injustice in a restoration, if assets remain out of which indemnification can be had. The general creditor will receive not a penny less than is his due. The appellant, if the remaining assets prove sufficient and availing, will receive that to which it is entitled, and no more. There has been an erroneous diversion of the fund,—caused, it is true, by the act of the appellant. If legal injury has resulted from the act, the appellant cannot be afforded relief; but it has not so resulted, and the general creditor will, by the granting of relief to appellant, be put in no worse plight than before the act. Restoration for diversion of funds, whether from design or through mere error, is not to be denied unless the diversion has occurred through the wrong or error of the party seeking restoration, and when, in the case of error, there has been wrought legal detriment to the opposing right. This is certainly true with respect to trustees and officers of the law, who are not permitted to assert a mere mistake of law as an excuse for the denial of justice, and who are required to act as any high-minded man would act under the like circumstances. In Ex parte James, In re Condon, 9 Ch. App. 609, a creditor had obtained judgment, and issued execution, which was levied by the sheriff upon certain personal property of the defendant, and upon its sale the proceeds were paid to the judgment creditor. Thereafter, the debtor being adjudicated a bankrupt, the assignee demanded the proceeds of the sale. The judgment creditor, supposing the assignee entitled thereto, paid over the same to him. Being afterwards advised that he had a right to retain the money, the creditor filed a petition against the trustee for restoration, and restoration was decreed. The court observed—

"That a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among creditors. The court, then, finding that he has money in his hands which, in equity, belongs to some one else, ought to set an example to the world, by paying it to the person really entitled to it. In my opinion, a court of bankruptcy ought to be as honest as other people."

It is true that in this case the moneys still remained in the hands of the trustee, but in the subsequent case of Ex parte Simmonds, 16 Q. B. Div. 308, a case was presented where the moneys received by a trustee through a mistake of law had been actually distributed among the creditors. The court approved of the decision referred to, Lord Esher, M. R., observing:

"If money has, by mistake of law, come into the hands of the officer of a court of common law, the court will order him to repay it as soon as the mistake is discovered. Of course, as between litigant parties, even a court of equity would not prevent a litigant from doing a shabby thing. But I cannot help thinking that if money had come into the hands of a receiver appointed by a court of equity, through a mistake of law, the court would, when the mistake was discovered, order him to repay it."

And with respect to the fact that the money had been distributed he remarked:

"Though the money has been divided among the creditors, the court sees that other moneys which would be applicable to the payment of dividends to the creditors are now to come into the hands of the trustee, and it has been

shown that no injury will be done to any one by ordering the trustee to apply this money which is coming to him to replace the other money which was paid by him in error. I think it is right that it should be so applied."

And Cotton, J., said upon the same point:

"But in my opinion we must regard the funds available for distribution among the creditors under a bankruptcy or liquidation as one entire fund; and, if that fund has been erroneously increased, I think it is a just extension of Ex parte James to say that out of any moneys which may hereafter be in the hands of the trustee, and applicable to the payment of dividends to the creditors, the amount which has come into his hands by mistake ought to be repaid."

And Lindley, J., observes:

"What is there unjust in saying that no money shall go to them (the general creditors) until the same has been repaid to the original owner?"

In the case of Dixon v. Brown, 32 Ch. Div. 597, a testator devised real estate to his nine children, as tenants in common, with power to three of them to sell the whole, to avoid the difficulties of partition. W., one of the three, effected sales under the power, retaining more than his share of the purchase money, and went into liquidation. Further sales were effected, and out of the proceeds a further sum was paid to W.'s trustee in liquidation, in respect of, and in excess of, his share. It was held that all of the purchase moneys received by the trustee were impressed with a trust, under the law, and that W.'s equitable interest therein was liable to recoup the other beneficiaries, and, this being so, that the payment to his trustee in liquidation was made in mistake of law, and must be refunded by the trustee. The court referred to the cases of Ex parte James, In re Condon, and Ex parte Simmonds, and by Kay, J., says:

"The judges in those cases treat the assignee or trustee in bankruptcy as being an officer of the court, and lay down the rule that money paid to him in mistake of law must be repaid by him; and even if he has spent the actual money he will be ordered, according to the latter of those decisions, to recoup the parties entitled to that money out of other of the bankrupt's assets coming into his hands afterward. That, as Lord Justice James said in the earlier of those cases, is because the court of bankruptcy, in dealing with its own officers, thinks it right to be perfectly fair, and not to regard the technical rule, which is scarcely honest in some cases. I am not exercising the jurisdiction of the court of bankruptcy, but the question is submitted to this court, and I have no doubt or hesitation in saying that a court of the chancery division does not consider itself bound to act upon principles less honest than the court of bankruptcy."

The principles upon which courts of equity act with reference to following property is well stated by Mr. Justice Bradley in Frelinghuysen v. Nugent, 36 Fed. 229, 239, and his language is quoted with approval in Peters v. Bain, 133 U. S. 670, 693, 10 Sup. Ct. 354:

"Formerly," says Mr. Justice Bradley, "the equitable right of following misapplied money or other property into the hands of parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it, by exchange, purchase, or sale; but if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better

doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor."

The like doctrine is held in National Bank v. Insurance Co., 104 U. S. 54, 68, and Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354.

We have examined numerous cases in which the doctrine has been considered and applied, notably Thompson's Appeal, 22 Pa. St. 16; Columbian Bank's Estate, 147 Pa. St. 440, 23 Atl. 625, 626, 628; Freiberg v. Stoddard, 161 Pa. St. 259, 28 Atl. 1111; Neely v. Rood, 54 Mich. 134, 19 N. W. 920; Sherwood v. Bank, 94 Mich. 78, 53 N. W. 923; In re Waterbury's Petition, Id.; Englar v. Offutt, 70 Md. 78, 16 Atl. 497; Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005; Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383; Ford v. Bank, 87 Wis. 363, 58 N. W. 766; and Burnham v. Barth, 89 Wis. 362, 62 N. W. 96. In all these cases the trust fund did not come into the possession of the trustee, or the party from whom it was sought to be recovered. They were therefore rightly decided. But the argument of the opinions in some of them fails to recognize the modern doctrine as stated by Mr. Justice Bradley. The case of Englar v. Offutt contains a well-reasoned discussion of the question, and in line with the conclusion reached by Mr. Justice Bradley. The supreme court of Rhode Island, in Slater v. Oriental Mills (decided in 1893) 27 Atl. 443, sustains the position here asserted, and concedes the right to relief where funds remain in the estate which go to swell the assets. The court observed:

"The rule is clear that one has an equitable right to follow and reclaim his property which has been wrongfully appropriated by another, so long as he can find the property, or its substantial equivalent, if its form has been changed, upon the ground that such property in different form is impressed with a trust in favor of the owner. If the trustee has mingled it with his own, he will be deemed to have used his own, rather than other's, and so to leave the remainder under the trust, and that is a sufficient identification for the owner."

Here the receiver is an officer of the law, having the assets in custodia legis. He has no interest in the fund, save to see that it shall be distributed among those entitled to it according to the highest principles of honesty and of equity. The assets of the bank received by him are, with respect to the question in hand, to be treated as an entirety. Those assets have been swelled by the property of the appellant wrongfully obtained by the bank, and which went into the possession of the receivers. That in the payment of dividends he has disbursed the actual money so received can make no difference, so long as assets remain out of which restitution can be made. The creditors have received that to which they were not entitled, and that which belonged to the appellant. If restitution be made out of the assets still remaining, the creditors will receive no less than that to which they were originally entitled, and the appellant will only receive that which was its due. To compass such a result is the highest equity, since otherwise the appellant will be deprived of its own, and the general creditors will receive that to which they have no right. The de-

cree sustaining the demurrer and dismissing the bill for want of equity will be reversed, and the cause remanded for further proceedings according to law.

McDOWELL v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1896.)

No. 82.

1. DISTRICT JUDGES—APPOINTMENT FOR ANOTHER DISTRICT—DE FACTO JUDGE.
A district judge, acting in another district, in which the office of judge is vacant, by virtue of an appointment, regular on its face, made by the circuit judge, is an officer de facto; and his orders continuing the term from day to day cannot be questioned, on the ground that a circuit judge has no power to make such an appointment when the office is vacant. Decided by supreme court in answer to question certified. 16 Sup. Ct. 111.

2. SAME—RECITALS IN BILL OF EXCEPTIONS.
The fact that, in the recital of the proceedings in the bill of exceptions, the term was wrongly spoken of as a special term, was immaterial, in the face of a statement that the regular term was open and continued from day to day until after the proceedings complained of had taken place. Decided by supreme court in answer to question certified. 16 Sup. Ct. 111.

3. MATERIALITY OF EVIDENCE — DECLARATIONS OF WIFE — IMPEACHING TESTIMONY.
A witness who testified that he had done a particular act was asked, on cross-examination, whether at a particular time and place he had not said that he had not done it. After answering this question, he was asked if, on the same occasion, his wife had not stated that he had not done it. *Held*, that this question was properly excluded, since his failure to do the act could not be proved, as an independent fact, by the wife's declarations; and that, if the intention was to contradict the witness, or lay the foundation for impeaching his testimony, the court should have been distinctly so informed.

In Error to the District Court of the United States for the District of South Carolina.

This was an indictment against A. F. McDowell for making, as postmaster at Walker, S. C., a false return to the auditor of the post-office department for the purpose of fraudulently increasing his compensation. Defendant was convicted in the district court, and brought the cause to this court on writ of error.

Stanyarne Wilson, for plaintiff in error.

Wm. Perry Murphy, for defendant in error.

Before FULLER, Chief Justice, and GOFF, Circuit Judge.

GOFF, Circuit Judge. This case comes to us on writ of error to the district court of the United States for the district of South Carolina. After it was submitted, on consideration of the record and briefs, we were of opinion that the principal point raised was of such general importance that it was desirable to obtain the instruction of the supreme court for its proper decision, and we therefore certified to that court the two questions hereinafter set forth. On the 18th day of November, 1895, that court answered the first question propounded to it in the affirmative, and deemed it unnecessary, because of said answer, to consider the second. The case is reported in 159 U. S. 596, 16 Sup. Ct. 111, from which the following statement of it is quoted: