the shoulders of the men, where it properly belongs. In doing this, however, he should not seek to evade the responsibility imposed upon him by law for the consequence of his own negligence. The rule which requires an employer to respond in damages to his servants for his negligent acts is sound and wholesome. It ought not to be set aside on any pretense of waiver on the part of the party injured from doing something which he has a clear right to do. It is said that the employé is not bound to accept benefits from the relief fund, and, if he does accept them, with full knowledge that he waives his right of action, he ought to be bound by his act. The logic of the proposition should be differently stated. Having paid for benefits, upon what principle can he be required to renounce them? If, for illustration, plaintiff had taken a policy in some accident and casualty company, could he be required to give up his right of action against the railroad company on accepting benefits from the insurance company? I think not. And the fact that the railroad company has entered into the insurance business does not affect the question in any way whatever. In respect to this contract defendant is an insurance company, and, having received the premium demanded of plaintiff, the latter is fully entitled to the benefits which he received, independently of any question affecting his relations to the railroad company as an employé. Having paid for them, plaintiff is as much entitled to the benefits received by him under the contract of insurance as to his monthly wages for services rendered to the railroad company. It was long ago wisely held that an employer cannot relieve himself from responsibility for his negligent acts by any provision in the contract of employment, and so it has come to pass that the company could not make the receipt of wages a waiver of this sort of action. No more can it be said that payment and receipt of benefits under a contract of insurance, such as is alleged in the answer, should bar the plaintiff's action. I am amazed to find that in several courts of unquestioned dignity and authority the defense here made has been fully sustained. Clements v. Railway Co. [1894] App. Cas. 482; Johnson v. Railroad Co. (Pa. Sup.) 29 Atl. 854; Leas v. Pennsylvania Co. (Ind. App.) 37 N. E. 423. I can only say that I agree with none of them. The reason of the thing stands altogether on the other side. The demurrer to the third answer will be sustained.

UNITED STATES v. CANDLER.

(District Court, W. D. North Carolina. November 14, 1894.)

1. LARCENY—EVIDENCE—IDENTIFICATION OF MONEY IN POSSESSION OF ACCUSED.
Coin or bank notes found in the possession of a defendant soon after a larceny has been committed must be clearly identified as the property stolen, in order to give rise to a legal presumption of guilt; mere general resemblance in kind and amount is only a fact which the jury may consider, in connection with other proved facts, as some evidence of guilt. State v. James, 72 N. C. 482; State v. Freeman, 89 N. C. 469.

2. CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE.
In a case founded entirely upon circumstantial evidence, the jury must consider all the independent coincident facts and circumstances shown in

evidence, and find that they are consistent with each other, and point to the guilt of defendant beyond a reasonable doubt, before a verdict of guilty can be properly rendered. U. S. v. Searcey, 26 Fed. 435.

3. SAME—TESTIMONY OF UNIMPEACHED WITNESS.
A jury may well consider the improbability of positive statements made by an unimpeached witness, when there are facts and circumstances in evidence tending to lessen the probability that such testimony is true. Quock Ting v. U. S., 11 Sup. Ct. 733, 851, 140 U. S. 417.

4. SAME — CONDUCT OF TRIAL — COMMENT BY PROSECUTION ON DEFENDANT'S FAILURE TO CALL WITNESS.
When the prosecution relies upon facts and circumstances as making out a prima facie case of guilt, the district attorney may properly comment upon the fact that defendant had a witness present in court who was not introduced, if it appears in evidence that such witness had probable knowledge of the truth or falsity of the facts and circumstances relied upon to make out such prima facie case. Graves v. U. S., 14 Sup. Ct. 40, 150 U. S. 118; Goodman v. Sapp, 9 S. E. 483, 102 N. C. 477.

(Syllabus by the Court.)

Indictment for breaking and entering a post office, and committing a larceny therein.

R. B. Glenn, Dist. Atty., and D. A. Covington, Asst. Dist Atty., for the United States.

V. S. Lusk, S. J. Pemberton, and J. M. Gudger, for defendant.

DICK, District Judge (charging jury). This trial has evidently excited much public interest. The evidence and the circumstances attending the trial are well calculated to give rise to such public interest. The defendant is a boy 15 years of age, and he was attended during the trial by his father, mother, sister, and other relatives, who are persons of high character in the community. The case has been well and ably managed by counsel on both sides, in the examination of the witnesses, and in their arguments before you,—and it is one that requires your careful and impartial consideration. That entry was made into the post office at the time stated, and that money and stamps were taken therefrom, are facts which are not controverted. The evidence shows only two ways by which entry into the post office could have been made,—by a key, or by the transom above the back door of the building. Miss Sherrill, the postmistress, and her brother who acted as her assistant, were the only persons who had possession of the key. She testified that on the evening before the night when the post office was robbed she examined her money drawer, and found that she had a $10 gold coin, a $5 bank bill, and some change in silver and coppers, amounting in all to about $25. She also had a number of 10-cent and 2-cent postage stamps. At 6 o'clock in the evening she locked the door, and carried the key to her home, and placed it in a trunk in her mother's room. On the next morning her brother went to the post office, and soon came back, and informed her that the office had been robbed. She found the drawer out on the floor, with lock broken, and her money gone, and some of the 10-cent stamps. On the inside of the room a chair had been placed close to the door. On the outside an old window shutter was leaning against the door, which had marks of dirt made by footsteps. The three panes of glass had been

taken from the transom, and placed above unbroken. The size of the panes of glass was about 10 or 12 inches. The door was about 3 feet wide, and she thought that the defendant could have easily passed through the transom. She saw the defendant that night at church about 9 o'clock, and he went home with her brother, and remained all night, and went off the next morning before she could see him. The defendant had never stayed at her mother's house before that time. Her testimony was substantially sustained by the testimony of her brother. He further said that defendant, on the morning after the robbery, went with him on his way to the post office, but turned aside to go to an unfinished church building close by. He also said that at the back door of the post office he found several tracks made by a No. 6 shoe, and he placed his own foot in the track, and there was a good fit. He also gave his opinion as to the size of the transom, and thought that defendant could have passed through. There is no evidence, ascertained by actual measurement, as to the exact size of the transom, and no experiment was made to find whether a 15-year old boy could have passed through the opening.

As this indictment is founded entirely upon circumstantial evidence, you should consider every attendant circumstance calculated to throw light upon the subject of investigation, and determine whether the independent coincident facts and circumstances shown in evidence are consistent with each other, and point to guilt of defendant beyond a reasonable doubt.

Had the defendant any knowledge of things in the post office? I remember no direct and specific evidence upon that point. As to the tracks on the outside, there is no direct evidence tending to show that defendant made them. His foot was not measured, and the evidence clearly shows that he usually wore No. 7 shoes. The evidence shows that on the day after the robbery the defendant was arrested at Murphy, and on search he was found in possession of a $10 gold piece and some silver change and coppers, amounting to about $25, but no $5 bank bill or stamps. If any of the coin had been marked so that it could have been strictly identified as the property stolen, such fact would have given rise to a strong presumption of guilt. As the coin found upon his person was like the ordinary circulating currency of the country, incapable of strict identity, no presumption of law arises, but the fact is a circumstance which may be considered in connection with other circumstances as evidence of guilt. The entry was made on the night of 2d April, while religious services were being conducted at a church close by, and in full view of the back door of the post office, and there was a large crowd inside and outside of the church. There is evidence that defendant was at the church, and talked with Henry Connor at the door, and asked him to go down town with him. Another witness testified that defendant came partly into the door of the church, looked around, and went out, and was absent half an hour, and then returned, and remained until the services were ended. It was insisted by counsel for defense that the entry could not have been made at that time, for the light which the evidence shows was used by the

robber would have been clearly visible to the large crowd attending the church. Upon this point you may consider whether a light seen in the post office at that early hour in the night would have been calculated to excite any surprise in the persons seeing it.

It is further insisted by counsel for defendant that, if defendant was the robber, he would not have gone to the home of the postmistress with her brother, and remained all night with the money on his person. The evidence shows that on the next morning the defendant left young Sherrill, and went into the unfinished church, and he assigned no reason for so doing, and such a circumstance might excite a conjecture that he went there to get the money which he had concealed the previous night. I will now call your attention to the testimony of Henry Connor. He testified before the commissioner, on the preliminary investigation, that on the morning after the robbery defendant came to his house, and asked him for the loan of a tobacco poke to put his money in. That he had some money tied up in a handkerchief, and the bulk was about the size of an inkstand, and he told witness that he had borrowed the money. On his examination before you he testified to another material fact, which he did not state before the commissioner,—although the prosecution was conducted by an earnest and skillful lawyer. He now says that on Sunday evening, the day before the robbery was committed, the defendant told him that he (defendant) intended to break into the post office to get money. You may well consider the probability of such a story, after being so long withheld from disclosure. Is it probable that, without any motive, the defendant would have told of his intention to commit a robbery, when he knew that his plan could so easily be frustrated by the witness making disclosure? If he had asked witness to participate in the robbery, then there would be some show of probability; but no such request is shown in evidence. There is certainly some improbability of the truth of the statement shown by the circumstances that witness did not remember so important a fact three days after the occurrence, when he was examined before the commissioner, and the citizens of the community and the officers of the law were so eager and desirous of finding the guilty offender.

I will now call your attention to the testimony of Joseph Connor. He was not a witness before the commissioner at Dillsboro, although he lived close by, and was present at the preliminary trial. More than two months after such trial Deputy Marshal Sherrill carried Joseph Connor before Commissioner Davies, when and where he made an affidavit, in which he stated that on the morning after the robbery defendant came to his sawmill, about a mile from Dillsboro, and showed him some money tied up in a handkerchief, and showed an envelope which, he said, contained postage stamps. He asked defendant where he got the money. After some dispute, defendant said to witness, "I snaked it last night." When this affidavit was made the deputy marshal told witness to keep the matter a secret. It is also in evidence that about the time the affidavit was made witness told Mr. Dills that he knew nothing against defendant as to Dillsboro post office robbery. As the commissioner had heard the

matter, and bound over the defendant to the district court, his jurisdiction had ceased, and the affidavit was extrajudicial, and is not admissible in evidence as a valid affidavit; but it may be used as a declaration of witness, for the purpose of supporting his testimony given on this trial. The secrecy observed by witness at the request of the deputy marshal who carried him before the commissioner, together with his declaration to witness Dills just after affidavit was made, that he knew nothing against defendant, is calculated to excite some suspicion as to the propriety of the motives of witness. You may also consider the probability of his statement that on the morning after the robbery the defendant voluntarily, and without any motive, showed him money and stamps, and told him, "He snaked it last night"; and that witness, although he knew of the arrest of defendant for the robbery committed on the previous night, did not disclose so material a fact on the preliminary trial. You may well consider the improbability of positive statements made by an unimpeached witness when there are facts and circumstances in evidence tending to lessen the probability that such testimony is true.

There is another fact relied upon by the prosecution as tending to show an evil mind and purpose on the part of the defendant. The railway agent at Dillsboro testified that a day or two before the post office was robbed the defendant came into his office, and inquired "if a man could ride on the railway cars with a stolen ticket," and also asked him where and how he kept the money of his office. You may well consider what were the motives of defendant in making such inquiries. Was it his purpose to steal from such office, and from the person of whom he made the inquiries? or were the questions prompted by the idle curiosity of a boy who could see the open manner in which tickets were kept, and who also saw the agent frequently receiving money?

On the day after the robbery the defendant was arrested at Murphy by the town marshal, under the authority of a telegram from his father. The defendant was searched, and on his person were found a $10 gold piece and some silver change and coppers in a tobacco poke, amounting to about $25, but no $5 bank bill or stamps were obtained. Defendant said he had found money tied up in a handkerchief near post office. It is material for you to inquire the reason that induced defendant to leave Dillsboro on the day after the robbery. If his conduct was induced by fear of an arrest, then it was a "flight" from justice, and is strong presumptive evidence of guilt. If his going to Murphy was the carrying out of a long predetermined purpose to visit his brother in Atlanta, and the execution of this purpose was hastened by the fight with his sister on the previous day, and the severe blow which he received from his mother, then his journey was not a flight, and furnishes no presumption of guilt.

The evidence further shows that when defendant was in custody, and was on his return to Dillsboro, he told the deputy marshal that he found the money that he had on his person when arrested by the town marshal at Murphy. The fact that defendant had on his person on the day after the robbery, money resembling that which had

been stolen from the post office, is a very material circumstance indicating guilt, calling for some probable and reasonable explanation on his part. He has endeavored to furnish such explanation by the testimony of his mother and sister. His mother testified that her son, the defendant, had been in Asheville with his brother for several months, and returned home in February, a day or two after the death of her little daughter. She soon after saw the defendant with a $10 gold piece, and some silver change, in all about $25, which he told her he had obtained in Asheville. He kept his money hidden in the barn, and asked her not to tell his father, as he would not let him go to Atlanta to visit his brother. She also stated that on the evening before the robbery defendant got into a fight with his sister, and had pulled her by the hair, when she (mother) struck him a severe blow on the head with a shoe, which produced considerable bleeding; and he left home in a very angry mood, and did not return until late next morning, when he requested her to prepare his clothes, as he was going to Atlanta that day. She prepared his clothes; examined those that were taken off, and saw considerable blood upon them. Defendant then went off to take the railway cars to Murphy, on his way to Atlanta. The sister, in her examination as a witness, confirmed the testimony of her mother in all respects, and further testified that at morning and evening, every day for three weeks, in March, her brother, the defendant, went with her to the barn when she milked the cows; that he went into the barn every time, and counted his money, and sometimes added some silver change or coppers; and she saw the money in the barn a few days before the robbery of the post office. The money in the possession of defendant, as shown by the mother and sister, has a more exact similitude to the money found on his person in Murphy than that of the articles stolen from post office, which consisted of a gold coin, bank bill, silver change, coppers, and stamps. If you believe the testimony of the mother and sister as to his previous possession of the money by them described, then a very strong circumstance tending to show guilt has been reasonably accounted for. The tracks at the back door of post office do not point to defendant as the robber, as the size did not correspond with shoes of defendant. The tobacco poke containing the money on his person when arrested at Murphy was not shown to be the identical poke given him by the witness Henry Connor. The strongest uncontradicted testimony tending to show guilt is that of the Connor boys, which I have already sufficiently called to your attention. There is evidence tending to show that there was a very active prosecution on the part of the friends of Miss Sherrill, the postmistress, and that some of the very material circumstances relied upon were not disclosed until this trial began. Counsel for prosecution commented on the fact that Dr. Candler, the father of defendant, was in court during the trial, and was not offered as witness to explain proved circumstances which indicated the guilt of defendant. If it had been shown in evidence that Dr. Candler probably had knowledge of the truth or falsity of the circumstances relied upon by the prosecution as making a prima facie case of guilt, then his failure to testify might properly be commented on as some

evidence to strengthen such prima facie case. But the evidence tends to show that Dr. Candler had no knowledge about such circumstances, or the purposes of defendant, as he was kept in the dark on the subject at the request of defendant. The fact that he sent the telegram that caused the arrest of his son at Murphy tends to show that he had no knowledge that his son had money, and intended to go to Atlanta. It is obligatory upon the prosecution to prove, beyond a reasonable doubt, the guilt of defendant before a verdict of guilty can be rendered by you. If the evidence fully satisfies you of such guilt, then you should so return your verdict, and leave matters of mercy and sympathy to the court. If, however, the evidence does not satisfy you, beyond a reasonable doubt, as to the guilt of defendant, then you should return a verdict of not guilty.

In re COMMISSIONERS OF CIRCUIT COURT.

(Circuit Court, W. D. North Carolina. December 29, 1894.)

1. UNITED STATES COMMISSIONERS—REMOVAL.
   While commissioners of the circuit court have no fixed tenure of office, and the appointing court has power to remove them at pleasure, the exercise of this power should be governed by a sound legal discretion, and, if there are charges against a commissioner, full opportunity should be given him for a hearing.
2. SAME.
   A district attorney made an application for the removal of all the commissioners of the circuit court within the district, with a view to a reorganization of that body of officers, alleging as grounds a waste of public money by institution of frequent trivial prosecutions, multiplication of proceedings to increase fees, and other similar misconduct, generally prevailing among them. It appeared that some abuses existed, but that these were not wholly the fault of the commissioners, and were not intolerable. *Held*, that the court would deny the motion for general removal of all commissioners, without prejudice to proceedings by the district attorney to remove any particular commissioner for sufficient cause.

This was a motion made by the district attorney for the removal of all the commissioners of the circuit court within the Western district of North Carolina.

Robert B. Glenn, U. S. Atty., for the motion.

DICK, District Judge. The motion which I am called upon to consider and determine was made in the circuit court at Asheville at last November term, and was continued for final hearing at this term of the circuit court at Charlotte. The motion is for the removal from office all the commissioners of the circuit court in this district, with a view to the reorganization of that body of public officers so as to remedy many existing evils, and insure a more cautious, prudent, economical, and rightful discharge of important official duties in the administration of justice. From the argument of the district attorney in open court, and from frequent conferences with him, I understand his reasons and views in support of his motion to be as follows:

First. In many counties there are two or more commissioners of the circuit court, and long experience has shown that their concurrent jurisdiction

in the same locality has caused an unseemly rivalry in business between such officers, which has resulted in many improper warrants and frivolous prosecutions, causing enormous and unnecessary costs to the government. Second. That frequent examinations of the written proceedings of many of the commissioners, returned to court, have clearly shown that they are too eager to make per diems and fees, and are otherwise not qualified to discharge, with correctness, efficiency, and justice, the important duties of their responsible position. Third. That for several of the past terms of the district courts the dockets and trials show that numerous trivial and frivolous prosecutions have been returned by commissioners to court, which would not have been instituted if they had exercised an intelligent, wise, and judicious discretion in the examination of evidence and the issuing of warrants. Fourth. That an application for a rule of court upon individual commissioners to show cause why they should not be removed from office would consume much of the time of the court, cause much expense and delay, and would fail to accomplish the objects of the pending motion in affording a speedy and effectual remedy for the evils existing in the present condition of affairs; and that the granting of this motion for general removal would not unjustly and injuriously reflect upon the personal character of the commissioners, as the expressed purpose of the motion is not intended as a special censure and condemnation of any person, but the manifest object is to make with facility a new and better arrangement, that will insure the fair, just, and efficient enforcement of the law, prevent trivial and frivolous prosecutions in the courts, save enormous costs to the government, and protect many citizens from unjust vexation, inconvenience, and expense.

In making this motion the district attorney referred to and relied upon, as a precedent, the action of this court 20 years ago in making a general order removing all the commissioners of the district, and directing new commissions to be issued to all of the old commissioners whose previous conduct had shown them to be competent, judicious, and efficient in the discharge of their official duties. When this motion was first made, it was readily entertained by the court, as the proceedings in all the district courts of this district showed probable and reasonable grounds of complaint against many of the commissioners for the number of trivial and frivolous cases which they had returned for investigation before the grand jury and for trial in court. Upon subsequent examination of the written testimony of witnesses, sent up by the commissioners, it appeared that many of the cases that seemed to be trivial and frivolous on the trial before the jury were made so by the witnesses giving testimony widely different from that which they had given before the commissioner on the preliminary investigation. From observation in the courts, and from information received from the district attorney and many other reliable sources, I am satisfied that some commissioners have been too ready and willing in issuing warrants upon the application of deputy marshals who had been eager and diligent in hunting up petty cases founded upon information derived from professional neighborhood witnesses. In most of such cases the defendants were guilty of a violation of law, but the offenses were too petty to require prosecution, and the selfish or malicious motives of the informants were too clearly manifest to receive encouragement from the officers of justice. Those petty crimes of illicitly retailing spirituous liquors are so numerous in many sections of the country that if a general indictment of all the residents were allowable, and the existing proof could be obtained, three-fourths would be found

guilty. As long as the manufacture and traffic of spirituous liquors are allowed by law upon the payment of revenue taxes, there will be illicit manufacture and sale to evade such taxes, and secretly and cheaply gratify the strong appetites of men for drink; and many sections of the country, by night and by day, on week days and Sundays, will be infested with secret dealers and purchasers engaged in concealing, removing, selling, and consuming blockade liquor, to the great detriment of the community. No reasonable number of the most diligent and faithful revenue officers and deputy marshals could prevent such illicit traffic, or bring to justice one-fourth of the offenders. The prosecutions of illicit retailers in the United States courts result in no substantial moral and social benefits to communities, and the expenses of the government are a hundred fold more than the special taxes received from legitimate dealers, who alone can derive protection and profit from a strict and diligent enforcement of the law against illicit dealers. It is thus clearly apparent that such prosecutions greatly diminish, rather than increase, the revenues of the government; and I am strongly of the opinion that all questions of morals and good order in society involved in the illicit traffic in liquors are not contemplated in national revenue laws, and should be regulated by state laws, to be enforced in the state courts. I am of opinion that the evil of numerous and petty prosecutions which have recently crowded the dockets of the court will be greatly checked, if not entirely prevented, by the rule of court, made at last Asheville term, prohibiting commissioners from issuing warrants for illicit retailing of liquors until they submit in writing the evidence in each case to the district attorney, and receive his order and direction to institute proceedings.

If I was of opinion that I had the judicial power, I would readily make a rule of court prohibiting commissioners from issuing warrants against any retail dealer, unless he carries on the business of a "retail liquor dealer" in violation of the express provision of section 3242, Rev. St. U. S. The evident purpose of that statute when enacted was to prohibit persons who had not paid a special tax from engaging, in the usual manner, in the regular business of retail liquor dealing. But a subsequent statute (section 3244) enlarges the provision of the previous statute, and includes "every person who sells or offers for sale" spirituous liquors in less quantities than five wine gallons at the same time. The remedy for preventing numerous and petty prosecutions under this statute must be provided by congress, and not by courts that are required to observe and enforce existing laws. With the views which I now entertain, and under present circumstances, I will not follow the precedent of this court referred to by the district attorney. The condition of affairs at that time was far worse than it is now, and no such sweeping and extreme remedy is now required. When that ruling of the court was made, I was reliably informed that some of the United States judges in other districts had peremptorily removed many commissioners without issuing against them formal rules to show cause why they should not be removed from office. I am also informed that there are some

eminent lawyers who are now of opinion that United States judges, who are authorized to appoint commissioners of the circuit courts without any definite term of office, can remove them at pleasure, and may often do so properly without affording them any opportunity of explanation and defense, upon the ground that the best interests of the public service require prompt action. After careful thought and examination of authorities, I entertain different views as to judicial power and duty, as will be shown in a subsequent part of this opinion.

The removal of the present commissioners, and new appointments, will not remedy the evils complained of, so long as there are numerous and active deputy marshals in each county eagerly seeking out willing witnesses, hunting up cases, and making constant and urgent applications to commissioners to issue warrants. A large majority of the present commissioners are men of high personal character, and in most instances were appointed upon the application of the best citizens and the recommendation of district attorneys, and they have honestly exercised the powers conferred upon them by law, in accordance with the best opinion which they could form from the evidence and the circumstances of the cases before them. Were I to allow the present motion, and remove such commissioners from office, it would certainly be the exercise of an arbitrary power, depriving them of vested rights, and condemning their official acts without affording them an oportunity of explanation and defense, contrary to the principles of natural justice and the general practice of the courts of this country and of England. Ex parte Robinson, 19 Wall. 505, and numerous other cases in state and federal courts. In Re Eaves, 30 Fed. 21, this court heard able and elaborate arguments upon the legal questions now under consideration, and used the following language in the opinion delivered in that case:

"Commissioners of the circuit court are officers appointed by the court, and authorized by law to exercise important judicial and ministerial functions in aid of the circuit and district courts in the administration of justice. They are appointed by the circuit court, but their powers are expressly conferred upon them by law, and they are not strictly officers of such courts, and subject to their supervisory control. Spear, Fed. Jud. 377, and cases cited. In this district rules of court have been formulated and adopted for the guidance and assistance of commissioners in the performance of their difficult and important duties, but do not interfere with the exercise of their judicial discretion in hearing cases before them. No special mode of procedure for removal has been prescribed by statute, and the precedents of the common law may properly be followed. Any mode of procedure would accomplish the ends of justice, if the respondent has reasonable notice of the charges against him, and is afforded full opportunity for explanation and defense. While the appointing court has the power to remove commissioners at pleasure, such discretion should be a sound and legal one, and such power should never be capriciously or arbitrarily exercised. Commissioners can materially assist the court in the administration of public justice, and by long experience they become more familiar with the forms of legal procedure, and more discreet and efficient in the performance of their important official duties. As no tenure of office is defined by law, they may well presume that they will be retained so long as they are discreet and efficient, and conduct themselves with propriety. It is all important to good government and the public interests that an officer who exercises important judicial functions should be free in thought and independent in judgment when he acts in the administration of

justice and the enforcement of the law. The course of justice would be impeded, and the efficiency of the commissioner would be greatly impaired, if his freedom of action was restrained by continual apprehensions of removal from office on account of honest official mistakes and errors of judgment, or by judicial caprice, or by the clamor of individuals excited by personal prejudices and hostility. As a security for the independence and impartiality of judicial officers, there is a general rule—of great antiquity in the common law, and now fully recognized and observed in every enlightened system of jurisprudence—that renders judges of courts of general and superior jurisdiction exempt from liability to civil actions and indictments for their judicial acts, and affords the same immunity to judicial officers of limited and inferior authority, when they act within the scope of their jurisdiction, with integrity and without malice or corruption."

Randall v. Brigham, 7 Wall. 523; Bradley v. Fisher, 13 Wall. 335.

There is much force in the argument of the district attorney as to the inexpediency of having two or more commissioners in the same county. They were appointed for the convenience of the people, and for the speedy and economical enforcement of the criminal law. By rules of court they are restricted in the performance of their official duties to the county in which they reside. In some instances their intercourse has not been friendly and harmonious, and their diverse interests in making fees have induced unseemly efforts in hunting up cases, and thus given rise to many petty and frivolous prosecutions. Where both commissioners are alike blamable, there is sufficient cause for the court to promptly remove both from office. But a competent and faithful commissioner should not be removed when he has in no way participated in the misconduct of his unworthy associate. The principles of common justice require that he should be fairly heard by the court before his official conduct is condemned by a peremptory removal from office. For the reasons above stated, the pending motion is disallowed, but this action of the court is by no means intended to prevent or discourage the district attorney from making application for the removal of any one or more of the commissioners for corruption, incompetency, inefficiency, bad moral character, want of public respect, or any other sufficient cause of removal.

(January 5, 1895.)

SIMONTON, Circuit Judge (concurring). Concurring in the order of the district judge in this case, it may be well that I should add a word or two. The law authorizing the appointment of commissioners of the circuit court is found in section 627 of the Revised Statutes of the United States:

"Each circuit court may appoint, in different parts of the district for which it is held, so many discreet persons as it may deem necessary who shall be called 'commissioners of the circuit courts,' and shall exercise the powers which are or may be expressly conferred by law upon commissioners of circuit courts."

The power of appointment is wholly with the court, and it can appoint so many discreet persons as it may deem necessary. There is no fixed tenure of the office. "It is held at the will of the appointing power and the incumbent, and the former may remove the latter at pleasure." Ex parte Hennen, 13 Pet. 230; U. S. v. Avery, Deady,

204, Fed. Cas. No. 14,481. Such is the general rule. But in the exercise of this power of removal courts should not be governed by caprice, but should exercise a sound legal discretion, removing the officer for cause. Commissioners are officers of the court, clothed with large powers and grave responsibilities. Necessarily, they are exposed, from the nature of their duties, to hostile criticism, and they are entitled to the support of the court. Above all, they should be assured that the faithful performance of duty will be recognized and rewarded by continuance in office. This assurance cannot be given if there be sudden and capricious removal without reasons. So, if there be charges against a commissioner, full opportunity should be given him for a hearing; otherwise faithfulness in office may lead to private attacks on him and his removal. See In re Eaves, 30 Fed. 21. Indeed, as the learned judge who presides over this district, in his well-considered and instructive opinion in the case just quoted, has given the views of the court on this question, every commissioner in this Western district has the right to expect support if he conducts himself faithfully, and full notice of any charge to the contrary.

THE LOTTA.

ROXBURY v. THE LOTTA.

(District Court, S. D. New York. November 28, 1894.)

1. MARITIME LIEN — REPAIRS — WRONGFUL DIVERSION OF CHECK IN PAYMENT DISREGARDED.
   An agent for two different lines of steamers wrongfully directed a check from one line to be applied by a material man in payment of a claim against the other line. On discovery of the fact several weeks afterwards, the credit was transferred to the proper company. *Held*, that the original lien was not affected by the temporary wrongful credit, or by the receipt in payment given thereon.
2. STATE RECEIVER—SUBSEQUENT LIBEL—ARREST BEFORE RECEIVER'S POSSESSION.
   After the appointment and qualification of a receiver appointed by the state court, a libel was filed to enforce a lien for repairs, and the vessel was arrested by the marshal before any person representing the receiver had taken actual possession of the vessel, or given notice of the receivership to the master thereof, or to any person on board, and before either had notice of the receivership. *Held*, that the arrest by the marshal was valid.

This was a libel by Theodore H. Roxbury against the steamboat Lotta for work done and materials furnished.

Wilcox, Adams & Green, for libelant.
Goodrich, Deady & Goodrich, for claimants.

BROWN, District Judge. The above libel was filed to recover the amount of lien on the steamboat Lotta for paint and painting supplied her in March and April, 1894. The defenses were: First, that the Lotta was in charge of a receiver before the arrest by the marshal, and could not be held; second, that $300 of the amount claimed had been paid and previously applied by the libelant in payment of the bill.