner avers that his arrest and extradition was for the murder of J. L. Elder and Bud Elder, and for no other offense, and for the sole purpose of placing this petitioner on trial for the murder of said J. L. Elder and Bud Elder. And petitioner would show that he stands indicted in the district court of De Witt

[1]The federal and state courts have concurrent jurisdiction in extradition proceedings. Ex parte Brown, 28 Fed. Rep. 653; In re Roberts, 24 Fed. Rep. 132.

county for the murder of said J. L. Elder and Bud Elder upon two separate indictments; that he applied for and obtained bail in said two cases—in the sum of $5,000 in the one case, and $2,500 in the other—from the Honorable H. CLAY PLEASANTS, judge of the Twenty-Fourth judicial district, (a copy of the order is hereto attached, and marked "D,") and that petitioner has prepared and executed the necessary bonds in said two cases in conformity with the order of said district judge, and that the sheriff of Bexar county has approved the same, and that petitioner would be now discharged upon said bail were it not for the charge of murdering one James Jackson on the twenty-seventh day of June, 1886, in the county of Wilson, Texas. And petitioner would respectfully show that he now stands charged in the district court of Wilson, by indictment, of the murder of James Jackson on the twenty-seventh day of June, A. D. 1886, and that he is here and now illegally restrained of his liberty by the said Nat Lewis, by virtue of the order aforesaid, based upon the charge of the murder of James Jackson on the twenty-seventh of June, 1886, aforesaid, and in fact the said James Jackson was killed in Wilson county on the twenty-seventh June, 1886; and thereafter at the December term of the district court of Wilson county, 1886, and in the month of December of said year, your petitioner was indicted for the murder of said James Jackson in Wilson county, charging the offense to have been committed on the twenty-seventh June, 1886. Petitioner would respectfully show that he was extradited on the sixth day of October, 1886, that the requisition for such extradition was on the second of October, 1886, and that the warrant of extradition issued on the sixth October, 1886,—which was long subsequent to the twenty-seventh June, 1886, the day and date of the killing of James Jackson, and for which your petitioner is now restrained of his liberty.

Petitioner would show that he was extradited for the murder of J. L. Elder and Bud Elder, and not for the murder of the said James Jackson; that by the treaty between the United States and the republic of Mexico, it is provided that parties extradited shall only be tried for the particular offense named in the extradition warrant; that the charge of the murder of James Jackson was not embraced or mentioned in the extradition warrant upon which this petitioner was arrested, nor in the affidavit, nor in the requisition for said extradition warrant by which this petitioner was arrested. And petitioner avers that he has never been extradited upon the charge of the murder of said James Jackson, and his trial thereon would be in violation of the rights of this petitioner, and of the supreme law of this land, viz., the treaty between the United States and the republic of Mexico, and would be in bad faith to the republic of Mexico, which has never delivered this petitioner, or consented to deliver him, to answer the charge of the murder of James Jackson. Attached hereto marked "Exhibit A" are certified copies of the proceedings of the extradition of the petitioner, and verified translations thereof, which are made part and parcel of this petition.

Petitioner further avers that on the eleventh inst. he applied to the Hon. GEORGE MCCORMICK, judge of the Twenty-Fifth judicial district of the state of Texas, for a writ of *habeas corpus* to procure his discharge from custody on account of said charge of the murder of said James Jackson, setting up the treaty stipulations between the government of the U. S. of America and the republic of Mexico, and alleging that he has not been extradited for said offense, and is therefore entitled to his said discharge. That said writ was granted, returnable before said judge on the fifth day of December next, sitting in the district court of Wilson county, Texas; but being desirous of a more speedy hearing, and the question being a federal question exclusively to be considered, petitioner abandoned said application, and filed his sworn abandonment of said application with the clerk of the district court of Wilson county on the nineteenth day of November, 1887, the said application and the said judge's

order thereon being thereto filed with said clerk, with direction to issue the writ prayed for,—a copy of which writing, abandoning said application, is hereto attached and made a part hereof, marked "Exhibit C."

Premises considered, petitioner prays that your honor direct the writ prayed for to issue, commanding the said Nat Lewis to produce forthwith the body of your petitioner before your honor, and that, upon the hearing thereof, your petitioner be discharged from custody, and that he have a reasonable time to return to the republic of Mexico after the final disposition of the said charges against him for the murder of J. L. Elder and the said Bud Elder, before he shall be arrested on the said charge of the said James Jackson.

TEEL & HATTON. CHARLES H. MAYFIELD.
E. R. LANE. L. S. LAWHORN.
BROWN & BEASLY. Attys. for Petitioner.

I, Juan Coy, being duly sworn, do say upon oath that the allegations contained in the foregoing petition are true to the best of my belief.

JUAN S. COY, Petitioner.

Sworn to and subscribed before me this twenty-second day of November, A. D. 1886. W. G. SAMUELS, Notary Public, Bexar county.

[Indorsed:] No. 850. *Ex parte Juan Coy.* Application for the writ of *habeas corpus* to Hon. E. B. Turner. Cited November 22, 1887. W. C. ROBARD, Clerk.

The following is the statement of facts as agreed upon:

It is hereby agreed that the following are substantially all the facts of this case: (1) That for thirty years the petitioner, Coy, has been a citizen of Texas. (2) That in October, 1886, he was indicted in two cases for murder, committed in Karnes county, Texas, September 6, 1886. (3) That upon said charges he was legally extradited from the republic of Mexico on October 6, 1886. (4) That in the county of Wilson he was on December 1, 1886, indicted for the murder of James Jackson, committed June 27, 1886, therein. (5) On the first two charges he was admitted to bail, but was not released by reason of his arrest and detention under the charge from Wilson county. He gave the required bail in the said first two cases, which was duly approved, and he is only now detained under the charge from Wilson county, for which he has never been extradited, and on which charge he was never arrested until after his extradition on said two first-named charges. (6) That no application was ever made for Coy's extradition on the Wilson county charge. (7) That when Coy was arrested for extradition he was residing in New Laredo, in the republic of Mexico, just across the Rio Grande river, within two miles of Texas, where he had been for two weeks without departure therefrom. (8) That the charges of murder in Karnes county, and that one preferred against him in Wilson county, are of equal degree, being each for murder in the first degree. (9) That at December term, 1886, of the district court of Wilson county, the petitioner, Coy, was duly arraigned on the indictment for said charge of murder, committed in said county, and was duly tried, upon a plea of not guilty, before the district court and a duly-qualified jury there; that a mistrial was the result of this proceeding. (10) That he did not interpose in said trial a plea to the jurisdiction of the state court on any ground; that he did not, nor did his counsel, as they claim, know for what case he had been extradited, but thought he had been kidnaped. It was only after the testimony had been introduced that they learned that he had been extradited in the Karnes county cases, and not in the Wilson county case. (11) That he is now restrained under and by virtue of the process exhibited by Sheriff Lewis. (12) That, on the eleventh day of this month, (November,) he (Coy) sued out a writ of *habeas corpus* before Dis-

trict Judge McCORMICK, setting up the same grounds for his release upon which he relies here; that the writ was granted by said district judge, and the case set for hearing at Floresville, Wilson county, next Monday, December 5th, at which time and place the said district court will be in regular session, and where and when the said sheriff, by order of said court, is commanded to produce the body of Coy, together with his authority for his restraint, etc.; that Coy, in said district court, on the nineteenth instant, filed his declaration, and his motion of abandonment of said application, as per exhibit attached to his petition filed in this case, and paid the costs incident to said proceeding up to said date; that no order has yet been taken in said court on said declaration and motion. (13) That since the said mistrial in Wilson county the said Coy has formally filed and raised by plea the questions herein presented as to the jurisdiction of said state court growing out of his detention without extradition in said case, which has not been passed on by said court. (14) That all the pleadings and exhibits filed in this case, or attached, or referred to therein, may be referred to as evidence, subject to all legal exceptions, etc., that may be raised thereto. (15) That the republic of Mexico has in no way interposed objections to the trial of Coy on the Wilson county charge, or to Texas exercising jurisdiction over him in the proceedings complained of by Coy, so far as known or heard of by the parties hereto, or by Coy himself; nor do we know that said republic knows of his proposed trial in Wilson county.

George Paschal, Dist. Atty., *A. J. Evans*, and *Mr. Hogg*, Atty. Gen. of Texas, for defendant.

Teel & Hatton, *L. Lawhorn*, *Mr. Mayfield*, and *Brown & Beasly*, for relator, Juan Coy.

TURNER, J. On the twenty-second inst. the relator presented his application for a writ of *habeas corpus* on the alleged ground that he was unlawfully restrained of his liberty by the sheriff of Bexar county, Texas. The petitioner, in brief, stated that the relator had been extradited from the republic of Mexico upon the charge of the murder of S. L. Elder and Bud Elder, and for no other or different offense; that he has been admitted to bail in said cases, but that he is now restrained of his liberty upon a charge of the murder of one James Jackson; that, having been extradited upon the charge of the murder of the two Elders, he is protected from arrest for any other or different offense than those for which he was extradited; that he had instituted proceedings for his release by applying to the Honorable Judge McCORMICK, district judge of the state of Texas, for a writ of *habeas corpus*, but that he had abandoned his suit thus instituted, and had paid all costs incident thereto.

These are, in brief, the facts stated in the application presented to me during the present sitting of this court, and upon that showing I directed the writ to issue, which was accordingly done. Under the statement of facts thus presented there can be no doubt but that relator has the right to claim exemption from trial upon any other charge than those mentioned in the extradition proceedings; and, inasmuch as the question arises under a treaty with our sister republic, the federal court has jurisdiction to issue the writ, and inquire into the cause of detention, and to discharge the relator from such confinement, if the facts in the case, when fully made known, show that justice and law require it. The question

of the right of this court so to act is conceded; the propriety of such action in this case is challenged and seriously questioned. It is claimed, and justly claimed, that the state courts have concurrent jurisdiction with the federal courts, and that that comity which does, and of necessity must, exist between the federal and state courts, would suggest the propriety of a careful exercise of that power by the federal courts when the relator is held by virtue of state authority, unless it should be made manifest that the state courts might reasonably be regarded as unwilling to observe the treaty stipulations referred to as the supreme law of the land.

The agreed statement of facts shows that relator was extradited upon the charge of the murder of the two Elders only. The statement further shows that relator had dismissed his suit or action taken with a view to his release by Judge McCormick, and had paid all the costs incident thereto. This he might lawfully do, and that left his case the same as if he had made no application to the state judge for the writ of *habeas corpus*. The statement of facts further shows that the Wilson county case, that was tried, resulted in a mistrial upon the charge of the murder of James Jackson, and that he (relator) has since said trial filed in the state court, where that indictment is pending, his plea to the jurisdiction or right of the state court to proceed to try him upon that charge, because not embraced in the extradition proceedings.

That the state courts have concurrent jurisdiction with this court in the premises is conceded; and that, if relator does not obtain his release therein, he may remove the case ultimately into the supreme court of the United States, and there secure immunity from trial upon the charge of the murder of James Jackson until opportunity be given him to return to Mexico, where he sought asylum. The question presents itself to this court, not as one of the abstract right to release, but whether the exercise of that right, under the facts of this case, would be the exercise of a sound discretion, considering the comity that does and should exist between the federal and state courts. There is nothing in evidence before me tending to show that the state judge will disregard the obligations of treaty stipulations, and treat them other than the supreme law of the land, and, upon the same showing made here, discharge the relator from detention and trial upon the charge of the murder of James Jackson until he shall have had reasonable time to return to Mexico. To assume that it will not, in advance, is to distrust the integrity of the state court. If it shall transpire that the state court shall be remiss in the discharge of a duty devolving upon it with reference to questions arising under the constitution of the United States, treaty stipulations, or the laws of congress, the federal courts will still be accessible. See *Ex parte Royall*, 117 U. S. 241 *et seq.*, 6 Sup. Ct. Rep. 734, and cases there cited. See, also, *U. S.* v. *Rauscher*, 119 U. S. 409, 7 Sup. Ct. Rep. 234, and case there cited; *Blandford* v. *State*, 10 Tex. App. 627.

The views thus expressed avoid the necessity of recurring to another point strenuously urged here with apparent earnestness, viz., the proposition that the relator has waived his immunity from punishment for other offenses not embraced in the extradition proceedings. If it were

true that the only question involved related to how Mr. Coy should be treated we might listen with propriety to what might be said upon that point. Mr. Coy, while entitled to all the benefits of the law in his favor, is not a very important factor in considering this question. This government has entered into solemn treaty stipulations with Mexico with reference to refugees from justice. These stipulations are, by a declaration of the constitution of the United States, the supreme law of the land, state constitutions and laws to the contrary notwithstanding. These stipulations this government cannot forget, nor can it justify their violation, without justly incurring the contempt of the civilized world; and yet we are seriously told that Mr. Coy has waived this binding obligation on the part of the United States, and has canceled the right of Mexico to expect the government of the United States to keep its plighted faith. This is not all; the political authorities of the United States have made the declaration to the world, contained in section 5275, Rev. St., which reads as follows:

"When any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the the United States, and tried for any crime of which he is duly accused, the president shall have power to take all necessary measures for the transportation and keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crime or offenses specified in the warrant of extradition, and until the final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused."

And again we are gravely told that Mr. Coy has released the government from this solemn declaration by a waiver. Was Mr. Coy a part of the treaty stipulations with Mexico? Is Mr. Coy able to bind and unbind the government from its duties and obligations towards other nations by any act that he can perform? The statement of the proposition discloses its absurdity.

The relator will be remanded to the custody of the sheriff of Bexar county, trusting and confiding in the intelligence, virtue, and wisdom of the state courts for such action as law and pride of country shall demand.

NOTE.

EXTRADITION—FOR ONE OFFENSE—TRIAL FOR ANOTHER. Independent of treaty stipulations, no absolute obligation of public duty rests upon a nation to surrender fugitives from justice to the country whose laws they have violated, and the general rule is that a person whose extradition has been obtained cannot be held to answer for any other crime than the one for which he was surrendered, until reasonable opportunity has been given him, after his release or trial upon the charge for which he was extradited, to return to the country from whose asylum he was taken. U. S. v. Rauscher, 7 Sup. Ct. Rep. 234. This rule is recognized in People v. Gray, (Cal.) 5 Pac. Rep. 240, a case arising under the treaty with Mexico, and in cases arising under the extradition treaty with Great Britain. Ex parte Hibbs, 26 Fed. Rep. 421; U. S. v. Watts, 14 Fed. Rep. 130. But see dissenting opinion in the case of U. S. v. Rauscher, *supra*. With regard to extradition between the states, it is held that in the application of the rule above cited no distinction is to be made between international and interstate extradition. In re Cannon, (Mich.) 11 N. W. Rep. 280. But in Harland v. Territory, (Wash. T.) 13 Pac. Rep. 453, it is held that the comity of the states, with regard to extradition, is exercised with more liberality than that which characterizes the relations between foreign nations,

and that a man may be tried for a slightly different offense from the one for which he was extradited, there being nothing to suggest fraud. And in *Wisconsin* the court holds that a man who has been extradited on the charge of the commission of a particular crime, and, on trial, acquitted, may be immediately rearrested for an entirely different offense, without being allowed a chance to return to the state from which he was extradited. State v. Stewart, 19 N. W. Rep. 429.

THE MARININ.

READ *v.* THE MARININ.

(*Circuit Court, S. D. New York.* November 11, 1887.)

1. SHIPPING—DAMAGE TO CARGO—SALE—CONDUCT OF.
   A damaged cargo of licorice root, consisting of 2,112 bundles, was sold by the libelant at auction. At the sale only 250 bundles were exposed to inspection. But one bidder was called as a witness in the proceedings against the vessel for damages, and he refused to give the name of the person for whom he made the bid. The purchaser who bought the entire lot was present at the hearing before the commissioner, but he was not put upon the stand. The extent of the injury to the cargo was involved in a sharp conflict of testimony. There was no dispute as to the market value of good licorice at the time of the sale. *Held*, that the sale, so conducted, did not supply a fair criterion of value, and that the conclusions of the district judge and the commissioner as to the libelant's damages would not be revised on appeal, their correctness depending wholly upon the credibility of the witnesses examined before them.
2. SAME—DAMAGE TO CARGO—SALE—EXPENSES.
   Expenses incident to the auction sale of a damaged cargo, and for the services of experts employed by the libelant, are not elements of damage against the vessel.

In Admiralty. On appeal from district court, 28 Fed. Rep. 664, modified.

Lorenzo Ullo, for claimants.

Josiah Hyland, for libelant.

WALLACE, J. The libel in this case was filed to recover damages for alleged injuries to a cargo of licorice root, consisting of 2,112 bundles, consigned to the libelant, arising in the course of transportation and unloading of the cargo.

This appeal presents only a question of fact as to the extent of the injuries, and the consequent damages sustained by the libelant. This question has been considered by the judge of the district court and by the commissioner to whom, by the interlocutory decree of that court, it was referred to ascertain and report the damages. The question of fact is involved in a sharp conflict of testimony, and this court cannot undertake to revise the conclusions of the district judge and of the commissioner, the correctness of which depends wholly upon the credibility of the witnesses examined before them. The libelant relies with great confidence upon the effect of the sale of the licorice root at auction, as showing the extent of the injuries by showing its then commercial value, there

being no dispute, substantially, as to what its market value would have been if it had been delivered in proper condition. Such sales, when fairly conducted, afford strong evidence of the market value at the time. They do not, however, supply an infallible criterion of value. They are readily susceptible of collusive practices, and when the circumstances create a reasonable suspicion that such practices took place, but little reliance can be placed upon the evidence.

In the present case the whole lot of licorice root was not exhibited at the sale, but 250 bundles were brought out upon the sidewalk, and exhibited as a sample of the rest. The purchaser who bought the entire lot, although present before the commissioner, was not called as a witness by the libelant. Another person who made a bid at the sale was called as a witness; but he refused to give the name of the party for whom he was acting in making the bid. He was the only bidder called. Both the district judge and the commissioner were convinced, by the testimony of the witnesses examined before them relative to the extent of the injuries to the licorice root, that the price obtained at the auction sale did not fairly represent its then commercial value. They were doubtless satisfied that the lot placed on the sidewalk for exhibition to bidders did not fairly represent the condition of the whole, and that the sale was conducted in the interest of the libelant in order to fix an apparent market value, for the purposes of a claim against the bark.

The items of damages growing out of expenses incident to the auction sale, and for the services of experts employed by the libelant, were erroneously allowed to the libelant by the commissioner, and seem to have been overlooked when the report was before the district court for confirmation. As the case is here upon an appeal by the bark as well as by the libelant, the amount of these allowances should be deducted. With this deduction, the decree of the district court is affirmed, with costs of this court to be taxed against the libelant.

THE OGEMAW.

RICHARDS and others *v.* THE OGEMAW.

(*District Court, E. D. Wisconsin.* November 23, 1887.)

1. COLLISION—VESSEL AT ANCHOR—DUTY OF BARGE AND TOW.
   A steam barge, with a tow of five vessels, coming down a river discovered the light of a vessel at anchor nearly in the middle of the stream, distant about a mile. There was room to pass on either side. The tug passed diagonally across the bows of the vessel at anchor, about 500 feet from her; but the distance between her and the other vessels in the tow gradually diminished by the force of the current, and the last vessel in the tow struck her. *Held*, that the barge being bound to keep out of the way of the vessel at anchor, must, at her peril, shape her course for a safe margin against the contingencies of navigation, and the effect of the current.

2. SAME.

A barge, being the last in a tow of five, crossing diagonally a river, collided with a vessel at anchor, the whole tow yielding to the force of the current, and each of the tow passing the vessel at anchor nearer than the one ahead. It was in testimony that the master of the barge, when the tow changed its course to cross the river diagonally, ported his helm, to head his vessel above the boat ahead of him, but the current drifted him down. *Held*, that the collision cannot be attributed to fault on the part of the barge.

3. SAME—VESSEL AT ANCHOR IN MID-STREAM.

A vessel anchored in the middle of a river about 1,900 feet wide, where vessels were frequently passing, leaving room on either side for them to pass. *Held*, that her place of anchorage was not improper.

4. SAME.

A vessel anchored in the middle of a river 1,900 feet wide, where vessels were frequently passing and repassing. The last boat in a tow of five crossing the river diagonally, through the force of the current struck her bow. She had her anchor light displayed, and her anchor watch on deck. Her mate seeing the danger called to the steam barge having the tow to keep off, but did not run out more anchor chain nor put the helm to port until the collision was immediately at hand. The captain was not on board. *Held*, that the circumstances of the anchorage imposed upon the vessel a degree of vigilance and care in which she was wanting, and the vessel must be held to be in part in fault.

Markham & Noyes, for libelants.
Van Dyke & Van Dyke, for respondents.

DYER, J. This is a libel for a collision between the schooner H. C. Richards, which was lying at anchor in the St. Clair river, about a mile below Port Huron, and the barge H. C. Davis, which, with other vessels, was in tow of the steam barge Ogemaw. The collision occurred in the evening of May 16, 1886. The Richards was bound on a voyage from Buffalo to Racine, Wisconsin, and with several other vessels had been in tow of a tug from Buffalo. On arrival at a point in the river near the place of collision, the tug left the Richards and two other vessels belonging in the tow astern of her, and proceeded with the rest of the tow to Lake Huron, intending to return for the Richards and her consorts, and, having brought the whole fleet together again at Lake Huron, to resume the voyage to ports on Lake Michigan. The Ogemaw was proceeding down the river with a tow of five barges. The vessels constituting the tow, naming them in the order in which they were placed in the tow, were: The Roberts, the City of the Straits, the Ketchum, the Church, and the Davis. The collision occurred between 9 and 10 o'clock in the evening. It was a clear, bright, moonlight night, and there was no wind nor sea to embarrass navigation. Bright anchor lights were displayed on the Richards and the two vessels astern of her. The anchor light of the Richards hung in the rigging about 16 feet from deck, and the second mate and one seaman were on watch.

The second mate of the Richards testifies that the vessel was lying bows up stream, with 30 fathoms of chain out, about half a mile below what is known as the "Middle-Ground," and a mile from Port Huron. The weight of the testimony on both sides is, that she was about 800 feet from the American shore. Above Port Huron and Sarnia the river flows

in a south-easterly direction, but at those points there is a bend in the stream, and for a long distance below the middle ground its course is south-westerly. As the Ogemaw passed the middle-ground she was headed directly down the river, but at that time, or soon afterwards, she changed her course so as to go between the Richards and the American shore. This put her and her tow on a diagonal course across the river, so that necessarily the vessels were more or less deflected from a direct line astern of the towing steamer, by the current. All the vessels in tow of the Ogemaw passed the Richards safely except the Davis, the last in the line. She struck the Richards on the bow, carrying away her bowsprit, bob-stays, jib-boom, guys, and dolphin striker, and doing other damage. The Davis was also injured.

As the collision occurred with a vessel at anchor, the steamer is *prima facie* liable, and can only relieve herself by showing that the accident was inevitable, or was caused by the culpable negligence of the schooner. *The Carroll*, 8 Wall. 304. See, also, *Manufacturing Co.* v. *The John Adams*, 1 Cliff. 413, and authorities there collated. The fact that a steamer has barges in tow does not alter the rule requiring her to keep out of the way of an approaching sailing-vessel, and in such a case the steamer should take extra and timely precautions to avoid a collision. *The Favorite*, 10 Biss. 536, 9 Fed. Rep. 709; *The Civilta*, 103 U. S. 699. The principle that, where a vessel at anchor is collided with by a vessel in motion, the latter is *prima facie* in fault, provided the former is anchored in a proper place, has been enforced against a towing steamer, although the collision was not with her, but was between one of the vessels in the tow and the vessel at anchor. *The Masters and Raynor*, 1 Brown, Adm. 342; *The Worthington and Davis*, 19 Fed. Rep. 836.

Upon consideration of the testimony, I can have no serious doubt that the Ogemaw was in fault. There is dispute about the precise locality where the Richards was anchored, and about the exact width of the river at that point. The libelants contend that the place of anchorage was about half a mile below the middle-ground. From an examination of a government chart of the river, which is in evidence, I should conclude that the width of the river between channel banks at that point is about 1,900 feet. The respondents claim that the Richards was lying further down the stream, where it is narrower, and where it would seem, from measurements made on the chart, the width is from 1,600 to 1,800 feet. The testimony on the part of the libelants tends to show that the Richards was lying about one-third of the distance across the river from the American shore; while the weight of the testimony on the part of the respondents is, that she was in mid-channel. However this may be, and whether the libelants or respondents are nearest right in their understanding of the facts as to the precise location of the Richards, and the width of the river at that point, it is obvious that there was ample space on both sides of the Richards for the Ogemaw and her tow to pass. If the Richards was where the libelants claim she was, then there was a space of about 800 feet between her and the American shore, and a space of about 1,000 or 1,100 feet between her and the Canadian side of the

channel. If she was where the respondents claim she was, then there was a space of 800 or 900 feet on either side of the Richards. If the Richards was half a mile below the middle-ground, there could have been no difficulty, in the exercise of proper watchfulness and care, in passing her safely on the American side, even with as many vessels as the Ogemaw had in tow. If she was lying as far down the river as the respondents say she was, the facilities for shaping the course of the tow after leaving the middle-ground so as to pass the Richards on the American side, were very greatly increased. It is evident, as was observed in the case of *Wells* v. *Armstrong*, 29 Fed. Rep. 218, that the fault of the master of the Ogemaw was in "not allowing a sufficient margin for safety amid the contingencies of navigation, and not taking in time the decisive measures at his easy command." He evidently did not take sufficiently into consideration the force and effect of the current on the vessels in tow, as they took a diagonal course in the wake of the steamer across the river. This is apparent from the fact that the distance between the Richards, and the tow gradually diminished with each passing vessel, until at last she was struck by the Davis. The Ogemaw was between 400 and 500 feet from the Richards when she passed her; the Roberts, the next boat in the line, passed at a distance of about 400 feet; the City of the Straits was about 250 feet, and the Ketchum about 150 feet, from the Richards, when they passed her. The mate of the Ketchum says he should judge the Church was 100 feet closer to the Richards than the Ketchum was, and the master of the Church testifies that his vessel was not more than 15 feet from the Richards when she passed. Such being the proximity of the vessels in the tow to the Richards, which the course they were on steadily increased, a collision between the Davis and the Richards was inevitable; and the course the tow was on, its proximity, and manner of approach, demonstrate that the master of the Ogemaw did not sufficiently consider what was a necessary margin for safety with such a line of vessels stretched out astern of him. The duty to keep out of the way embraces the duty to keep away by a prudent and safe margin, having reference to all the contingencies of navigation. *The Aurania and Republic*, 29 Fed. Rep. 125. A steamer bound to keep out of the way must, at her own peril, shape her course for a safe margin against the contingencies of navigation and the effect of tide currents. *The City of Springfield*, 29 Fed. Rep. 923.

There was no difficulty in observing the anchor light of the Richards a sufficient distance away. Nearly all the witnesses concur in the statement that the light was seen when the tow was passing the Sarnia elevator. The master of the Ogemaw testifies that he and his second mate saw the light when it was between three-quarters of a mile and a mile off, and that when he rounded the bend of the river he was a little closer to the Canadian than the American side of the river. He then took a course which he says "was pointing dead on the lights" of the Richards, keeping that course until, as he testifies, he ported his wheel a little, "enough just to go down the middle, or a little towards the shore from the vessel, seeing a good open road at that side, and seeing a tow ahead

going the same way." From all the evidence it is also plain that the steamer and her tow could have passed directly down the river on the Canada side of the channel without embarrassment or difficulty. It is true a propeller was then going up the river on that side, but there was ample space for her to pass, as she was a single boat without a tow. It is claimed that the course the Ogemaw took, was occasioned, in part at least, by the approach of the propeller between the Richards and the Canada shore. But the master of the Ogemaw himself testifies that he saw the lights of the propeller after he had ported her wheel to go between the Richards and the American shore; so that he must have determined upon his course before he saw the propeller at all.

Attempt has been made to charge responsibility for the collision upon the Davis. It is said that in rounding the middle-ground she did not turn soon enough; that her wheel was not promptly ported, and that she was thus suffered to get out of line by those in charge of her. It is then argued that for this alleged fault the towing steamer is not responsible. As the Davis was manned by her own master and crew, it was their duty to exercise reasonable care and skill in her navigation. *The City of Alexandria*, 31 Fed. Rep. 430. The steamer was the dominant mind and will in the adventure. It was the duty of the tow to follow her guidance, to keep as far as possible in her wake, and to conform to her directions. The exercise of reasonable skill and care within this sphere was incumbent on the tow. *The Margaret*, 94 U. S. 496. I am of the opinion that the respondents have failed to show an omission of this legal duty on the part of those on board the Davis. The testimony in support of respondent's theory in this respect consists largely of expressions of opinion. It was of course more difficult to keep the Davis, the last vessel in the tow, exactly in line with the steamer than to keep the vessels nearer the steamer in line. As we have seen, all of them gave way more or less to the force and effect of the current, the Davis, naturally, from her position, more than the others. The consequence was, that each succeeding vessel was drawn nearer to the Richards than the vessel ahead, and this explains the true cause of the collision. The testimony of witnesses who were on the Ogemaw, and on the vessels nearest to her, in support of the claim that the Davis got out of line, is necessarily unreliable, because of their distance from her; and if she did drift out of course, they were not in a situation to say whether it was attributable to fault of navigation or to the force of the current, and unavoidable embarrassment arising from her position in the tow. The master of the Davis testifies that about the time his vessel passed the Sarnia elevator, the Ogemaw changed her course to pass on the American side of the river; that in following that course he tried to head his vessel above the boat ahead of him, but that the current drifted him down; that his wheel was hard a-port at the time of the collision, and had been for some time before; and that he kept his vessel just as far over to the American shore as the appliances at his command would permit, and as was possible. He testifies further that, when he saw the Ogemaw "make the turn," he gave the order to port the wheel of his vessel; that this was done below

the Sarnia elevator, and that he knows the wheel was put to port. This testimony, coming from the officer in command of the Davis, who it appears was an experienced navigator, and thus detailing just what was done on board the Davis, outweighs the other testimony in the case, which tends, though not with much force, to attribute the collision to fault on the part of the Davis.

Having determined that negligence is imputable to the Ogemaw, it remains to be considered whether the Richards was in any manner in fault. First, it is said she was anchored in an improper place. But as we have seen, there was ample space for the Ogemaw and her tow, in the exercise of proper skill and care, to pass on either side of her.

Undoubtedly, as was said by Judge LONGYEAR in the case of *The Masters and Raynor*, *supra*, there are safer places for vessels to lie at anchor, and where they would be a less obstruction to navigation. But no law or custom is shown prohibiting vessels from anchoring at the place where the Richards was lying, and her legal right to lie there must be conceded. The case just cited was one of collision very similar to that between the Richards and Davis, and it occurred very near the spot where this one occurred. The bark Fame lay at anchor in the St. Clair river a little below Port Huron, and just opposite the foot of the middle-ground. As she so lay at anchor the tug Masters came down the river, with a tow of four vessels, the fourth vessel being the Raynor. The tug undertook to pass the bark on the American or port side of her, and between her and the middle-ground, and in doing so the schooner sagged off to port, and came in collision with the bark. There, as here, the proofs were contradictory as to the precise point where the vessel collided with, lay in the river, varying from one-third of the distance from the American channel bank to the middle of the channel. Judge LONGYEAR held that the place of anchorage was not an improper one, as there was room on both sides for the tug and tow to pass.

In the case of *The Planet*, 1 Brown, Adm. 124, it was held by Judge WILKINS that it was proper for a vessel to lie at anchor in the St. Clair river 1,000 feet from the Canadian shore, and more than 300 feet from the American shore, even with her sails up, and when there was a puffy wind, there being, as was said by the court, ample room for other vessels to pass on either side.

"If there is no rule or custom requiring a vessel to bring up out of the fairway, she may anchor there, although directly in the track of ships. Thus a vessel brought up in the Mersey directly in the track of the ferry steamers was held not to be in fault for lying there. The obligation on a ship under way to keep clear of another at anchor applies, although the ship at anchor is in an improper berth. And a vessel brought up in a berth which is improper only in the sense that it is in an exposed and dangerous position, does not thereby contribute to a collision caused by another ship negligently driving into her." Mars. Coll. 224.

In *The Worthington and Davis*, *supra*, it was held that anchorage in the St. Clair river is not necessarily improper because the channel is comparatively narrow, and vessels are frequently passing and repassing, if

room be left for vessels and tows to pass in safety. See, also, *Wells* v. *Armstrong*, *supra*.

As there was ample space for vessels to pass the Richards on either side, I must hold that her place of anchorage was not improper. But anchoring there as she did, she was undoubtedly bound to exercise a greater degree of care and diligence in respect to her light and her anchor watch, than would be requisite if she were anchored out of the usual path of vessels. It was her duty to keep a vigilant lookout, and to take all the precautions to avoid collision with other vessels which the exigencies of the situation might require. Mars. Coll. 224; *The Worthington and Davis*, *supra*; *The Henry Warner*, 29 Fed. Rep. 601.

As before observed, the anchor light displayed by the Richards was sufficient, and conformed to the requirements of law. Fault is found with her for not exhibiting a torch-light when the Ogemaw and her tow approached; but there is nothing in this circumstance, because the Richards was seen early enough to have avoided her, and as soon as there could possiby have been any obligation to show a torch. *The Leopard*, 2 Low. Dec. 238.

The anchor watch consisted of the second mate and one seaman. The crew of the vessel consisted of six men before the mast, the master, and first and second mates. The master was not on board at the time of the collision. The same circumstance in the case of *The Sapphire*, 11 Wall. 170, was accorded some weight in the opinion of the court, as evidence of negligence. All the crew were below except the anchor watch, but came on deck just before the collision. The mate put the wheel of the Richards to port, but it is apparent from the evidence this was not done until the collision was immediately imminent. The second mate knew there was danger when the Ogemaw was abreast of the Richards, for he says he hailed the men on the deck of the Ogemaw, and told them to keep away, and that he hailed the barges in tow, warning them to keep their wheels hard a-port. No effort was made to run out more anchor chain, thus allowing the vessel to drop down the stream with the current. In fact, nothing was done on the Richards to avoid the collision, except to hail the passing vessels, and put the wheel of the Richards to port when the collision was unavoidable. More effective measures might have been taken to avert the disaster which resulted. The second mate and seaman, constituting the anchor watch, saw the Ogemaw and her tow approaching a long distance off. It was their duty to be alert, and to call assistance from below promptly. The danger was especially apparent when they saw, as they must have done, that the tow was a long one, and that each succeeding vessel, as it passed, came in closer proximity to the Richards. If her helm had been promptly put to port, and thus, by the force of the current, the stern of the vessel had been worked over to leeward, and the bow turned off to starboard, and if, in addition to this, more anchor chain had been run out, thus allowing the vessel to drop down the stream with the current, and if all this had been done, as it might have been, before a collision was actually impending, it is highly probable the collision would have been avoided, or

that the damages occasioned thereby would have been lessened. For the failure to take such precautionary measures, Judge LONGYEAR held the vessel at anchor in fault in the case of *The Masters and Raynor*, *supra*, a case so parallel in its facts, to the case in hand, as to make it applicable here with singular force. The circumstances of the situation imposed upon the crew of the Richards the duty of exercising a degree of vigilance and care in which they appear to have been wanting. The Richards is therefore held also in fault.

Both vessels being found in fault, it follows that each must bear a moiety of the damages. A decree in favor of the libelant will be entered accordingly, and there will be a reference to a commissioner to ascertain and report the damages.

THE REBECCA SHEPHERD.[1]

THE BENJAMIN BOURNE.

THE REBECCA SHEPHERD *v.* THE BENJAMIN BOURNE.

(*District Court, E. D. Pennsylvania.* December 6, 1887.)

COLLISION—INEVITABLE ACCIDENT.

The schooners A. and B. were sailing early in the morning, off Cape Cod. The wind was blowing freshly from the south-west, or nearly so; the sea was chopping, and the weather foggy and "thick." Each vessel maintained a vigilant lookout, and signaled frequently by horn. Their general course was the same, and both were close-hauled. The A. was on her starboard tack, heading nearly south-east by south, and the B. was on her port tack, heading about south-west. Neither could see the other or hear the signals, until immediately before the collision. When a collision was imminent each acted promptly, and both went to starboard. The A. contended that the B. should have ported instead of starboarding. The B. claimed that the accident could not be avoided. *Held*, that the collision was the result of an inevitable accident.

In Admiralty.

Flanders & Pugh, for libelant.

Henry R. Edmunds, for respondent.

BUTLER, J. In the early morning of August 14, 1886, the libelant, when 12 or 15 miles south-east of Cape Cod, was run into by respondent, and seriously damaged. Both vessels were bound for Philadelphia, sailing on the same general course, each in ballast and close-hauled, the former on her starboard tack, heading nearly south-east by south, and the latter on her port tack, heading about south-west. The wind was south-west, or nearly so, blowing freshly, and the sea chopping. The weather was foggy and thick. Each vessel maintained a vigilant lookout and signaled frequently, by horn.

[1] Reported by C. B. Taylor, Esq., of the Philadelphia bar.

While the libel and answer charge the respective parties with serious faults, the libelant now stands alone on the allegation that the respondent, on coming into view, should have ported her wheel and luffed, instead of starboarding to go astern; and the respondent confines herself to the allegation that the former should have held her course, instead of starboarding as she did; that her speed was too great; and that the collision was inevitable. The situation of the vessels, their courses through the water, imposed on respondent the duty of keeping off, and on the libelant that of holding her course. In view, however, of their close proximity, the libelant was justifiable in changing as she did, although it is probable the change brought her stern nearer the respondent. If her rate of speed was too great, this did not tend to the collision, but rather to facilitate the respondent's effort to pass her stern.

A careful examination of the case has satisfied me that neither vessel was in fault,—that the collision was unavoidable. The defense of inevitable accident is not often sustained, and should not be. Generally, indeed almost universally, collisions are attributable to negligence, and it is only where the absence of negligence is clearly shown that the defense should be sustained. Here, I am fully persuaded, each vessel did her whole duty,—was entirely free of fault. Neither was able to hear the other's signals, nor to see her approach, until so near that the collision was unavoidable. While the libelant now puts the distance at 300 yards, the libel states it to have been two lengths, (270 feet,) and the respondent puts it at about 250 feet. The precise distance cannot, of course, be known, nor very nearly approximated; the witnesses guess at it simply, and their guessing is no doubt wild. That the distance was so short as to render the situation very dangerous is clear. It produced instant alarm on both vessels. The libelant's officers shouted orders to the respondent, as well as to her own crew, and varied her course, which was only justified by the peril impending, and the shock followed almost immediately, before the libelant had succeeded in turning her head more than two points. The collision was therefore, we repeat, unavoidable. This appears from the libelant's testimony, as well as from the respondent's.

It is urged, however, that the injury would have been less if the respondent had ported instead of attempting to go astern. This is by no means certain; to have brought the vessels side by side would have required a change of course in each of about five points, or ten between them. As the libelant had not succeeded in getting off more than two when struck, it is manifest that the vessels could not have been brought to this position, and that the attempt to do it would simply have landed the blow further towards the libelant's bow, where the injury might have been as great, or greater. Granting, however, that the respondent, under the necessity for immediate action, in view of the danger, failed in judgment respecting the best method of escape, such failure is not a fault for which she is liable. *The F. P. Hall*, 14 Fed. Rep. 408; *The John Stuart*, 4 Blatchf. 444. To say the least, whether she should have ported and fallen off eastward or starboard to go astern, was debatable. To do

either would not have been a mistake; which was best was simply a question of judgment. The two experts called differ about it. Her master, an experienced, competent seaman, who was earnestly seeking to escape the danger, selected the course adopted; whether his judgment was right cannot be ascertained, and is not important. With a little more space he doubtless would have gone clear, if the libelant had held her course. To measure the distance accurately under the circumstances, and know whether it was sufficient, was impossible. No one was better capable of judging than he, and he believed it to be sufficient. He could turn in this direction (from the wind) readily and quickly, while he could not in the other. With sufficient space between the vessels this was not only the proper movement, but the only one allowable.

The mate, who was on deck when the vessels came into view, had instantly given an order to port, which being heard by the master, who was below, he ran up and countermanded it by the order to starboard. This countermand is complained of as a fault, on the ground that it delayed and embarrassed the effort to keep off. But why should it be complained of? The master's judgment was as good as that of the mate, probably better, and no appreciable time had been lost. The vessel's course was not affected by the first order. There is no satisfactory evidence that the wheel had been changed. What the libelant's witness says respecting it is incredible; the circumstances (the danger and excitement, the distance and difficulty of seeing) forbid belief that he saw and noted what he asserts. It would be interesting to hear the respondent's wheelsman, but I cannot believe his testimony is important. Suppose the wheel had been changed, the vessel's course was not affected, and the delay must, therefore, have been but momentary, and immaterial. If the order to starboard had been given by the mate instead of that which he gave, the result must have been the same. This cannot be doubted. Possibly the blow might have been a little further back, but the consequences would have been the same. The libel must be dismissed.

END OF VOLUME 32.

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NOTE. A star (*) indicates that the case referred to is annotated.

vided that a careful examination of all the details warrants such an inference.—Id.

4. In attachment proceedings, if the circumstances relied upon by the plaintiff to establish the fraudulent intent are just as consistent with honesty as dishonesty of purpose, no such inference arises.—Id.

5. When a merchant buys goods on credit with a preconceived intention of getting them into his possession, and disposing of them, and of not paying for them at any time, the debt is contracted with a fraudulent intent, and attachment will lie.—Id.

ATTORNEY AND CLIENT.

Compensation.

Counsel are entitled for their services to what those services could have been obtained for under a contract made in advance. — Middleton v. Bankers' & Merchants' Tel. Co., 524.

BANKRUPTCY.

Limitation of action by assignee.

1. An assignee in bankruptcy filed a bill to recover certain shares of stock alleged to have been transferred to defendant in fraud of her husband's creditor's. It appeared that the right of action existed when the assignee was appointed, and that complainant as counsel had represented one against whom defendant had brought suit concerning this stock, and that in that proceeding such information of the transfer had been disclosed as, if diligently pursued, would have led to the discovery of all the facts constituting the fraud, at a period more than two years before the bill in this proceeding was filed. *Held*, that the suit was barred by Rev. St. U. S. § 5057, which provides that "no suit * * * shall be maintainable * * * between an assignee in bankruptcy and a person claiming an adverse interest touching any rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued."—Yancy v. Cothran, 687.

Liability of assignee.

2. The assignee sold real estate to the bankrupt's wife, and, without the sanction of the court, took a bond, secured by mortgage, for the purchase price. The interest was allowed to accumulate until the security became inadequate. *Held*, that the assignee was liable for the loss, and that, to avoid the delay of foreclosure, the mortgage should be transferred to him upon payment to the estate of the amount due thereon.—In re Newcomb, 826.

3. A new assignee appointed in the place of former assignees, deceased, and who, is seeking to enforce against their estates demands which they permitted to outlaw, should not himself be permitted to set up the statute of limitations as a defense to a note given by him to his predecessors for goods purchased of them.—Id.

4. An assignee who, without the sanction of the court, sells the effects of the estate on credit, and suffers the notes given for the purchase price to become outlawed, is liable for the loss, whether the makers of the notes were responsible or not.—Id.

5. Under the act of congress of June 22, 1874, § 4, it is the duty of the assignee to sell at public auction notes which belonged to the bankrupt; but where he retains them, and suffers them to become outlawed, he is liable only to the extent that they were collectible.—Id.

6. An assignee in bankruptcy, who disregards the express order of the court in depositing funds, is liable for the interest which the designated depositary would have paid.—Id.

7. Notes taken by the assignee in renewal of notes held by the bankrupt, to avoid the statute of limitations, or for some other reason equally good, are a charge against him, when outlawed, only so far as they were collectible.—Id.

8. An assignee in bankruptcy is liable, in the absence of all explanation, for legal interest on money collected and not deposited as ordered by the court, which remained in his hands through a long period of years.—Id.

Assignee's commissions.

9. Rev. St. U. S. § 5062, provides that every assignee who shall "fail or neglect to well and faithfully discharge his duties * * * shall forfeit all fees and emoluments," etc. *Held*, in a case where deceased assignees, to whom no bad faith was imputed, had caused a great loss to the estate by suffering notes, etc., to be outlawed, that the question as to whether or not commissions should be allowed, was for the register in the first instance, and that the representations of the deceased assignees should have opportunity to appear.—Id.

BANKS AND BANKING.

National banks—Examiner.

1. A national bank examiner is not an officer or agent of the bank, and has no authority, as such, to act for the bank, and cannot bind it by any act done in its behalf.—Witters v. Sowles, 762.

—— Assets.

2. Among the assets of an insolvent national bank were three mortgages which were sought to be impeached by the assignees of the mortgagor as having been given in violation of the insolvency law of the

be in fact no such office, and consequently the incumbent be not strictly an officer, but an agent or employe of the government.—Rogers v United States, 890.

Bridges.

CARRIERS.

Carriers of goods—Misdelivery.

1. Where a shipper attaches his bill of lading to a draft upon the consignee, he thereby expresses his intention to deliver the goods upon payment of such draft, and to retain control of them until such payment, and the carrier who, under such circumstances, delivers them while in transit to the shipper, is liable to the consignee who has duly taken up the draft.—Wells, Fargo & Co. v. Oregon Ry. & Nav. Co., 51.

2. Under Civil Code Cal. § 3336, providing that, in an action brought by a consignee against a carrier for wrongfully delivering up goods in transit to a party other than the consignee, the measure of damages shall be the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money *properly* expended in pursuit of the property, it is incumbent on the plaintiff to show the circumstances under which the expenditure claimed by him to have been incurred was made, so that the court can decide whether it was proper.—Id.

—— Freight.

3. On January 28, 1887, petitioner entered into a contract with the agent of a receiver of a railroad for shipment of goods from New York to Texas, at cut freight rates. The steamer at New York refused to receive the goods, and February 12, 1887, the receiver guarantied the contract, and the goods were shipped March 1st. On March 4th the petitioner was informed that the time had expired, and the former rates restored. Petitioner testified nothing was said to him as to limitation of time of shipment; the agent of the receiver was under the *impression* he had mentioned it. *Held*, that the direct testimony of the petitioner and the conduct of the parties showed that no immediate shipment was contemplated.—Easton v. Houston & T. C. Ry. Co., 897.

—— Lien.

4. In order to recover property held by a collector or other customs officer under Rev. St. U. S. § 2981, which provides that whenever the collector shall be notified of a lien for freight on any goods imported he shall hold the same until it is shown that the freight has been paid or secured, the consignee should first tender the amount of freight he admits to be due, and if declined he should tender a sufficient bond conditioned to pay all freight that may be found to be due or that may be adjudged due by any court of competent jurisdiction. Should this be declined, proof of these tenders should be made to the collector; who, if he finds the bond adequate to secure the carrier, should release the goods on the deposit with him, for the use of the carrier, of the bond originally tendered.—Wyman v. Lancaster, 720.

5. In an action to recover property held by a collector of customs or other customs officer under Rev. St. U. S. § 2981, providing for the detention of goods upon which the carrier has a lien for freight, and arbitrarily detained by him after tender of a sufficient bond for the security of the carrier, the petition should show all the steps taken to secure a release of the property, including the tender of freight, the tender of the bond, and the proof of these facts before the collector.—Id.

CHATTEL MORTGAGES.

Validity.

A chattel mortgage was made and taken in good faith to secure a debt due to the mortgagee from the mortgagor, but at the date of its execution the mortgagor was hopelessly insolvent, though the fact of insolvency was not known to either of the parties. Gen. St. S. C. § 2015, enacts that preferential assignments of a part of an insolvent's property shall be void if made within 90 days of a general assignment. *Held*, that the mortgage could not be set aside, as no general assignment had been made, and the transaction was in good faith.—Wietz v. Potter, 888.*

CLAIMS AGAINST UNITED STATES.

Fraudulent claims.

One is guilty, under Rev. St. U. S. § 5438, who presents a claim which he believes to be true and just, but which he seeks to substantiate by affidavits, certificates, or depositions of persons who to his knowledge depose or certify to material facts of which they know nothing.—United States v. Jones, 482.

COLLISION.

Between sailing vessels—Fog.

1. The schooners A. and B. were sailing early in the morning off Cape Cod. The wind was blowing freshly from the south-west, or nearly so; the sea was chopping, and the weather foggy and "thick." Each vessel maintained a vigilant lookout, and signaled frequently by horn. Their general course was the same, and both were close-hauled. The A. was on her starboard tack, heading nearly south-east by south, and the B. was on her port tack, heading about south-west. Neither could see the other or hear the signals, until immediately before the collision. When a collision was imminent each acted promptly, and both went to starboard. The A. contended that the B. should have ported instead of starboarding. The B. claimed that the accident could not be avoided. *Held*, that the collision was the result of an inevitable accident.—The Rebecca Shepherd, 926.

Steam and sail.

2. As a schooner was approaching New York harbor, she was run into and sunk by the steamer K. The schooner's witnesses testified that from the time the steamer's lights were sighted, the schooner's course was never altered until the collision, and that her red light was continually exhibited to the steamer. The evidence for the K. showed that the green light of the schooner was first seen a little on the steamer's port bow, whereupon the latter ported; that, when the schooner's light had come to bear over the starboard bow of the steamer, the schooner ported, and this change of helm brought her under the bows of the K. *Held*, that the schooner was alone responsible for the collision.—The Kanawha, 240.

Tugs and tows.

3. A large vessel in tow, and in charge of her own master and crew, who participate in and in part control the navigation, is jointly liable with the tug for a collision caused by navigating in violation of the state statute, when no protest is made by the master, nor any timely effort to correct the fault.—The Doris Eckhoff, 555.

4. The schooner Flint was going up the East river with the flood-tide, in tow of the tug Stevens, some 400 or 500 feet from the New York shore, and had reached a point opposite Corlear's Hook. The bark Doris Eckhoff, coming down the river in tow of the tug Carter, was in the eddy tide above the Hook, and about 100 or 200 feet from the shore. At this point in the river the flood-tide takes a strong set towards the Brooklyn shore. When about 400 yards apart the tugs had signaled once to each other, with intent to pass port to port, but the cross-tide carried the bark to port, and she ran into and sank the schooner. *Held*, (1) that both tugs were in fault for disregard of the New York statute requiring vessels in the East river to go "in midstream, or as near thereto as may be;" that they were also in fault in not exchanging signals earlier, and in attempting to pass so close to each other in that part of the river; (2) that the bark in starboarding, as she was running into the true tide, was faulty in her navigation, and was not exercising that care and skill which were known to be necessary at that point, and which, if observed, would have avoided this collision; (3) that the schooner, whose master and crew were on board, participating in her navigation, and which received the injury while proceeding in a part of the river forbidden by law, should for that reason bear a part of the loss.—Id.

5. The tug R., towing the schooner B., met, in the Arthur Kills, a long tow in charge of two other tugs. The wheelsman of the schooner, the only man on deck, could not well see forward, his view being obstructed. The R. passed very near libelant's boat, though the evidence showed that there was from 150 to 300 feet of available water to leeward, and the schooner struck libelant's boat, which was on the port side of the tail of the tow. *Held*, that the schooner was in fault in going through a narrow passage with no lookout and the wheelman's view obstructed; that the tug R. was in fault in passing unjustifiably near the other tow, and for not taking measures to counteract a sheer made by the schooner.—The Raritan, 847.

6. A barge, being the last in a tow of five, crossing diagonally a river, collided with a vessel at anchor, the whole tow yielding to the force of the current, and each of the tow passing the vessel at anchor nearer than the one ahead. It was in testimony that the master of the barge, when the tow changed its course to cross the river diagonally, ported his helm, to head his vessel above the boat ahead of him, but the current drifted him down. *Held*, that the collision cannot be attributed to fault on the part of the barge.—The Ogemaw, 919.

7. A steam-tug with two tows, one behind the other, entered the south branch of the Chicago river abreast of a steam-barge, going in the same direction at the rate of about four miles an hour. Within half a mile the tug so increased her speed that the stern of her rear tow came abreast of the wheel of the barge, which maintained her speed of four miles. The suction of the wheel caused the tow to sheer, so that she came into collision with a passing steamer. *Held*, that the tug was re-

yond the middle of the river, on an ebb-tide. Her course lay as far off the New York shore as was convenient, having regard to the ice. Between Eighth and Ninth streets the tug and tow met a flotilla of two tugs and two car-flats, bound up the river. The N. had the regulation lights set and burning, and pursuant to signal, the tug and tow and flotilla passed starboard to starboard. As they passed, the N. was at least 400 feet off the Ninth-street pier. The ferry-boat F., starting from the slip at seventh street, had stopped to allow the flotilla to pass, and now exchanged signals with the N. to pass on her course across the bow of the F. The F.'s pilot did not see the N.'s lights indicating she had a tow, and, as soon as the flotilla passed, the F. started ahead, and collided with the canal-boat C. *Held*, the collision was caused solely by the fault of the F. *Held, also*, as the circumstances probably justified the libelant in joining the N. as a co-respondent with the F., that he was entitled to the costs of the district court against the F., and the N. was entitled to the costs of the circuit court against the F. —The Flushing, 334.

17. The tug S., coming down the North river, saw, according to her witnesses, the green light of the ferry-boat P., two points on her starboard bow. She whistled twice, and the P. once, whereupon the S. stopped and backed. The ferry-boat saw ahead the green light of the S., a little off the port bow. Her witnesses testified that one whistle was given her, and then a second signal blast, to which the S. replied with two. At the last signal the P. had commenced to round into her slip, and continued at full speed, until struck by the S.'s tow. The rounding course of the ferry-boat was known to the pilot of the S. *Held*, that the continued view of the green light of the S. on about the same bearing should have indicated to the P. that the S. was swinging across her course, and was such evidence of "risk of collision" as made it obligatory upon the P. to stop and back, under rules 21 and 24; that for failure to do so she was in fault.—The C. H. Seuff, 237.

Right of way.

18. The tug S., coming down the North river, saw, according to her witnesses, the green light of the ferry-boat P., some two points on her starboard bow. She whistled twice, and the P. once, whereupon the S. stopped and backed. The witnesses for the ferry-boat testified that they saw ahead the green light of the S., a little off the port bow; that one whistle was given her, and then a second single blast, to which the S. replied with two; that at the last signal the P. had commenced to round into her slip and she continued on at full speed, until, struck by the S.'s tow. The rounding course of the ferry-boat was known to the pilot of the S. *Held* that, as the ferry-boat and her course were recognized by the S., the latter was bound to avoid her, not only under the general rule of the starboard hand, but also under the special rule relating to ferry-boats approaching their slips; and, for attempting to cross ahead of the P., the S. was in fault.—Id.

19. Though a boat having the right of way may keep her course, she is not absolved from stopping and backing, when there is risk of collision.—Id.

20. The tug Talisman saw on her starboard bow the red light of the tug America. The Talisman attempted to cross the bows of the America, but was struck on her starboard quarter. The America slowed as the vessels approached, giving one whistle twice, and when the tugs were 50 to 100 feet apart gave an alarm signal, and reversed. She did not alter her helm. *Held*, that the Talisman was in fault for not avoiding the America, having the latter on her starboard hand; that the America was in fault, though she had the right of way, for not taking more effectual measures to avoid a collision as soon as she saw by the movement of the Talisman's lights that there was risk of collision; and that the damages should be divided.—The America, 845.

Overtaking vessels.

21. It is a fault in a vessel following another vessel, and going with the flood-tide in the East river, to approach so near the vessel ahead as to be unable to avoid her in case of a stop on the part of the leading vessel.—The Hackensack, 800.

22. The tug Glen Island, while proceeding down the bay of New York, was overtaken and run down by the steam-ship Cephalonia, of the Cunard line. The tug was sunk, and several lives were lost. Prior to the collision the tug did not alter her course. On suit brought against the steam-ship to recover for the loss of life and property, *held*, that the Cephalonia, as the overtaking vessel, was bound to have avoided the tug; that the fact that she blew whistles in time to enable the tug to get out of her way was no excuse for the collision; and that she was solely responsible for the collision.—The Cephalonia, 112.

Practice—Parties.

23. Under the fifty-ninth admiralty rule, the owner of a vessel which has been libeled *in rem*, for collision, may, by petition, bring into the suit, by process *in personam*, any other parties, who are not owners of the vessel libeled, alleged to be liable for the same collision. Rule 15, by implication, prohibits only the joinder in a collis-

CONFLICT OF LAWS.

Actions of tort.

1. Petitioner sought to recover damages for injuries in the United States court against a receiver of a railroad appointed by the court. *Held*, that the laws of the state where the action arose would govern as to defendant's liability. SABIN, J., dissents. —Easton v. Houston & F. C. Ry Co., 893.

Property rights of foreign assignee.

2. A voluntary assignee of a non-resident under the laws of another state cannot hold assets found in Illinois against attaching creditors resident in that state —Sheldon v. Wheeler, 773.*

CONSPIRACY.

What constitutes.

1. Rev. St., so far as it declares that every person who enters into any agreement, combination, or conspiracy to defraud the government of the United States, or any department or officer thereof, by obtaining, or aiding to obtain, the payment or allowance of any false or fraudulent claim, shall be punished without requiring any act in furtherance of the conspiracy, is modified by section 5440, as amended by the act of March 17, 1878, which declares that 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 parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to the penalty specified; so that a mere conspiracy, without some overt act in execution of it, is not an indictable offense.—United States v. Reichert, 142.

To defraud government.

2. Rev. St. U. S. § 5440, relating to conspiracies to defraud the general government, is not limited in its operation to conspiracies to defraud the United States of its "revenue," but applies to all conspiracies to deprive the United States of any property or dues by means of misrepresentation or concealment of material facts. —United States v. Owen, 534.

Indictment.

3. Where an indictment alleges as part of the conspiracy that a false, fictitious, and fraudulent claim was to be presented to the United States surveyor general for allowance and payment, it should also allege that such officer was authorized to allow and approve the claim, and for the omission of this allegation the indictment is defective.—United States v. Reichert, 142.

4. An indictment alleging a conspiracy, without alleging the execution of any act to carry it into effect, is fatally defective. —Id.

CONSTITUTIONAL LAW.

Construction.

1. The settled rule of construction of state constitutions is that they are not special grants of powers to legislative bodies, but *general* grants of all legislative powers not actually prohibited or expressly excepted. It is equally well settled that the *exception* must be *strictly* construed. The construction is *strict* against those who stand on the *exception*, and *liberal* in favor of the government itself. —Southern Pac. R. Co. v. Orton, 457.

Abridgement of privileges.

2. The New Jersey act of April 6, 1886, prohibiting any person or corporation from erecting any bridge, etc., over or in any part of the navigable waters where the tide ebbs and flows, and separating that state from other states, without permission from the legislature of that state, is unconstitutional so far as it is sought to be put into operation against the Staten Island Rapid Transit Company, a corporation of New York, claiming to exercise the privilege conferred upon it by the act of congress of June 16, 1886, of erecting and maintaining a railroad across Staten Island sound, or "Arthur Kill."—Stockton v. Baltimore & N. Y. R. Co., 9.

3. Minnesota act of March 9, 1885, entitled "An act relating to foreign corporations doing business in this state," provides that in suits or proceedings arising in that state

CONTRACTS.

Counties.

COURTS.

meanor under the laws of the state. As a matter of fact, when the bonds were issued there was a law (Wag. St. Ed. 1872, p. 306, § 21) authorizing counties to "levy a special tax to pay the interest on such bonds, or to provide a sinking fund to pay the principal." *Held*, that the return was insufficient, the judgment having determined the validity of the bonds, and the rights of the holder being fixed by the laws in force at the date of issue, and any order made in the case by the federal court being ample protection to the county judges.—United States v. Judges of Scotland County, 714.

16. Pending proceedings in the state court under an assignment for the benefit of creditors, a creditor who was not a party, and who was a non-resident of the state in which the assignment was made, brought suit in the United States circuit court to determine the validity of a deed of trust made prior to the assignment, and covering a large amount of the assets assigned. The assignee had entered upon the duties of his trust, but had taken no steps to contest the deed. *Held* that, as the question of the validity of the deed was one which was so entirely separate and distinct from those questions involved in the general proceedings that it could properly be eliminated therefrom without prejudice to such proceedings, it was one which the United States court had jurisdiction to determine.—Gould v. Mullanphy Planing-Mill Co., 181.

17. Replevin was brought in a state court to recover stone alleged to have been wrongfully taken from plaintiff's quarry, and the property was seized by the sheriff. Pending this action, defendant brought suit in the United States circuit court for the recovery of the property so seized, together with other stone quarried subsequent to the seizure. *Held*, that the court had no power to determine the rights of the parties to the property seized, under process of the state court, as the same question was before the state court.—Williams v. Morrison, 177.*

18. The United States circuit court had, by a peremptory writ of *mandamus*, compelled the judges of the county court to levy a tax to pay a judgment against the county. Afterwards an action was brought in a state court, and the collection of the tax was enjoined. *Held*, that the action of the state court was an unwarranted interference with the United States court, and furnished no defense to a peremptory writ of *mandamus* by the United States circuit court to compel the collection of the tax.—Hill v. Scotland County Court, 716.

Construction of statutes.

19. In 1863, the supreme court of California construed a provision of the state constitution, which construction remained unquestioned by the courts for 11 years, during which time much legislation of a similar character to that in question, and among it that involved in this case, was had, under which important rights had become vested. In 1874, the supreme court, being differently constituted, overruled the prior decision; three of the six justices who sat in the two cases having taken one view, and three the other. The supreme court is now to be again reorganized, with seven members, only one of whom has considered the question as a member of the court of last resort. *Held*, that the construction is *not settled* within the rule, and the national courts are at liberty to adopt the view which appearst o them correct.—Southern Pac. R. Co. v. Orton, 457.

20. The settled construction of the provisions of a state constitution by the highest court of the state, when not in conflict with any provision of the constitution of the United States, will be adopted and followed by the national courts, whatever their opinion may be as to the correctness of such settled construction.—Id.

CRIMINAL LAW.

See, also, *Indictment and Information; Witness*.

Jurisdiction, see *Admiralty*, 3, 4.

Fraudulent claims against government, see *Claims against United States; Conspiracy*.

Offenses against election laws, see *Elections and Voters*, 2–10.

Failure of accused to testify.

1. There is no presumption of guilt against a defendant merely because he has not taken the stand as a witness in his own favor.—United States v. Pendergast, 198.

Instructions.

2. In a criminal action, where witnesses had testified as to defendant's good character, the trial judge charged: "And if you believe him guilty, let not the fact that bankers and business men have testified that he is a man of integrity, by which they mean, probably, that he pays his debts, influence your verdict, or discourage you in the discharge of your duty." *Held*, that this was a correct statement of law, and though it was a "covert fling" at the witnesses' criterions of character, it was not error.—Hayes v. United States, 662.

3. The court further said: "And he (defendant) went out and took counsel of * * * with respect to it (the verdict.) His choice of an adviser was rather unfortunate; that a man should go to a boon companion in a drinking-saloon, a bar-room loafer, to ask what the law is on a

subject of that kind." *Held*, that this was not error, as the judge's reference to the witness as a "bar-room loafer" might have been justified by his appearance, and the other facts referred to appeared in the record.—Id.

4. Defendant was indicted for contempt of court and corruptly obstructing the administration of justice as a juror. On the trial counsel for accused stated that this was "the first case of the kind." The court told the jury it was not the first of the kind, and that a similar case had arisen, and gave the general facts of it. *Held*, that it was not error for the court to thus disabuse the minds of the jury of an impression that they were trying an unprecedented case.—Id.

New trial.

5. The judge, refusing a motion for a new trial in criminal cases, should come to his conclusion without a reasonable doubt. —United States v. Jones, 569.

6. When, on a motion for a new trial, it appears that the judge erred in admitting incompetent testimony, the verdict will not be disturbed if, upon careful examination, the court is satisfied that the testimony was immaterial, or manifestly could not have affected the verdict.—Id.

CUSTOMS DUTIES.

On salved property, see *Salvage*, 7.

What subject to.

1. Goods brought into the United States by salvors, who have salved them within the limit of the United States, are not imported goods, in the sense of the customs laws, so as to necessarily attach the right to duties.—Lewis v. Sixty-Five Packages of Merchandise, 111.

2. But where the goods so brought within the United States, subsequently, by virtue of a sale, pass into consumption within the United States, an equitable right on the part of the government to be paid duties arises; not taking precedence, however, of the salvage claims.—Id.

Entry.

3. The fact that at the time a person entered merchandise at the custom-house there were in existence, to his knowledge, several copies of the bills of lading and invoices presented by him, does not make his sworn statement, as required by Rev. St. U. S. § 2841, that he does not know of or believe in the existence of any invoices or bills of lading other than those produced by him, a false oath; as the other invoices or bills of lading intended by the statute are bills of lading or invoices different from those presented, and not merely the copies thereof which by commercial usage or statute are required to be procured.—United States v. Harrison, 386.

Action to recover—Protest.

4. In an action to recover an excess of duties, the evidence showed that the protest required by Rev. St. U. S. § 3011, was signed with the firm name, but there was nothing to prove the handwriting or the authority of the individual who wrote the signature. *Held*, that a verdict should have been directed for the defendant.—Grandmange v. Schell, 655.

5. There was no evidence to prove either the handwriting or the authority of the individual who wrote the firm name to the protest, and added his initial to the signature. *Held*, that the acceptance of the protest by the collector was no waiver, as he was under no obligation to inquire into the authority of the person protesting before he received the written protest.—Id.

6. With regard to one entry, there was only the naval-office copy, and as to the other entry, there was a copy of the collector's entry with a mark at the upper left hand corner, which looked as if at one time there might have been something attached. *Held*, that there was nothing to leave to the jury to prove that such a protest as the law requires was served.—Id.

—— Bill of particulars.

7. Rev. St. U. S. § 3012, requiring the plaintiff, in suits to recover duties erroneously or illegally exacted, to serve a bill of particulars within 30 days, is *mandatory* in its provisions.—Castner v. Magone, 578.

8. Where plaintiff in an action to recover, from a collector of customs, duties alleged to have been illegally exacted, fails to serve a bill of particulars within 30 days after defendant's appearance, as required by Rev. St. U. S. § 3012, judgment of *non pros.* must be entered against him.—Id.

9. The court has no power to grant an application by plaintiff for leave to serve a bill of particulars *nunc pro tunc* after the expiration of 30 days from defendant's appearance.—Id.

10. Where the bill of particulars served by plaintiff in a suit against a collector of customs, to recover duties alleged to have been illegally exacted, does not contain all the items required by section 3012, Rev. St., a motion for judgment of *non pros.* will be granted.—Sherman v. Hedden, 756.

11. Where the bill of particulars served by plaintiff in a suit against a collector of customs, to recover excess of duties alleged to have been illegally exacted, does not contain all the items required by section 3012, Rev. St., the court is without power to grant leave to amend *nunc pro tunc.*— Id. 757.

12. The original bill of particulars had the following phrase at the bottom: "E.

DAMAGES.

For personal injuries — Excessive damages.

showed no signs of existing or permanent injury. *Held*, that the amount of damages given should be reduced from $3,638 to $1,200.—The Grecian Monarch, 635.

2. Where the plaintiff suffered a complete paralysis of the right side owing to a fall on a sidewalk, *held*, that a verdict of $10,000 would not be set aside as excessive.—Osborne v. City of Detroit, 36.

3. Where an accident occurred through the negligence of defendant, resulting in the loss of libelant's hand, *held*, that a judgment for $4,000 was not excessive.—Withcofsky v. Wier, 301.

DEATH BY WRONGFUL ACT.

Elements of damages.

In an action brought by a wife for her husband's death it is proper for the jury, in assessing the damages, to consider the age of the husband, his health and habits of life, and his capacity for earning a livelihood for himself and his family.—Hogue v. Chicago & A. R. Co., 365.*

DECEIT.

Action by corporation.

1. In an action by a corporation to recover damages for alleged fraudulent misrepresentations as to the merits of a certain heating device, made by officers of the company owning said device, to certain parties, who thereupon organized a corporation for the purpose of selling said heater, *held*, that such statements were in effect made to such corporation.—Iowa Economic Heater Co. v. American Economic Heater Co., 735.

2. A corporation purchasing the right to sell a device or invention may rightfully rely upon the statements and representations of the vendors, and is not bound by the doctrine of *caveat emptor*.—Id.

Pleading—Joinder with contract.

3. A suit being brought for fraudulent representations in the sale of the right to sell a certain invention, the plaintiff also alleged that defendant failed to deliver to plaintiff a certain number of the patented articles as agreed. *Held*, on demurrer for joinder of tort and contract, that this latter allegation was not a cause of action sounding in contract, but was an allegation of defendants' fraudulent scheme, and as such is pertinent to the claim for damages for the tort.—Id.

DEED.

Of trust, see *Mortgages*.
Tax-deed, see *Taxation*, 2.
To foreign corporation, see *Corporations*, 18.

Validity.

1. Where a deed is regular on its face and duly recorded, the burden of proof is on the party attacking it to show facts establishing its invalidity.—McClung v. Steen, 373.

2. The fact that, at the time the grantor in a quitclaim deed executed it and left it with his agent for delivery, the name of the grantee and the amount of the consideration were not written in, does not render the deed void, where the agent had authority to fill out the blanks in a certain way and did so fill them out before the deed was delivered.—Id.

Deposition.

On letters rogatory from foreign courts, see *Constitutional Law*, 6.

Descent and Distribution.

See *Executors and Administrators*.
Liabilities of heirs and distributees, see *Banks and Banking*, 5, 6.

DOMICILE.

Proof of—Intent.

1. Plaintiff was born in New York, but removed to New Jersey, in 1868, where he married, in 1877, and continued to reside until the death of his wife in 1880. He then took his children to Scotland. On his return he located in New Jersey, and lived there until 1884, when he went to St. Louis, where he formed a partnership with defendant. He then closed out his business in New Jersey, and moved such of his machinery as he could not sell to St. Louis. After living there for two years, he sued defendant in the federal court for dissolution of partnership, alleging that he was a citizen of New Jersey. *Held*, that the facts set out established a residence in Missouri, and that they were not overcome by a secret purpose of plaintiff to return to New Jersey when his business in Missouri was concluded at some indefinite future period.—Wright v. Schneider, 705.

Corporations.

2. Corporations are citizens and residents of the state under the laws of which they were created, and they cannot, by engaging in business in another state, acquire a residence there.—Fales v. Chicago, M. & St. P. Ry. Co., 673.

DOWER.

Who entitled to dower.

1. Under 2 Or. Laws, § 2974, relating to dower, a woman who is not a resident of the state is not entitled to dower in any

resentative in the fiftieth congress, * * * defendant being then and there a judge of election appointed and acting under authority of the laws of said state, * * * did then and there, as judge aforesaid, with intent to affect said election, and the result thereof, willfully and knowingly receive and place in the ballot-box * * * a certain ballot then and there offered to him. * * *" The sixth count charged that "a lawful election was held," not stating what for, nor that a congressman was voted for. On motion in arrest of judgment, *held*, that the fourth and sixth counts charged no offense cognizable by the federal courts, and that the motion should be sustained.—Id.

9. An indictment for an offense against the United States election laws, to be cognizable by the United States courts, must contain an affirmative and distinct charge of an act which does or may affect the election of a representative or delegate in congress.—Id.

Offenses against election laws—Judicial notice of state law.

10. On the trial of an indictment for an offense against the United States election laws, the federal courts will take judicial notice that, at the election at which the offense was charged to have been committed, state officers were to be elected, and that, by the laws of the state in which the election was held, the names of all candidates voted for, both for state and national offices, were required to be on one ballot.—Id.

EMINENT DOMAIN.

Elements of damage.

1. The charter of a street railway company gave it the exclusive right for 50 years to operate *horse cars* in Omaha, Nebraska. A *cable company*, when the charter had still 30 years to run, paralleled on some streets the tracks of the railway company, and crossed them on others. *Held*, in proceedings by the latter for compensation for its property so "damaged," under the Nebraska constitution, of 1875, that the cable company was not liable for any injury flowing from the mere matter of competition, or from the fact that the better facilities of the new road attracted passengers from the old; and that the crossings worked no damage; but that the loss of passengers to the railway company caused by the inconvenience of access at those points of the route where the cable cars ran between the street cars and the sidewalk was, though difficult of accurate estimation, a legitimate matter of damage.—Omaha Horse Ry. Co. v. Cable Tram-way Co., 727.

2. It appeared that on those portions of the route of the street railway paralleled by the cable, the number of passengers carried by the cars would be reduced 75 per cent., and that of the 75 per cent. thus secured by the cable, 70 per cent. would be due to the competition, and but 30 per cent. to inaccessibility. It was also shown that the operating expenses of the railway company were 50 per cent. of its earnings. *Held*, that 30 per cent. of the 75 per cent. of the passenger traffic so diverted should be taken as the basis of calculation and the result cut down 50 per cent. for the present year, and that the amount so ascertained be computed at 10 per cent. as damages for the unexpired years of the franchise.—Id.

3. Where a proposed public use causes to property, no part of which is taken, an injury of such a character as, if it accrued when a portion of the property was taken, would form a proper element of the damages to the part not taken, there is a "damage" within the scope and protection of the constitutional provision, and the owner is entitled to compensation.—Id.

Payment in advance.

4. Under Const. Ill. art. 2, § 13, providing that "private property shall not be taken or damaged for public use without just compensation," only damages for injuries caused by an actual appropriation of private property need be paid in advance—Lorie v. North Chicago City Ry. Co., 270.

Remedy.

5. Section 21 of the Bill of Rights of the Nebraska constitution of 1875 provides that "the property of no person shall be taken or damaged for public use without just compensation therefor." *Held*, that where the tracks of a street railway, owning an exclusive franchise for that mode of carriage, were paralleled by those of a cable tram-way, the latter having obtained from the owner of the soil the right to occupy the streets, the property of the former was "damaged" and not "taken," and the provisions of Comp. St. Neb. c. 16, § 95, for ascertaining damages, being applicable only where property is "taken," damages might be assessed in an injunction suit between the parties, although they had failed to agree upon the amount of compensation.—Omaha Horse Ry. Co. v. Cable Tram-way Co., 727.

6. *Special* injury to property, resulting from the construction and maintenance of a street railway in front thereof, must be remedied by an action at law for the special damage, and not by an injunction. For an injury sustained in common with the public at large there is no remedy.—Lorie v. North Chicago City Ry. Co., 270

EQUITY.

See, also, *Quieting Title; Specific Performance; Trusts.*

Laches, see *Limitation of Actions*, 1.

Pleading, allegations on information and belief, see *Trusts*, 3.

—— multifariousness, see *Fraudulent Conveyances*, 4.

Pleading.

1. Under the liberal practice in the circuit court touching applications, under the fifty-seventh rule of practice in equity, for leave to file supplemental bills, the court will not, on such an application, proceed to try the cause, and to determine questions which may more appropriately be raised by demurrer, but will grant such leave although, upon the facts set forth in the supplemental bill, there may be grave doubts as to the complainant's right to the relief prayed for therein.—Oregon & Transcontinental Co. v. Northern Pac. R. Co., 428.

2. Complainant, a stockholder, trustee, and creditor of an unincorporated association, brought a bill against his co-trustees for the winding up of the affairs of the company on account of gross mismanagement, for an accounting, and the appointment of a receiver; also praying for an injunction against a proposed fraudulent sale by the trustees of a large portion of the property of the association. *Held*, that such a prayer did not make the bill multifarious.—Mills v. Hurd, 127.

Parties.

3. In a bill for an accounting by a member of an unincorporated association, and praying an injunction against a proposed fraudulent sale, it is proper to make the proposed vendee a party to the suit, although he may have no interest in the accounting.—Id.

Masters in chancery.

4. Equity Rule, No. 80, provides that "all affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master." *Held*, that testimony taken by the examiner for the hearing in chief, under a decree against an infringer for an accounting, which was not brought before the master in making up the case on the accounting so that it could be answered or explained on the other side, but was merely referred to in argument, and requests for findings upon the case made, was not within rule 80, and an exception to the master's report for failing to find upon the point made by this testimony should be overruled.—Bell v. United States Stamping Co., 549.

5. It is only in cases of extreme hardship to the defendant that the court will review an incidental ruling of the master, in the course of the accounting, when that ruling can be reviewed upon exceptions to his report.—Welling v. La Bau, 293.

6. When a claim preferred by intervening petition against receivers appointed in an equitable proceeding is referred to a master for hearing, and is of such nature as would ordinarily be tried by a jury, the court will not, on exceptions to the master's report, set aside his finding on an issue of fact, unless the testimony returned produces a firm conviction in the mind of the court that the master's finding is erroneous, and that there is not sufficient testimony to sustain it.—Central Trust Co. v. Texas & St. L. Ry. Co., 448.

7. The compensation of masters, whose functions are judicial, may be measured by the standard of judicial salaries.—Middleton v. Bankers' & Merchants' Tel. Co., 524.

Decree—Correction.

8. Before the decree is entered or signed, the court, at the suggestion of either party, or on its own motion, will correct any error or oversight that may appear in the decision or decretal order. — Witters v. Sowles, 130.

Rehearing.

9. Upon a rehearing, for the purpose of considering the effect of newly-discovered evidence as to the validity of reissue No. 9,148, of the Garver patent, dated April 13, 1880, when such evidence is not sufficient to disturb the decree, the circuit court will not make the rehearing the pretext for adjudicating upon the controversy *de novo*, it having twice been heard before a justice of the supreme court, although the circuit court has serious doubt of the correctness of the superior decision.—Reed v. Lawrence, 228.

10. Proceedings upon a decree will be stayed for the purpose of allowing parties to take and file testimony newly discovered, when such testimony appears to be material, and its materiality was not so direct and apparent that the failure to discover and produce it on the first hearing amounted to laches.—Witters v. Sowles, 765, 766.

11. A motion to reopen a hearing for the admission of testimony which is merely cumulative will not be granted.—Pfanschmidt v. Kelly Mercantile Co., 667; Witters v. Sowles, 765.

12. In a suit to quiet title the court intimated before the argument was closed that judgment would go for the plaintiff. The defendant thereupon moved to open the case and to introduce parol testimony to show that the deed under which plaintiff claimed title was in fact void. The deed

3. A conveyance of property made by a debtor for the purpose, and with the intent, of hindering or delaying some of his creditors, is fraudulent so far as the debtor is concerned, and will authorize an attachment against him, even though the debtor, by means of such conveyance, pays some other creditor whom he justly owes.—Strauss v. Abrahams, 310.

Action to set aside—Pleading.

4. In a suit brought by an assignee of a bankrupt against several parties, the complaint alleged facts showing that they were all connected with fraudulent undertakings for the purpose of preventing the bankrupt's property from reaching the assignee's control, but showing also that the defendants were not all connected with each fraudulent act, but that some of them performed one act, and some another, all tending to the same result. *Held*, upon demurrer on the ground of multifariousness that the complaint was good as the defendants joined in the common fraudulent purpose.—Potts v. Hahn, 660.

GUARDIAN AND WARD.

Suit on bond.

1. Rev. St. Wis. c. 170, § 3968, provides that "in case of any breach" of a guardian's bond, the bond "may be prosecuted in the name of the ward for the use and benefit of such ward, or any person interested in the estate, *whenever the county court shall direct.*" *Held*, the bond running to the ward by name, and it being the duty of the guardian, by its terms, to settle with the ward personally, the ward after coming of age, could maintain suit in his own name on the bond, against the sureties, without first obtaining authority to do so from the county court.—Hudson v. Bishop, 519.

—— Limitation of actions.

2. The death of the guardian before the ward comes of age operates to "discharge" him, within the meaning of Rev. St. Wis. c. 170, § 3968, providing that "no action shall be maintained against the sureties on any bond given by a guardian, unless it be commenced within four years from the time when the guardian shall have been discharged;" and the special limitation in that section in favor of the sureties begins to run from the date of the death.—Id.

3. A guardian appointed in 1866, died in 1875, his estate being closed in 1883. An accounting had in 1874 disclosed a balance in favor of the ward. This balance was proved against the estate, and allowed by the probate court in 1876, but it was never paid in full. *Held*, that a suit against surety on the bond, commenced in 1886, to recover the balance, was barred by the four-years limitation of Rev. St. Wis. c. 170, § 3968; the guardian "having been discharged," at the latest, by the proof and allowance of the claim against his estate in 1876.—Id.

4. Rev. St. Wis. c. 170, § 3968, provides that "no action shall be maintained against the sureties on any bond given by a guardian unless it be commenced within four years from the time when the guardian shall have been discharged." *Held*, that the bond being statutory, and the limitation a special one for the benefit of the sureties as contradistinguished from the guardian, the limitation entered into and formed a part of the sureties' contract.—Id.

Habeas Corpus.

Review, collector's decision, see *Immigration*, 3.

HIGHWAYS.

Defects.

1. By the law of Oregon, a county has charge and supervision of all the public roads therein, and, by means of road-districts, supervisors, and local taxation, is provided with the means to open and keep them in repair, and is therefore on principle liable at common law for any injury to person or property resulting from its act or omission in the construction or maintenance of a bridge on such highway.—Eastman v. County of Clackamas, 24.*

2. A supervisor of roads is the agent of the county within his district, and notice to him of a defect in a highway therein is notice to the county; and what he may know of such defect in the diligent discharge of the duties of his office he has notice of, and the county also.—Id.

Husband and Wife.

Power of wife to contract, see *Banks and Banking*, 11.
Right to testify, see *Witness*, 1.
Wife's separate estate, see *Banks and Banking*, 9.

IMMIGRATION.

Under contract to labor.

1. The act of congress of February 26, 1885, and the amendment thereto of February 23, 1887, clearly prohibit the immigration of aliens under a contract to labor in the United States, and an immigrant under such a contract may be prevented from landing. The claim that only the persons soliciting or encouraging the immigration are affected by the acts cannot be sustained.—In re Cummings, 75.

2. An immigrant arriving in this coun-

INTEREST.

International Law.

JUDGMENT.

clerk, who entered on his minute-book: "Bill dismissed as to A. and B. Decree." The clerk sent defendants' counsel a copy of this opinion, and a paper containing the draft of a decree, which, he wrote, had been "handed down with the opinion, and may be subjected to minor alterations before being spread upon the record." Defendants then appealed. Finding that the decree had not been entered, they moved in the circuit court for *mandamus* to compel the clerk to make such entries as would establish the opinion and accompanying paper as a decree in the cause, and to the judge to certify them as correct. *Held*, that the writ should be denied; the paper not being the decree, but only a draft made by the judge for the convenience of counsel, that they might see in a general way what decree he was prepared to enter, and it being no part of the official duty of the clerk to receive the opinion, or make a copy of it.—Fairbanks v. Amoskeag Nat. Bank, 572.

Res adjudicata.

2. The petition in a suit upon a "railroad aid bond" issued by a city set out a copy of the bond, from which the purpose of the issue, viz., the building of machine-shops, appeared, and in which there was a reference to the statute under which the city took its action. The answer set up a special defense of change in municipal organization. There was a verdict for the plaintiff, and the defendant, a new trial having been refused, moved in arrest of judgment on the ground that "the averments of the petition and the recitals in the bond * * * showed that the bond was issued without authority of law." This motion was overruled, and a rehearing applied for, a brief being presented taking the same position, viz., that the use was not a public one. The rehearing was refused, but in his opinion the judge discussed the defense raised by the answer *only*, and concluded as follows: "This being the *only* matter set out in the plea," etc. *Held*, in a subsequent action between the same parties, on other bonds of the same issue, that the question as to the validity of the bonds, because of the purpose for which they were issued, was *res adjudicata*.—Laird v. City of De Soto, 652.

3. In an action brought in a Missouri state court against four defendants, judgment was rendered in favor of one of them and against the others, as is permitted by Code Proc. Mo. § 3673. The latter made a motion for a new trial, and in arrest of judgment, which was overruled in the court below, but sustained on appeal on the ground of insufficient evidence. The action was subsequently dismissed in the state court, but recommenced in the federal court against all four defendants on the same cause of action. *Held*, that the former judgment, as far as it related to the defendant in whose favor it was rendered, not having been appealed from, was a bar to the action against him in the federal court.—Bloch v. Price, 447.

4. Where A. and B. are the only parties to a suit affecting the title to *one* of several tracts of land conveyed by a quitclaim, a judgment in that suit declaring the deed to be void is, as to C. and D., neither of them privies with A. or B., simply *res inter alios acta*, and, in a suit by C. against D. to quiet title to another of the tracts covered by the quitclaim, is neither binding as *res adjudicata* nor estoppel.—McClung v. Steen, 373.

Against joint trespasser.

5. A judgment against one joint trespasser or wrong-doer, without satisfaction, is no bar to a recovery against the others.—American Bell Telephone Co. v. Albright, 287.

Collateral attack.

6. In an application for a *mandamus* for the levy of a tax to pay a judgment, it is competent to show that the judgment was obtained *coram non judice*.—Moore v. Town of Edgefield, 498.

Satisfaction.

7. Defendant and G. were sued separately for the same infringement of complainant's patent, and in the suit against G. complainant obtained a decree for an injunction and account, and waived the account and took a decree for nominal damages of one dollar, and costs to be taxed. The costs were taxed at $293.69. G. testified that he sent one dollar to complainant's attorneys in a registered letter in settlement of the damages and received a return card acknowledging receipt of the registered letter. He did not give a copy or state the contents of the letter, and no answer appeared to have been returned. *Held*, insufficient to show satisfaction for the infringement.—American Bell Telephone Co. v. Albright, 287.

Power of court to modify.

8. Except upon bills of review in equity cases, upon writs of error *coram vobis* in cases at law, or upon motions which in practice have been substituted for the latter remedy, no court can reverse or annul its own final decision or judgment for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes; from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing.—Morgan's Louisiana & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 525.

9. After an appeal has been allowed and

a *supersedeas* bond is taken, either during or after the term, jurisdiction as to all matters—certainly those of substance—determined by the decree is transferred to the court to which the appeal goes.—Id.

10. Plaintiff brought suit to have a claim declared an equitable lien on the property of a railroad company, prior to the lien of two mortgages on the same property executed to defendant. Receivers were appointed by the court, and they took charge of the property. Subsequently the court declared plaintiff's claim a lien on the property, but subordinate to the mortgages of which it decreed a foreclosure. Plaintiff appealed from the whole decree, and gave a *supersedeas* bond; and, after the expiration of the term in which this decree was rendered, the court, at the instance of defendant, modified its decree so as to order the property in the receivers' hands to be turned over, subject to the court's supervision, and pending the appeal, to the defendant, who was the trustee under the mortgages, in accordance with the condition in the mortgage that, upon default of payment, the trustee might take possession of the mortgaged property. *Held*, the court had no power over the decree after the expiration of the term and after the appeal had been perfected, and that the attempted modification was a substantial alteration.—Id.

LIBEL AND SLANDER.

Justification—Partial failure.

1. If defendant, a newspaper corporation, publishes an article stating that the plaintiff had committed incest with her brother, and was pregnant thereby, but does not attempt, either by answer or evidence, to establish the pregnancy, plaintiff will be entitled to a verdict.—Edwards v. Kansas City Times Co., 813.*

Mitigation--Evidence.

2. In an action against a newspaper for libel, defendant introduced testimony to show the untruthful character of the plaintiff, and that at the funeral of two children with whose murder the libel was connected, plaintiff was laughing, and showing a feeling of indifference. *Held*, that these facts were to be considered in estimating the true character of the plaintiff.—Id.

3. In an action against a newspaper for libel, it appeared that the article was taken from a neighboring sheet as a mere matter of news, and with no circumstances of aggravation or malice. *Held*, that the plaintiff was entitled to compensation for the injury suffered, and the manner of the publication was to be considered by the jury, either in mitigation or aggravation of damages.—Id.*

4. In an action against a newspaper for libel, *held*, that matters that transpired after publication cannot be considered in mitigation of damages.—Id.

Damages.

5. A newspaper published a statement that plaintiff had committed incest with her brother, and was pregnant thereby. At the trial for libel it did not attempt to prove pregnancy, but introduced testimony as to the incestuous intercourse, which plaintiff denied. *Held*, that though technically the plaintiff would be entitled to a verdict, yet, if the jury believed she were guilty of incest, her reputation could not be seriously injured by the charge.—Id.

LICENSE.

Revocation.

An oral license to take out stone from a quarry for a term of years is subject to revocation at any time, upon notice to the *licensee*, and he is not entitled to possession of the stone taken out subsequent thereto.—Williams v. Morrison, 177.

Liens.

See *Carriers*, 4; *Maritime Liens*.

Life Insurance.

See *Insurance*.

LIMITATION OF ACTIONS.

Action by assignees in bankruptcy, see *Bankruptcy*.
Redemption of tax title, Iowa statute, see *Taxation*, 2, 3.
Running of the statute, see *Corporations*, 10.
To what cases applicable, see *Admiralty*, 6.

To what cases applicable.

1. The statute of limitations of California applies to suits in equity as well as actions at law.—Chemical Nat. Bank v. Kissane, 429.

2. Under Code Iowa, § 2534, providing that a cause of action barred by the laws of the country where defendant had previously resided, shall be barred in that state as though it had arisen there, the fact that the surety on a guardian's bond in Wisconsin removed into Iowa does not prevent him from setting up the Wisconsin statute as a defense to a suit on the bond, where at the time he left Wisconsin the bar of that statute had already fallen.—Hudson v. Bishop, 519.

3. Rev. St. Mo. § 3231, places a limit of three years upon an action upon a statute for a penalty of forfeiture where the action is given to the party aggrieved, or to such

MASTER AND SERVANT.

Defective appliances.

1. Defendant, master of a vessel, caused the spare-wheel, which in its ordinary condition rested loosely and unfastened upon the drum of the steam-wheel, to be lashed so that it would rotate with the drum, thus rendering the apparatus dangerous to one engaged in cleaning it. No notice of the changed condition of the wheel was given to libelant, a seaman, in consequence of which, while the latter was engaged in his duty of cleaning the apparatus, his hand was caught and so injured as to require amputation. *Held*, that defendant was liable for the injury.—Withcofsky v. Wier, 301.

2. Plaintiff, while assisting as a brakeman in making up a train by the direction or with the consent of the yard-master, who had authority to employ necessary assistants in his department, was thrown violently from the end of the train by the sudden slack of the train caused by the engineer reversing the engine to arrest the speed of the train as it was running down grade, such reversal being rendered necessary because of a defect in a brake which had existed for four or five months, and was known to the foreman of the round-house, whose duty it was to repair the defect, but was not known to plaintiff. *Held*, that plaintiff was entitled to recover for the injuries caused by the fall.—Central Trust Co. v. Texas & St. L. Ry. Co., 448.

3. A person who without pay assists as a brakeman in making up a railroad train by the direction or with the express permission of a yard-master, who has authority to employ necessary assistants in his department, is not a trespasser on the train, but a servant of the company, and it will be liable to him for an injury resulting from the use of a defective brake.—Id.

Negligence of fellow-servant.

4. A track-repairer and an engineer of an elevated railroad company are fellow-servants, and for a personal injury resulting to the former, while in the course of his employment, solely from the negligence of the latter in running his train at too high a rate of speed, the company is not liable; such negligence of the engineer being one of the natural and ordinary risks incident to the track-repairer's employment.—Van Wickle v. Manhattan Ry. Co., 278.*

5. The petitioner was a section hand in the employ of a receiver of a railroad, and, while returning to a section-house on a hand car, it was run into by a train in charge of an engineer in the employ of the receiver, and petitioner was injured. *Held*, that as the petitioner at the time of the injury was running a car on the track, he was brought into direct relations with the employes running the train, and they were fellow-servants, respectively charged with the ordinary risks of each other's negligent acts.—Easton v. Houston & T. C. Ry. Co., 893.*

Master in Chancery.

Fees, see *Equity*, 7.

MORTGAGES.

Railroad bonds and mortgages, see *Railroad Companies*, 4–7.

Rights of mortgagee.

1. Where a lease is executed by a mortgagor subsequent to the mortgage, and there is no privity of estate or contract thereby created between the mortgagee and lessee, and there is no attornment by lessee to mortgagee, the mortgagee cannot, either before or after the mortgagor's default, demand the benefits of the lease without the consent of the lessee.—Moran v. Pittsburgh, C. & St. L. Ry. Co., 878.

Foreclosure—Limitation.

2. A deed of trust can be enforced within 20 years after the maturity of the debts secured by it.—Opie v. Castleman, 511.

MUNICIPAL CORPORATIONS.

Ordinances.

1. The city and county of San Francisco, to provide for the health of its inhabitants, and by virtue of express provisions of the constitution of California, art. 11, § 11, and by the consolidation act of 1863, has power to make regulations for the removal of dead animals, not slain for human food. Pursuant thereto, the board of supervisors entered into a contract, and passed the necessary ordinance to give it effect, whereby plaintiff and his assigns were granted the exclusive privilege, for 20 years, of having and removing such dead animals. During the existence of the contract, the board of supervisors passed a resolution directing its clerk to advertise for proposals from parties desirous of obtaining the carcasses of dogs killed by the pound-keeper pursuant to the order of the board, and repealing "all orders or resolutions, or parts of orders or resolutions, in conflict with this resolution." *Held*, that the passage of a resolution or order or ordinance providing for the removal of dead animals by the board was a matter of legislative discretion, and an injunction restraining the passage of such a resolution, order, or ordinance would not be granted by the circuit court of the United States.—Alpers v. City and County of San Francisco, 503.*

PARTNERSHIP.

Rights of partners inter se — Accounting.

1. A solvent firm of which a bankrupt is a member may set off, against a debt due the bankrupt, a debt due by the bankrupt to the firm.—Warren v. Burnham, 579.

2. Where a member of a firm obtained indorsements from another member, of certain negotiable paper, upon a representation that he was to use such paper for the benefit of the firm, but in fact used it for his individual purposes, and afterwards became bankrupt, the firm remaining solvent, the amount so obtained by the bankrupt is a proper charge against him, and in favor of the firm.—Id.

3. In an action brought by the assignees of a person who is a bankrupt individually, but a member of a solvent firm, against the other member of the firm, for an accounting, the defendant may properly claim to his credit amounts advanced by him individually to such bankrupt.—Id.

4. Costs in such an action, like other equitable actions, may be awarded to the successful party.—Id.

Notice of dissolution.

5. A commission firm sent "price-currents" to all shippers who had dealings with it. These gave the firm name as well as the names of the individual partners. Plaintiff had received these lists prior and subsequent to June, 1882. On June 5, 1885, he made them a consignment. One of the partners retired in February, and another in November, 1882, and the third about a year later. The business was continued under the old name, with their consent. After November, 1883, the lists sent plaintiff no longer showed the individual names, but in all other respects were the same. The partnership was formally dissolved July 1, 1884, and on that date notices were published in the local papers and circulars mailed to correspondents. Plaintiff did not receive a copy of the circular, nor had he any knowledge of any change in the firm when he made the shipment of June 5, 1885. *Held*, that plaintiff was entitled to notice of the several changes in the firm; and having made the shipment in good faith, and on the credit of the firm, he was entitled to a recovery against all the members for the conversion of the proceeds of its sale.—Bloch v. Price, 562.

PATENTS FOR INVENTIONS.

I. Issue of Letters.

Priority of invention.

1. Complainants' application for a patent was made prior to the date of the patent of one S., introduced in evidence as anticipating it, but was not dated until after the date of the S. patent. *Held* that, in the absence of evidence showing that S.'s invention antedated complainants' application, the presumption was in favor of the priority of complainants' patent.—Kearney v. Lehigh Valley R. Co., 320.

Joint invention.

2. Where the evidence showed that patent No. 140,315, June 24, 1873, of an apple paring and coring machine was issued to two patentees jointly, but that the whole machine was made up of about 12 different claims for a patent, and that one of these was invented by one of the patentees alone, a joint patent on such claim and part of the machine is invalid.—Stewart v. Tenk, 665.

II. Proceedings to Vacate.

Power of general government.

3. In the absence of any specific statute, the United States cannot maintain a bill in equity to cancel a patent for an invention. — United States v. American Bell Telephone Co., 591.

4. The United States cannot maintain an action to repeal letters patent for an invention on grounds that have been sustained in a suit for the infringement of the letters patent.—United States v. Colgate, 624.

Bill by attorney general.

5. The attorney general of the United States has no power to maintain in his own name, "as he is the attorney general of the United States," a bill in equity to repeal letters patent for an invention.—Attorney General v. Rumford Chemical Works, 608.

III. Reissue of Letters.

Claims—Subcombinations.

6. Subcombinations may be claimed in a reissue of letters patent, if shown in the original as performing the same function, even though claimed only as a part of a larger combination.—Jenkins v. Stetson, 398.

7. Where a reissue is applied for less than six months after the grant of the original patent, in which combinations are described which are found in the original patent, being merely subcombinations of the combination therein described, such reissue will not be held void simply for the absence of a showing of inadvertence or mistake.—Id.

proved composition for casting ornamental figures consisting of paraffine, stearine, and pulverized sugar, is not anticipated by the patent of March 5, 1872, to Henry Hirsch, the compound covered by which consists of paraffine, bees-wax, and gypsum.—Kiesele v. Haas, 794.

—— Telephone.

32. In the apparatus made by Reis, of Germany, in 1860, with its several modifications, as described by Legat, Pisco, Vanderwyde, and others, an intermittent or pulsatory current of electricity was employed, the transmitter, when actuated by the sound waves, making and breaking the circuit at each vibration. *Held*, that the apparatus was from its very nature unable to send and receive articulate speech, and was not an anticipation of letters patent No. 174,465, of March 7, 1876, to Alexander Graham Bell for improvements in telegraphy, the essential elements of which are the employment of the undulatory, as contradistinguished from the pulsatory, current of electricity, to transmit and copy air vibrations corresponding exactly in amplitude, rate, and form to those produced by the human voice, and the apparatus therefor.—American Bell Telephone Co. v. Molecular Telephone Co., 214.

33. One Holcomb, who in May, 1860, obtained a patent for an extremely sensitive polarized electro-magnet, constructed in the fall of that year an apparatus which he claimed was capable of sending and receiving articulate sounds. The only witness besides himself who testified that it did such work was his wife. Others testified that he then made no such claim. He filed no application for a patent until January, 1878, and the only parts of the instrument produced were a permanent steel magnet, a sounding box, a steel bow with a brass attachment, a brass clamp, and some broken pieces of the diaphragm. *Held*, that the evidence was insufficient to overthrow the presumption of priority and validity arising from the grant of the telephone patent to Bell.—Id.

34. Holcomb got one Beardslee interested in his apparatus, who made several organizations to test for his own satisfaction the correctness of Holcomb's claims. He became satisfied that the apparatus would not operate at great distances, and abandoned it. *Held*, not an anticipation of the Bell telephone patent.—Id.

35. The fifth claim of letters patent No. 186,787, of January 30, 1877, to Alexander Graham Bell, for improvements in electric telephony, is as follows: "The formation, in an electric telephone, such as herein shown and described, of a magnet with a coil upon the end or ends of the magnet nearest the plate." *Held*, the claim not being for the combination of which the magnet is a constituent, that that part of the patent was void, being anticipated by the magnet in Hughes' printing telegraph as described in Schellen's work.—Id.

—— Wash-board.

36. A patent of a wash-board known as the "George" patent, numbered 187,842, and issued February 27, 1877, consisted of a frame of the usual shape for wash-boards and made with a corrugated zinc rubbing surface constructed of a single heavy sheet of zinc with the lower edge wrapped tube-shape, about a supporting rod. *Held*, to possess no patentable novelty over the "Heath Wash-Board" patent No. 168,252, issued September 28, 1875, which was very nearly like the former, only made with two overlapping zinc plates instead of one; and as the evidence did not clearly show an invention by George prior to that by Heath, the former's patent is invalid.—Pfanschmidt v. Kelly Mercantile Co., 667.

—— Waxing paper.

37. The fifth claim of reissued letters patent No. 8,460, October 22, 1878, to Siegfried Hammerschlag is for a "method * * * of waxing paper by spreading the wax upon the surface, heating the paper from the opposite side, * * * removing the surplus wax, and remelting and polishing the wax upon the paper," etc. The paper is passed in contact with a heated revolving cylinder, partly submerged in melted paraffine, then over a scraper, and lastly over a polishing roller. A scraper is applied to the cylinder between the wax-trough and the place of contact with the paper. In the Stenhouse English patents granted in 1862, and the American patent No. 97,983, to Cheney and Milliken, assignees of Stenhouse, December 14, 1869, one method of impregnating fabrics with paraffine was by passing them over hot metallic rollers, working in paraffine; the amount applied to the rollers being regulated by a gauger, and the incorporation of the paraffine into the fabric being effected by hot rollers, which also removed any excess of paraffine. Another method was to stretch the fabric on a heated metallic surface, and rub over it a flat block of paraffine, then compressing by a hot flat-iron or hot rollers. *Held*, that the Stenhouse invention was no anticipation of the Hammerschlag invention; following Hammerschlag v. Scamoni, 7 Fed. Rep. 584.—Hammerschlag Manuf'g Co. v. Bancroft, 585.

V. Extent of Claim.

Construction.

38. Where the specifications of the application and of the letters patent are not

Limitation to process described.

Prior state of the art.

one side of which was enlarged so as to allow the spindle to pass a locking hook on the enlarged side of the neck. Elevation of the knob interlocked the hooks. *Held*, in view of the state of the art, that the Parker patent is limited to a device in which the enlargement is opposite the pin, and that the Beebe patent is no infringement.—Nashua Lock Co. v. Norwich Lock Manuf'g Co., 87.

47. In an action for infringement of claim 2 of letters patent No. 177,237, granted Nelson W. Goodrich, May 9, 1876, for an improved machine for beveling and trimming horseshoe nails, consisting of a horizontal and intermittent carrier ring, operating on a stationary ring, and provided with teeth projecting downward below its lower surface, serving to retain it in place, as well also for carrying and holding the nail blanks to the dies, *held* that, in view of the prior state of the art, and the language of the specifications, the claim must be restricted to the particular elements of the combination therein, and that this claim was not infringed by a device for beveling and trimming horseshoe nails, which consisted of a horizontal, intermittent carrier ring, without such projecting teeth.—Ausable Horse-Nail Co. v. New Haven Horse-Nail Co., 92.

48. In an action for infringement of claim 1 of letters patent No. 139,332, granted the National Horse-Nail Company, as assignee of Robert Ross, May 27, 1873, for an improved machine for beveling and trimming horseshoe nails, consisting of a constantly revolving feed-screw, with a continuous and non-intermittent motion, *held* that, in view of the prior state of the art, and the language of the specifications, the claim must be restricted to the particular elements of the combination therein, and that this claim was not infringed by a device for beveling and trimming horseshoe nails, which required an intermittent feed.—Ausable Horse-Nail Co. v. New Haven Horse-Nail Co., 92; Same v. Essex Horse-Nail Co., 94; Same v. Saranac Horse-Nail Co., 94.

Claim after expiration of patent.

49. The patentee of a machine, capable of producing needles of a superior quality, subsequently obtained a patent upon the product of such machine. *Held*, that the latter patent was void, as an attempt to patent the function of the machine, and thus extend the monopoly of the invention beyond the time allowed by law, and that an action could not be maintained against one manufacturing the same kind of needles by the use of the machine after the expiration of the patent thereon, when the right to use it had become vested in the public.—Excelsior Needle Co. v. Union Needle Co., 221.

VI. Assignment and License.

Assignment.

50. There is no authority under the patent laws to record an agreement for a future assignment of a patent not yet issued, and if recorded it does not amount to notice.—New York Paper-Bag Machine Co v. Union Paper-Bag Machine Co., 783.

51. An assignee of a patent, whose assignment is properly recorded, is protected as to all of his rights thereunder, as against a subsequent assignee of the patentee.—Aspinwall Manuf'g Co. v. Gill, 697.

—— Scope of.

52. Where it is apparent from the terms of the assignment that the intention of the patentee is to transfer thereby all his rights under the patent, the whole legal title is in the assignee, and he may sue for infringement in his own name; the fact that the transfer took the form of an assignment, rather than that of a license, in order that the transferee might sue in his own name, is immaterial.—Siebert Cylinder Oil-Cup Company v. Beggs, 790.

53. An assignment of an expired patent by an administrator of the patentee, purporting to convey "all the right, title, interest, claims, and demands whatsoever, which the estate has in, to, by, under, and through the said improvements and letters patent," covers the right to sue for and collect claims for past infringements.—May v. County of Saginaw, 629.

54. Where a patentee assigned his patent for $12,000, "together with all the improvements I may hereafter make, without further cost," the assignee is entitled to make and sell the original inventions as improved after his assignment.—Aspinwall Manuf'g Co. v. Gill, 697.

—— Action on.

55. Plaintiff assigned to defendant one-third of the right to an invention. The patent-office divided the application for the patent into three applications for as many inventions. The question in issue was whether this subdivision of the claims divested defendant of his interest in one of the patents issued. *Held*, that this was a question purely of patent law, of which the circuit court of the United States had jurisdiction.—Puetz v. Bransford, 318.

56. In an action for an assignment of an interest in a patent, defendant pleaded a former suit in bar. Plaintiff claimed the former suit decided the question of an interest in the invention, and not the question of an interest in the patent. It appeared that in the former suit it was alleged in the bill, and denied in the answer, that plaintiff was "the sole and exclusive owner of the patent," and the decree was

PATENTS ENUMERATED.

United States Patents.

Original.

PAYMENT.

In Confederate money.

A. and B. entered into a contract for the sale of land in 1856. The deferred payments under the contract came due during the years of the civil war, and were paid by the vendee, B., to the personal representative of A. with depreciated Confederate money. *Held*, that as against the heirs of A. not ratifying it, such payment did not extinguish the indebtedness; the original contract contemplating payment in lawful money of the United States.—Opie v. Castleman, 511.

PILOTS.

As salvors, see *Salvage*, 2-4.
Liens for services, see *Maritime Liens*, 13.

Rates—Discrimination.

1. Section 2466, Pol. Code Cal., providing rates for pilotage and half pilotage to be charged vessels entering the port of San Francisco, is not so affected by the joint operation of § 2468, Pol. Code Cal., exempting vessels sailing between San Francisco and ports in Oregon, Washington, and Alaska from half pilotage, and Rev. St. U. S. § 4237, forbidding discrimination in rates for pilotage and half pilotage, as to exempt vessels sailing from a foreign port to San Francisco from liability for half pilotage, but § 2466 will prevail, and § 2468 fail, so far as its provisions come within the United States statute forbidding discrimination in pilotage rates.—The Alameda v. Neal, 331.

Action for services.

2. Where the evidence fails to show a refusal by the master of a vessel to accept the services of a pilot, whom, under the law, he was bound to employ, a libel filed by such pilot to recover the value of services, which were never rendered, will be dismissed.—The Harriet S. Jackson, 110.

Negligence.

3. Libelant, a pilot, took a ship to sea through the Swash Channel. On the passage she touched bottom, and damaged her keel, and in this action by the pilot for his pilotage fees the vessel set up the said damage, and alleged it to have been caused by the pilot's negligence. The evidence showed that the vessel was in the channel, the depth of water in which exceeded her draught, when she encountered a heavy and unusual wave, which lifted her, and caused her to strike; that the reason of her not taking the main channel was the presence in the latter of ice; and that libelant, before starting, had been warned by the owner not to take the ship through ice. *Held*, that no negligence on the part of the pilot was shown, and that he was entitled to his pilotage fees.—Comfort v. The Wallace, 672.

Pleading.

Amendment, see *Customs Duties*, 16.
In equity, see *Equity*, 1, 2.
In infringement suit, see *Patents for Inventions*, 93.
Motion to make more definite and certain, see *Negotiable Instruments*, 3.

POST-OFFICE.

Proof of mailing invoice; course of business, see *Principal and Agent*, 2, 3.

Mailing indecent or obscene matter.

1. A creditor deposited in the mail letters inclosed in envelopes directed to a debtor, on one of which was indorsed: "Carry me back in due time to ———, the Regulator, for publication, 32 South Washington, Minneapolis, Minn. Persons who want us to collect from DEAD BEATS should send their accounts to 32 Washington avenue south, Minneapolis, Minn. Send five cents to insure postage for a large letter to the critter;" and on another: "Return in 10 days to ———, the Collector of BAD DEBTS, 32 Washington Av. S., Minneapolis, Minn. I am looking for an OLD BILL. The DEAD-BEAT COLLECTOR hires me to look them up." He also mailed a postal card addressed to the debtor, containing the following writing: "SIR: Considering how near you can come to fill a bill, I have decided to post you on all DEAD-BEAT lists I know of in the city, and have accordingly given the different agencies a chance at you." *Held*, that the creditor was not liable to prosecution under Rev. St. U. S. § 3893, as amended, making it an offense for any

to the plaintiffs, and assented to by them, and, in pursuance thereof, large quantities of goods were shipped, received by the superintendent, some of the bills paid by his direction, and many of the goods disposed of in the usual course of trade. When defendants at last discovered what the superintendent had been doing, and with knowledge that plaintiffs claimed that all the goods had been sold to the house, they laid out all the goods remaining on hand which had come from plaintiffs, in order to ascertain whether any of them were goods which had not been paid for, but were unable to determine whether they were or not, and they were thereupon put back into the stock, and sold; that after the discovery other goods were received from plaintiffs, under the same arrangement, and were refused and returned. *Held*, that the defendants did not ratify the unauthorized acts of the superintendent by retaining and selling the goods after discovery, and that plaintiffs could not recover the price of them.—Schutz v. Jordan, 55.*

3. In such action, it was sought to charge the defendants with knowledge by showing that the invoices for goods purchased by the superintendent under the unauthorized arrangement had been mailed to the defendants at their place of business. The jury were instructed that the fact that the invoices were so sent would not in law establish the fact that the defendants received them, and would not be proof of that fact, and that the presumption arising from mailing notices in cases of negotiable instruments did not apply. *Held*, in view of the evidence showing the course of business to be that such invoices were received by the superintendent, and not by the defendants personally; that the instruction was practically correct.—Id.

PROPERTY.

In private letters.

An advertising solicitor entered into a contract with a "specialist," to furnish him with 60,000 letters which were in the possession of the Voltaic Belt Company, of Marshall, Michigan, that had been written to that company in response to its advertisements of the curative qualities of the instruments and articles in which it dealt. The solicitor paid $500 to the company for such letters, and delivered them to the specialist, who agreed to pay him therefor $1,200, and did pay him $500, but refused to pay him the balance, claiming that the letters had already been used by other specialists, and were valueless. The solicitor sued to recover the balance. *Held*, that the receiver of private letters has not such an interest therein that they can be made the subject of the sale without the writer's consent, and that the contract in this case was void.—Rice v. Williams, 437.

PUBLIC LANDS.

Homestead title before patent.

1. Where the right to a patent for land has become vested in a purchaser, the government holds the legal title in trust for the purchaser until the patent is issued.—United States v. Freyberg, 195.

Railroad grants—Title under grant.

2. The condition attached to a grant to a railway company, that the road shall be completed by a day named, is a condition subsequent, for a breach of which no one but the government, the grantor, can claim a forfeiture; and the title of the company, though defeasible in the mean time, is still the legal one, on which it may maintain ejectment against any intruder or trespasser.—Denny v. Dodson, 899.

3. Where a corporation, authorized to receive grants of land for the purposes of the corporation, brings an action against a trespasser to recover possession of lands granted to it, such trespasser will not be heard to question the title of the corporation, on the ground that it had no authority to take them. This is a question between the state and the corporation.—Southern Pac. R. Co. v. Orton, 457.

—— Conflict of claims.

4. Lands in controversy between two railroad companies, grantees under acts of congress,—complainant under act of 1866, and defendant under acts of 1857 and 1865,—were within the place limits of complainant's road, and within the indemnity limits of the road of defendant. Complainant's definite location was made before any selection by defendant. The lands in dispute were conveyed to defendant in 1871 and 1872. Complainant's road along these lands was finished in 1879, and application made for entry in 1883, which being refused, complainant brought suit in 1886. As against the holding of the United States supreme court that no title passes to indemnity lands until selection, and that as to place lands the title vests on completion, and relates back to the date of grant, and is specifically fixed by the definite location of the road upon the tracts of the place limits, defendant urged the administration of these grants by the land department, both in Minnesota and in Washington, as a construction and determination of the law. *Held*, that there is no reason why, both parties being donees, either may not insist as against the other upon the full measure of the rights given it by the grants.—Hastings & D. Ry. Co. v. St. Paul, S. & T. F. Ry. Co., 821.

5. The St. Louis, Kansas City & Northern Railway Company executed a mortgage to the United States Trust Company, covering the line from Pattonsburg, Missouri, to Council Bluffs, Iowa, "as said road is or may be hereafter constructed, maintained, operated, or acquired, together with all privileges, rights, franchises, real estate, right of way, depots, depot grounds, side tracks, water-tanks, engines, cars, and other appurtenances thereto belonging." Subsequently the line to Council Bluffs became part of the Wabash system, being known as the "Omaha Division." After the consolidation the Wabash Company purchased a lot in Stansberry, Missouri, and built a hotel thereon to afford accommodation for their employes and passengers. The title to the lot was taken in the name of a trustee, in order that the company might sell the hotel if proper arrangements could be made, and to prevent the mortgage from becoming a lien on the property. The trustee in the mortgage had no knowledge of this arrangement. The receivers of the Wabash system, who had been previously appointed, insured all the property in their hands, including the hotel, for the benefit of all parties interested therein. The hotel was leased and kept for the benefit, not only of the employes and passengers of the Wabash system, but of all persons desiring to stop thereat, until it was entirely destroyed by fire. After the fire, a receiver of the Omaha division was appointed, and the receivers of the Wabash system turned over to him said division, and the property appurtenant thereto. *Held*, that the hotel was to be deemed appurtenant to the railway, and that the insurance thereon was payable to the receiver of the Omaha division for the benefit of the mortgagees holding under the mortgage, and not to the receivers of the Wabash system, representing the general creditors of the Wabash, St. Louis & Pacific Railroad Company.—United States Trust Co. v. Wabash, St. L. & P. Ry. Co., 480.

6. A railroad company promised the owner of a saw-mill near one of its switches, which was not used for receiving freight, that it would take up lumber for him at that point in certain quantities. A month later the road notified the mill owner that it would not receive any more lumber at the switch. The road subsequently passed into the hands of receivers. *Held* that, assuming the contract to be one that the company could not terminate at its pleasure, the claim of damages for its breach was not one entitling the mill owner to an allowance against the property in the hands of the receiver, or out of the earnings of the road, in preference to the mortgage bondholders.—Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 566.

Mortgages—Foreclosure.

7. A trust company, citizen of New York, filed a bill in the federal court against a railway company, citizen of Texas, to foreclose a mortgage, and for a sale of the premises, and also asked that certain persons, citizens of Texas, who had obtained judgments, and were seeking to enforce them, against the railway company in the state court, be made parties, and required to assert their claims, in the action in the federal court. Pending the hearing of the bill, a sale of the road was had, pursuant to a decree of foreclosure rendered in the state court in favor of a citizen of Texas, who was made a party to the bill. It was purchased by a citizen of New York, who afterwards assented to an appointment of a receiver in the federal court. *Held*, after judgment on the bill *pro confesso* against the defendants, citizens of Texas, that citizens of New York, who claimed an interest in the road acquired after the jurisdiction of the federal court had attached, as being the real parties in interest for whom the sale and purchase in the state court was had, were entitled to intervene and set up their rights.—Farmers' Loan & Trust Co. v. Texas Western Ry. Co., 359.

Negligence—Accidents at crossings.

8. In an action against a railroad company to recover for injuries resulting from its negligence in not constructing and maintaining a sufficient crossing, as required by Laws Mo. 1885, p. 87, the defendant can be relieved of liability therefor only by showing that the crossing was constructed in strict compliance with the statute; that it has always been maintained in a safe condition; and that it is located in that part of the street that is graded and usually traveled by vehicles; or that the failure to do any of these things was not the direct cause of the injury; or that the accident was the result of the negligence of the person injured; or that it was the result of the negligence of neither; or when the plaintiff, upon whom the burden of proof rests, fails to show by a preponderance of evidence that the defendant has failed to discharge its duty in some respect. —Hogue v. Chicago & A. R. Co., 365.

RECEIVER.

Power, construction of order, see *Corporations*, 10.

Contracts under orders of court.

1. Intervenor had a lien on a road leased by the defendant, which defendant agreed with its lessor to pay. Defendant made the leased portion a part of its own line, and placed a mortgage on the whole line. The road went into the hands of a receiver, who, acting under an order of the

court, made a contract with the intervenor to purchase his interest, and pay him from the proceeds of the sale of the road under the mortgage. The sale was made and conditionally confirmed. The claim of intervenor not having been paid, he applied for an order setting aside the sale. *Held*, that the contract with the intervenor having been made by the order of the court, the court is bound to enforce it. The sale should be set aside, and the receiver placed again in possession. — Farmers' Loan & Trust Co. v. Burlington & S. W. Ry. Co., 805.

Actions.

2. Although the order appointing a receiver *pendente lite* in mortgage foreclosure proceedings authorized him to bring such suits as he might be advised, he cannot maintain a suit in equity to obtain an adjudication that certain real property is subject to the lien of the mortgage, and that all liens claimed thereon by parties in possession and parties out of possession are invalid against him, and to obtain possession thereof, against one claiming adversely, where neither the mortgagor nor mortgagee is made a party, and no assignment by them to him of the property or cause of action is shown. — Harland v. Bankers' & Merchants' Tel. Co., 305.

3. A receiver, appointed in an action to foreclose a mortgage given by a telegraph company, and alleged to cover all subsequently acquired property of the mortgagor, cannot maintain a bill for an accounting for damages suffered by the mortgagor from breach of a contract to construct certain telegraph lines.—Id.

Compensation.

4. The receivers of a railway company received and paid out during their trust about $60,000,000. At the time of their appointment the mileage was about 3,600 miles and the property consisted of 30 or 40 different roads, all heavily mortgaged. There were about $4,000,000 of floating and pressing debts resting upon the company, and its credit was gone. On their personal guaranty the receivers obtained money to satisfy most of the pressing claims; the aggregate sum thus advanced amounting to $22,000,000. Considering their successful administration for two years and a half and its felicitous outcome, *held*, that $70,000 for each of the receivers is a just and fair compensation for the services actually rendered.—Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 187.

REFERENCE.

To masters, see *Equity*, 4-7.
Who are referees, see *Costs*, 9.

Remand for additional testimony.

Where the opinion advising a reference to commissioners to report the plaintiff's damages plainly indicates the elements of damage to be considered, the hearing will not be sent back for additional testimony on one point of injury on the ground that the party moving therefor had but brief notice of the meeting of the commissioners; and this is especially so when, after the testimony of the other party upon that point had gone in, the movant asked for no delay, but introduced all the evidence it desired.—Omaha Horse Ry. Co. v. Cable Tram-Way Co., 727.

REMOVAL OF CAUSES.

Penalty for obtaining, see *Constitutional Law*, 3.

The right of removal.

1. Where a railroad company, by a contract of perpetual lease, acquired property of the lessor for which an action of ejectment was pending, *held*, the lessees' right of removal was only such as existed in the lessor.—Richmond & D. R. Co. v. Findley, 641.

2. Under section 1 of the removal act, as amended by an act of March 3, 1887, the United States circuit court cannot take cognizance of a suit brought against a party in a district of which he is not an inhabitant; and section 2 does not authorize the removal of a suit brought in a state court against a party not an inhabitant of the district.— County of Yuba v. Pioneer Gold Min. Co., 183.

3. Section 2 of said act, as amended, does not authorize the removal of a suit from a state court to the United States circuit court, which could not have been originally brought in said circuit court. —Id.

4. The right of a citizen to remove a case into a federal court is not a vested right of property. The rules of statutory construction when vested rights are concerned do not apply when the jurisdiction of a federal court to entertain a removal case has been cut off by act of congress.— Manley v. Olney, 708.

Application.

5. Defendant, his demurrer to the bill having been overruled on appeal by the supreme court of the state, filed his petition for removal, April 12, 1887, on the grounds of (1) citizenship, and (2) local influence and prejudice. *Held*, that the application came too late, the act of March 3, 1887, requiring petitions for removal on the first ground to be filed at the term to which the case is *returnable*, and those on the second ground "before trial," and the

SPECIFIC PERFORMANCE.

Laches.

Specific performance of a contract to assign a patent will not be decreed when the complainant has been guilty of laches, unless the defendant has acquiesced in the delay; and when specific performance of such a contract is sought after a subsequent assignment of the patent to a third party, the complainant must show that he performed, or tendered performance of, his part of the contract, and that the assignee had notice of his contract.—New York Paper-Bag M. Co. v. Union Paper-Bag M. Co., 783.

STATUTES.

See, also, *Constitutional Law.*

Construction in federal courts, see *Courts*, 19, 20.

Constitutionality.

1. Under the established rule of strict construction, applicable to state constitutions, an act of the legislature should never be declared unconstitutional, unless there is a clear repugnance between the statute and the organic law.—Southern Pac. R. Co. v. Orton, 457.

Construction.

2. A statute contained simply mandatory provisions, and it imposed a penalty for a failure to comply with the conditions of the section. *Held*, that whatever criticism might be placed on the use of the word "conditions," the intent was plain, and the statute was to be construed so as not to defeat the manifest intent to cast upon the delinquent the prescribed penalty for a failure to comply with the mandatory provisions.—State v. Kansas City, Ft. S. & G. R. Co., 722.

3. A statute passed after an accident had taken place, limiting the amount of recovery in such cases, but which did not go into effect until after the trial, was held to be prospective only, and having no bearing upon the plaintiff's right to recover full damages. A statute should be held to operate prospectively only, unless its terms show clearly a legislative intent that it should have a retroactive effect.—Osborne v. City of Detroit, 36.

4. An act provided that for each day from and after a certain specified day the delinquent should forfeit and pay the sum of $25. *Held*, that the legislature intended an accumulation of penalties, and the defendant could not atone for its delinquencies by the payment of a single penalty.—State v. Kansas City, Ft. S. & G. R. Co., 722.

5. A statute imposed penalties for a failure to comply with the conditions of the section. *Held*, that a disobedience of any one of the provisions subjected the delinquent to the penalty.—Id.

Effect of repeal.

6. In 1885 the legislature of Missouri amended an act passed in 1881. The defendant company claimed that the amendment worked a repeal of the law of 1881, and released it from penalties incurred before the amendment. Rev. St. Mo. § 3151, provides: "No offense committed, and no fine, penalty, or forfeiture incurred, previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all such offenses, and the recovery of such fines, penalty, and forfeiture shall be had, in all respects, as if the provisions had remained in force." *Held*, that though the penalty was incurred prior to the amendment of 1885, still under this section it was recoverable.—Id.

7. A statute of Oregon passed in 1854 gave an action against a county for an injury arising from its act or omission, which was continued in force after the adoption of the constitution by section 7 of article 18 thereof, and on the adoption of the Code of Civil Procedure, in 1862, the provision was carried into section 347 thereof; but on February 21, 1887, the legislature amended said section so as to omit such provision, without making any express provision as to any existing right of action thereunder. *Held* that, in the absence of any express provision to that effect, the act of 1887 ought not to be construed so as to affect or take away any such rights, and did not affect this action then pending in this court for damages for such an injury.—Eastman v. County of Clackamas, 24.

Street.

See *Municipal Corporations*, 3-9.

TAXATION.

Sale of bank stock for taxes.

1. In 1865, a tax collector assumed to sell 50 shares of testator's bank stock for delinquent taxes, and they were bid in by defendant E. S., but never transferred on the books of the bank. E. S. received the dividends until the validity of the tax was adjudged, and afterwards they were received by testator. *Held* that, the laws of Vermont then in force for distress and sales for taxes not applying to bank stock, no title passed, and that there was no such acquiescence on the part of testator as to make the sale good.—Witters v. Sowles, 130.

Redemption—Notice of expiration.

2. Before the issuance of a county treasurer's deed of lands sold for taxes an affi-

davit that notice had been given to the owner of the expiration of the period for redemption was filed, which was defective in that the seal of the notary was not attached to the jurat. *Held*, that the defect was capable of being remedied, and that the lapse of five years would operate as a bar to question the validity of the deed, under Code Iowa, § 902, providing that "action for the recovery of real property sold for non-payment of taxes must be brought within five years from the execution of the treasurer's deed."—Slyfield v. Healy, 2.

Redemption—Action to redeem.

3. Code Iowa, § 902, providing that an action for the recovery of real estate sold for non-payment of taxes must be brought within five years from the execution of the treasurer's deed, cannot be set up as a defense to an action for redemption from a tax sale, where notice of the expiration of the period of redemption has not been given to the actual owner of the land as required by Code, § 894.—Id.

Erroneous assessments.

4. Any person who has property listed on the assessment roll of a county for taxation is "interested" in the proceedings of the county board of equalization, and may appear before it, and have redress against an unjust and unequal valuation of property on said roll, to his injury, whether the same is caused by an over-valuation of his own property, or an under-valuation of that of others.—Dundee Mortgage Trust Invest. Co. v. Charlton, 192.

5. A person aggrieved by the wrongful action of an assessor, in the valuation of his own or other's property for taxation, cannot maintain a suit in equity to enjoin the collection of any portion of the tax resulting from such action, unless he first seeks redress at the hands of the county board of equalization, as provided by statute.—Id.*

TENDER.

Effect, see *Corporations*, 9.
Waiver, see *Shipping*, 8.

Effect.

1. When, upon a claim for money, the debtor, before suit brought, tenders a certain sum in lawful tender, absolutely and without condition, to his creditor, and this is refused, he may retain the money, and, on suit brought against him, will be relieved from payment of interest after the date of tender, and from payment of costs, if plaintiff recover no more than the sum tendered.—Coghlan v. South Carolina R. Co., 316.

2. A lawful tender made pending suit, unless followed up with an offer to pay the money into court, or, at the least, submit to a judgment for the sum admitted, is of no avail.—Id.

TRADE-MARKS.

What will be protected.

1. The plaintiff was incorporated in 1871, by the name of the "Celluloid Manufacturing Company," and from that time used its corporate name in the manufacture and sale of various compounds of pyroxyline, which it designated as "celluloid," to distinguish it from similar compounds made by others. The word "celluloid" was originally coined and used to a limited extent by certain individuals, who assigned their interests in the same to the plaintiff, when incorporated, and the plaintiff from that time stamped said word on the articles manufactured by it, and registered the word in the patent-office in 1873, and again in 1883. The defendant was incorporated in 1886, by the name of the "Cellonite Manufacturing Company," the corporators having been previously associated under a different name, and prepared to manufacture and sell compounds of pyroxyline under the name of "cellonite," stamped with said word; which compounds they had previously designated as "pasbosene," and by other names. The plaintiff thereupon filed its bill to restrain infringement of its trade-mark. *Held*, that the similarity was sufficient, under the circumstances, to mislead an ordinarily unsuspecting purchaser, and that the plaintiff was entitled to the relief sought.—Celluloid Manuf'g Co. v. Cellonite Manuf'g Co., 94.

2. In dealing with corporations, an unlawful imitation of a name is subject to the same rules of law which apply where the parties are unincorporated firms or companies.—Id.

3. Plaintiff used on the bottles, in which it sold liquid bluing, a bright metallic cap of tin, extending down over about half of the rim at the mouth of the bottle, the cap having six perforations. *Held*, that defendant should be restrained from using for the sale of his bluing a similar cap on bottles of the same shape and appearance as those of plaintiff.—Sawyer Crystal Blue Co. v. Hubbard, 388.

4. Montserrat being the name of an island from which both parties import lime juice, the complainants, in the absence of fraud, are not entitled to the exclusive use of the word "Montserrat" as a designation for lime juice, although their article may have acquired a high reputation for purity and strength, while that of defendant may be of an inferior quality.—Evans v. Von Laer, 153.

5. Where both parties are dealers in lime juice, the defendant has no right to

TRIAL.

Instructions.

In the trial of a case, a correct apprehension by the court of all the principles of law involved is not demanded; but it is sufficient if the instructions are correct, as applicable to the case presented, and that the court should not be wrong to the extent of misleading the jury.—Schutz v. Jordan, 55.

TRUSTS.

Implied trusts.

1. In Wisconsin, where money or other securities of one person are used by another

WATERS AND WATER-COURSES.

WHARVES.

WITNESS.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.